

INDIAN CASES

CONTAINING

FULL REPORTS OF DECISIONS

OF

The **PRIVY COUNCIL**, the High Courts of **ALLAHABAD**,
BOMBAY, **CALCUTTA**, **LAHORE**, **MADRAS**,
PATNA and **RANGOON**, the Courts of the Judicial
Commissioners of **CENTRAL PROVINCES**,
ODUH and **SIND**

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442	Shama Charan v. Emperor	...	(1925) Pat. 263; A. I. R. 1925 Pat. 610; 6 P. L. T. 766; 26 Cr. L. J. 1562.
444	Chhutkau v. Emperor	..	28 O. C. 258; 26 Cr. L. J. 1564; A. I. R. 1926 Oudh 36.
445	Faujdar Rai v. Emperor	...	26 Cr. L. J. 1565; A. I. R. 1926 Pat. 25; 7 P. L. T. 199.
447	Emperor v. Gajadhar Prasad	..	2 O. W. N. 707; A. I. R. 1925 Oudh 610; 26 Cr. L. J. 1567.
449	Kanhya Lal Sewbux, <i>In the matter of</i>	...	29 C. W. N. 1019; A. I. R. 1926 Cal. 176.
450	Krishnaji v. Kashirao	..	A. I. R. 1926 Nag. 220.
451	Kanai Lal Ghosh v. Basanta Behari Sen	...	29 C. W. N. 1020; 42 C. L. J. 490; A. I. R. 1926 Cal. 451.
454	Rameshwar Singh Bahadur v. Durga Mandar	..	7 P. L. T. 42; A. I. R. 1926 Pat. 14.
456	O. S. Meah v. Durga Churn Dutta	...	29 C. W. N. 1027; A. I. R. 1926 Cal. 243.
458	Kruthiventi Perraju Garu v. Sitaramachandra	...	48 M. L. J. 584; A. I. R. 1925 Mad. 897; 22 L. W. 568.

463	Rameshwar Marwari v. Upendranath Dass Sarkar ...	29 C. W. N. 1029; A. I. R. 1926 Cal. 455.
465	Sutrama Govinda Rao v. Anugoda Matada Rudrayya ...	(1925) M. W. N. 228; 49 M. L. J. 14; A. I. R. 1925 Mad. 830.
468	Attorneys, <i>In the matter of</i> ...	29 C. W. N. 1047; A. I. R. 1925 Cal. 964.
470	Achal Singh v. Shaghunath Kuer ...	2 O. W. N. 713; 12 O. L. J. 603; A. I. R. 1926 Oudh 2; 29 O. C. 51.
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488	Kamal Mandalini v. Paramasukh Chakrabutty ...	29 C. W. N. 1033; A. I. R. 1926 Cal. 289.
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504	Harendra Nath Ohaudhury v. Sona Gazi ...	A. I. R. 1926 Cal. 259.
505	Inder Kuer v. Mohammad Taqi ...	A. I. R. 1926 Oudh 64.
509	Ananda Chandra Kacharu v. Barada Kanta Dey ...	42 C. L. J. 203; A. I. R. 1926 Cal. 177.
509	Ponnoppa Reddi v. Thiruvengada Pillai & Co. ...	49 M. L. J. 104; 22 L. W. 455; A. I. R. 1179; (1925) M. W. N. 713.
512	Ramesh Chandra Guha v. Dinesh Chandra Guha ...	42 C. L. J. 224; A. I. R. 1925 Cal. 1010.
513	Satya Niranjana Chakravarty v. Sushila Bala Dasi ...	4 Pat. 799; A. I. R. 1926 Pat. 103.
523	Gour Chandra Das v. Subashini Dasi ...	42 C. L. J. 200; 30 C. W. N. 39; A. I. R. 1926 Cal. 240.
524	Secretary of State for India v. Bishan Narain Bhargava ...	A. I. R. 1926 Oudh 44.
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529	Chandra Kumar Sen v. Mathuriya Debya ...	29 O. W. N. 1035; 42 C. L. J. 120; 52 C. 1009; A. I. R. 1925 Cal. 1228; 26 Cr. L. J. 1569.
530	Mania Manikha Padayachi, <i>In re</i> ...	49 M. L. J. 155; A. I. R. 1925 Mad. 1061; 22 L. W. 755; 48 M. 874; 26 Cr. L. J. 1570.
534	Ahmed Ali v. Emperor ...	42 O. L. J. 215; 26 Cr. L. J. 1574; A. I. R. 1926 Cal. 224.
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544	Srish Chandra Ghose v. Abani Nath Hazra ...	42 O. L. J. 139; 26 Cr. L. J. 1584; A. I. R. 1926 Cal. 260.
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561	Pandu Joti Kadam v. Savla-Piraji Kate	...	27 Bom. L. R. 1109; A. I. R. 1925 Bom. 472.
561	Prasanna Kumar De Mahajan v. Nanigopal De	...	42 C. L. J. 134; A. I. R. 1925 Cal. 1175.
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566	Narain Das v. Debi Din Singh	..	A. I. R. 1926 Oudh 38.
567	Behari Lal Manna v. Murali Dhar	...	A. I. R. 1926 Cal. 287.
569	Bhondai Miser v. Ram Prasad Miser	...	2 O. W. N. 710; A. I. R. 1925 Oudh 607.
570	Sashi Mohan Tarkasastri v. Meajan Haji	..	A. I. R. 1926 Cal. 255.
572	East Indian Railway Co. v. Moea Ram-Gaja Nand	...	2 O. W. N. 689; A. I. R. 1925 Oudh 615.
573	Premji Mulji v. Garlick & Co.	...	A. I. R. 1925 Sind 254.
575	Ambika Charan Bhakta v. Ram Prosad Chatterjee	...	30 C. W. N. 163; 42 C. L. J. 578; A. I. R. 1926 Cal 377.
577	Gobind Prasad v. Narbhir Singh	...	A. I. R. 1926 Oudh 35.
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579	Bhagwan Singh v. Lachuman Prasad Sahu	...	3 Pat. L. R. 225; A. I. R. 1925 Pat. 754.
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593	Sivaswami Iyer v. Tirumudi Chettiar	...	49 M. L. J. 665; A. I. R. 1925 Mad. 1057; (1925) M. W. N. 541 & 841.
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604	Motilal Gopaldas v. Krishnabai Gopalrao	...	27 Bom. L. R. 1156; A. I. R. 1925 Bom. 513.
605	Rambhatlu v. Anniahbhatlu	...	49 M. L. J. 152; 22 L. W. 366; A. I. R. 1926 Mad. 144.
607	Bhupendra Narayan Singh v. Narapat Singh	..	A. I. R. 1925 P. C. 226; 42 C. L. J. 227; 49 M. L. J. 722; L. R. 6 A. (P. C.) 206; (1925) M. W. N. 724; 52 I. A. 355; 53 C. 6 P. C.
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611	Chandra Wati v. Jagan Nath Singh	...	A. I. R. 1925 Lah. 489; 7 L. L. J. 281.
613	Bunyad Singh v. Naubat Singh	...	2 O. W. N. 753; A. I. R. 1926 Oudh 59.
614	Vidyavardhak Sangh Company v. Sangirimallappa	...	27 Bom. L. R. 1152; 49 B. 842; A. I. R. 1925 Bom. 524.
616	Venkatarama Iyer, <i>In re</i>	...	(1925) M. W. N. 606; 22 L. W. 327; 49 M. L. J. 440; A. I. R. 1925 Mad. 1236.
617	Khatemy Chhaikuddin v. Ram Narain Ghose	...	A. I. R. 1926 Cal. 364.
620	Gurbachan Kaur v. Satwant Kaur	..	A. I. R. 1925 Lah. 493; 7 L. L. J. 288.
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657	Mahari Dhangar v. Baldeo Narain	...	26 Cr. L. J. 1585; (1926) Pat. 16.
659	Kuppa Mudali, <i>In re</i>	...	49 M. L. J. 421; 22 L. W. 339; (1925) M. W. N. 795; A. I. R. 1925 Mad. 1206; 26 Cr. L. J. 1587; 49 M. 71.

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661	Ram Pershad Tewari v. Emperor	...	26 Cr. L. J. 1589; A. I. R. 1926 Pat. 5.
665	M. Sanyasayya Naidu v. Public Prosecutor	...	22 L. W. 156; A. I. R. 1925 Mad. 1224; 26 Cr. L. J. 1593.
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739	Hemchandra Mahto v. Prem Mahto	...	(1925) Pat. 330; A. I. R. 1926 Pat. 54; 7 P. L. T. 295.
741	Sitla Bux Singh v. Ram Niwaz	...	2 O. W. N. 811; A. I. R. 1926 Oudh 20.
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746	Indra-Narayan Ghose v. Tarini Prosad Guin	...	A. I. R. 1926 Cal. 100.
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763	Mahammed Ismail v. Sharfatullah	..	*Calcutta High Court.
766	Ram Charan v. Sirtaji	..	2 O. W. N. 849; A. I. R. 1926 Oudh 22.
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804	Hari Har Bakhsh Singh v. Mohammad Usman Khan	...	A. I. R. 1926 Oudh 144.
805	Purusottam Mahesri v. Panchanan Mazumdar	..	42 C. L. J. 197; A. I. R. 1926 Cal. 373.
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INDIAN CASES

1925.

VOLUME 90.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 37
OF 1922.

May 22, 1925.

Present:—Mr. Justice Adami
and Mr. Justice Kulwant Sahay.

Babu SUDHA KRISHNA MUKHERJI—
PLAINTIFF—APPELLANT

versus

THE EAST INDIAN RAILWAY
COMPANY THROUGH AGENT—

DEFENDANTS—RESPONDENTS.

*Carriage of goods—Goods consigned to Railway
Company for carriage—Risk Note Form "A"—Loss
of goods—Suit to recover damages—Burden of proof.*

Where goods are consigned to a Railway Company for carriage under Risk Note Form "A", the Company is absolved from any responsibility for loss of the goods owing to the bad condition of the consignment throughout the period of transit, and the period of transit commences from the time that the goods are received and are carried to the train. [p. 2, col. 1.]

The question of onus is not the same in a case based on the terms of a Risk Note in Form "A" as it is in a case based on the terms of a Risk Note in Form "B". The two indemnities are quite different in their effect. In a suit based on the terms of a Risk Note in Form "A" where it appears from the admission of the plaintiff himself that there has been such loss or damage as is contemplated in the Risk Note, it is not necessary for the Railway Company to prove that there has been such loss. [ibid.]

Appeal from a decision of the Additional Subordinate Judge, Hazaribagh, dated the 27th September 1921, modifying that of the Munsif, Giridih, dated the 26th January 1921.

Mr. B. C. De, for the Appellant.

Mr. S. N. Bose, for the Respondents.

JUDGMENT.

Adami, J.—The plaintiff-appellants are merchants in Giridih. They ordered a consignment of rice from Burma and this consignment duly arrived at the Kidderpur docks in Calcutta. Their agent in Calcutta delivered this rice, which on weighment was found to amount to 2,473 maunds, to the

East Indian Railway at the Kidderpur dock. The Railway Company seeing that the bags in which the rice was contained were unsound and had holes in them and that the seams were weak, refused to take the consignment unless the consignor agreed to sign a Risk Note in Form "A". The Risk Note was signed by the consignor and showed that the weight of the rice delivered to the Railway Company was 2,473 maunds. The consignment was received 3rd November and was delivered at Giridih. On arrival at Giridih and on weighment the consignment it was found that there were 2,268 maunds in the bags. The plaintiff thereafter instituted the suit out of which the second appeal arises claiming damages for the shortage of the consignment delivered. The Munsif decreed the plaintiff's suit but the Subordinate Judge has reversed the finding on appeal and has dismissed the suit except as regards the freight paid by the plaintiff for 108 maunds of the rice.

The line of argument taken up before us is that though it has been found that no loss can have happened during the time that the rice was actually in the train, since the seals on the wagon were found to be in tact, the defendant Railway Company would have to show that the loss did not occur after the rice was received on the 3rd November and before it was put into the Railway wagon. It is argued that the Risk Note in Form "A" does not cover this period.

Now, in the first place, there is no evidence to show that the Railway Company stored the rice for any time before putting it into the train. It appears that it was taken from the steamer in the dock and put into the Railway wagon as soon as possible. In the second place, there can be no doubt that from the time when the rice

was delivered to the Railway Company up to the time it was delivered at Giridih the consignment was in transit and was covered by the Risk Note in Form "A".

The material portion of the Risk Note in Form "A" is as follows:—

"Whereas the consignment.....is in bad condition and liable to damage, leakage or wastage in transit, I the undersigned do hereby agree and undertake to hold the said Railway administration.....harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at destination and for any loss arising from the same."

It is clear in my mind that this Risk Note would absolve the Company from any responsibility for loss owing to the bad condition of the bags throughout the period of transit, and the period of transit would commence from the time that the bags were received and were carried to the train. It may be true that it was not found that any escaped while the rice was in the wagon, but it is quite possible that

the bags were being taken to the train when the loss occurred owing to their bad condition. The Risk Note frees the Railway Company from responsibility for any loss arising from the condition in which the goods packed in these unsound bags might be delivered to the consignee. The learned Subordinate Judge has come to a definite finding that the loss was due to the defective condition of the packing and I think that that finding is sufficient to absolve the Company from responsibility.

It has been argued that the onus would fall on the defendant-Company in the first place to show that the loss was one such as is contemplated by the Risk Note, and, I think that the admission of the plaintiffs that the bags were in poor condition was sufficient to save the defendant from discharging such onus if such discharge was necessary. The question of onus will not be the same in regard to the Risk Note in Form "A" as it is in regard to the Risk Note in Form "B". The two indemnities are quite different. It is not necessary for the defendant Company to prove that there has been such loss or damage as is contemplated in the Risk Note, because it is clear from the admissions that there was such loss and damage.

There is no reason, I think to interfere with the finding of the learned Subordinate

Judge and I would, therefore, dismiss the appeal with costs.

Kulwant Sahay, J.—I agree.

Z. K.

Appeal dismissed.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 146 OF 1924.

June 26, 1925.

Present:—Sir Grimwood Mears, Kt., Chief Justice, and Mr. Justice Sulaiman.

MAKUNDI SINGH AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

PARBHU DAYAL AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, rr. 8, 8, 9—Some defendants present—Plaintiff absent—Suit dismissed in default—Application of r. 9.

Where on the day fixed for the hearing of a suit, one out of the several defendants appears, but neither the plaintiff nor the rest of the defendants are present, and the suit is dismissed in default, the order of dismissal, so far as the defendant who is present is concerned, must be regarded as one under O. IX, r. 8, C. P. C., and as against the absentees under O. IX, r. 3. Consequently, a fresh suit on the same cause of action against the absentee defendants is not barred by provisions of O. IX, r. 9. [p. 4, col. 1.]

Bukharam v. Ramji, 23 Ind. Cas. 878; 10 N. L. R. 39 and *Damu Diga v. Vakrya Nathu*, 56 Ind. Cas. 455; 44 B. 767; 22 Bom. L. R. 328, referred to.

Letters Patent Appeal against a judgment of Mr. Justice Kanhaiya Lal, dated the 4th August 1924.

Mr. P. L. Banerji, for the Appellants.

Mr. U. S. Bajpai, for the Respondents.

JUDGMENT.—This is an appeal by the defendants, arising out of a suit for arrears of rent. On a previous occasion the plaintiffs had instituted a suit against the defendants to the present suit, namely, Tirbhuwan Singh and two others, on the same cause of action, for recovery of the same arrears of rent. On the day fixed for the hearing of the previous suit Tirbhuwan Singh alone appeared before the Court, but neither the plaintiffs nor the other two defendants were present. The Court did not question Tirbhuwan Singh whether he admitted any part of the claim or not—nor did it take down his statement. It simply dismissed the suit for default.

The plaintiffs made an attempt to have the dismissal set aside and the suit restored, but their application was infructuous. They then brought the present suit on the

same cause of action against the same defendants.

The Courts below held that the present suit was barred by the provisions of O. IX, r. 9, and the plaintiffs' only remedy was to have the previous dismissal set aside, and not to institute a fresh suit.

A learned Judge of this Court on second appeal, however, came to the conclusion that although the plaintiffs were not entitled to maintain a second suit against Tirbhuwan Singh, who had appeared on the former occasion, they were not debarred from maintaining a suit against the other defendants who also had been absent. He came to the conclusion that the dismissal should be deemed to have taken place under O. IX, r. 3 so far as the other defendants were concerned and under O. IX, r. 8 as far as Tirbhuwan Singh was concerned. He accordingly dismissed the suit against Tirbhuwan Singh but decreed the claim against the other two defendants. Inasmuch as all the defendants were jointly and severally liable for the arrears of rent the learned Judge passed a decree for the whole amount claimed against these other defendants.

The defendants have come up in appeal under the Letters Patent, and the learned Advocate for them has conceded that if the suit is maintainable against the defendants other than Tirbhuwan Singh, then there can be no doubt that they are liable for payment of the entire amount of the arrears. His main contention has been that the whole claim as against all the defendants was barred by the provisions of O. IX, r. 9. His argument is two-fold. In the first place his contention is that inasmuch as at least one of the defendants was present on the former occasion it cannot be said that neither party appeared within the meaning of O. IX, r. 3, and that, therefore, the previous dismissal could not have been under that rule. He further contends that that dismissal must be taken to have been under the first portion of r. 8, namely, where the defendant appeared and the plaintiff did not appear.

His second contention is that even if the suit was dismissed partly under r. 3 and partly under r. 8, the provisions of r. 9 still apply and the second suit is barred.

With regard to the second contention, we may say at once that it has clearly no force. If it be assumed that the previous dismissal was partly under r. 3 and partly under r. 8, then r. 9 can only apply to the dismissal so

far as it was under r. 8 and not so far as it was under r. 3. The words in r. 9 are "where a suit is wholly or partly dismissed under r. 8." That expression obviously means a suit dismissed in part or in its entirety. It does not mean 'where a suit is dismissed wholly or partly under r. 8 or partly under some other rule'. This is the only grammatical meaning which can be given to the expression. The words "wholly or partly" modify the verb "is dismissed" and not the expression "under r. 8." The partial dismissal under r. 8 refers to the dismissal of the claim in part.

As to the first contention it must be conceded that if the language of r. 3 were to be considered alone, there would be much to be said in favour of the appellants' contention, for in common parlance the expression 'neither party' would mean "not any one of two or more parties." This is the meaning assigned to the word "neither" in Murray's Dictionary. It would, therefore, look at first sight as if r. 3 would be applicable only if no one whose name appears on the record as a party is present. We, however, find that the words "the plaintiff" or "the defendant" in the Code various rules refer to the plaintiff the defendant or the party, whose case is being considered. For instance in O. V wherever the word 'defendant' appears, it is obvious it means the particular defendant whose case is being considered. Similarly in O. IX, rr. 1 and 2 the word 'defendant' would mean the defendant with whom we are concerned and this would be the meaning attached to the word 'defendant' in r. 6. Examining r. 8 in detail, we find that it consists of two portions. Under its first portion when the defendant appears and the plaintiff does not appear the suit is to be dismissed. Clearly the word 'defendant' does not necessarily mean all the defendants, it may mean any one of the defendants or it may mean the particular defendant with whose case we are concerned. Under the second portion of the same rule if a defendant appears and admits part of the claim the suit is to be decreed against him in part and is to be dismissed so far as it relates to the remainder. There is no express provision in the second portion of the rules under which the suit is to be dismissed in its entirety. It follows that unless the word 'defendant' is taken to mean the particular defendant with whose case we are concerned, there would be no ground for the

dismissal of the whole suit when one of the several defendants appears and admits a part of the claim. The language of the rules is certainly not very happy—but on the whole we have come to the conclusion that this is the best interpretation which could be put on the rules in this order.

The result would be that the case of each defendant has to be considered separately. So far as the defendant who had appeared is concerned the suit must be deemed to have been dismissed against him under r. 8; and the only remedy open to the plaintiffs as against him would be to have it set aside under r. 9—they cannot maintain a second suit, so far as the other defendants, who never appeared in Court, are concerned, the case is one where neither party appeared, namely, neither the plaintiffs nor those defendants. The provision of r. 3 would, therefore, apply as between these two sets of parties.

The learned Judge of this Court has referred to the case of *Bukharam v Ramji* (1) decided by the Officiating Judicial Commissioner of Nagpur, which on facts is very similar to the case before us. We may also refer the case of *Damu Diga v. Vakrya Nathu* (2), where Crump, J., remarked that it was difficult to follow the reasoning that for the purposes of r. 8 it is sufficient if one or some of several defendants appear. In this opinion it was necessary to take the case of each defendant on its own merits. In the case of several defendants the consequences of an order of dismissal need not necessarily be the same for all—the suit being dismissed against one set under r. 3 and against others under r. 8.

We accordingly uphold the decree of the learned Judge of this Court, and dismiss the appeal with costs including in this Court fees on the higher scale.

S. D.

Appeal dismissed.

(1) 23 Ind. Cas. 878; 10 N. L. R. 39.

(2) 56 Ind. Cas. 455; 44 B. 767; 22 Bom. L. R. 328.

CALCUTTA HIGH COURT.

CIVIL RULE No. 497 OF 1925.

July 7, 1925.

Present:—Justice Sir Ewart Greaves, Kt., and Mr. Justice B. B. Ghose.

D. D. BARBAR—PETITIONER

versus

I. W. C. DEBENHAM AND ANOTHER—
OPPOSITE PARTY.

Calcutta Rent Act (III of 1920), s. 2 (c)—Premises, whether include fans and lights—Intention of parties—Standard rent, whether can be fixed including fixtures

In the case of a demise it depends on the intention of the parties and on the nature of the agreement to be gathered from the same, whether such fixtures as fans and lights are intended to go with and to form part of the premises or building demised. [p. 5, cols. 1 & 2.]

Where fans and lights are attached to the premises demised and are intended to be used with them, they must be taken, according to the intention of the parties, to be part of the demised building for the purposes of the Calcutta Rent Act and it is open to the Rent Collector to fix a standard rent in respect of the premises which comprises these fixtures. [p. 5, col. 2.]

Rule against an order of the President of the Tribunal, dated the 26th February 1925, affirming that of the Controller, dated the 19th August 1924.

Babu Suresh Chandra Taluqdar, for the Petitioner.

Messrs. H. L. Ganguli, Satindra Nath Mukerjee and Babu Saroj Kumar Dutt, for Opposite Party No. 1.

Babus Hiralal Ganguli, Asita Ranjan Ghose and Profulla Chandra Chakraborty, for Opposite Party No. 2.

JUDGMENT.

Greaves, J.—By an agreement in writing contained in two letters dated respectively the 29th and 31st August 1923, the first of which was addressed by the petitioner to the respondent Debenham and the second by Debenham to the petitioner, the respondent Debenham agreed to let and the petitioner agreed to take for a period of 21 months from the 1st September 1923 with an option of renewal as therein mentioned, the Lower Flat of No. 4 Rawdon Street comprising the following accommodation, sitting room with one electric fan and lights, three bed rooms with bath rooms each bed room with one electric fan and lights also lights in the bath room, south verandah with space under stairs with electric lights and other accommodation as therein mentioned at a rental of Rs. 320 per month inclusive of taxes and without any other extra charge but excluding the cost of

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electric current. An application was subsequently made to the Rent Controller by the petitioner to fix the standard rent of the premises and the Rent Controller on the 20th August 1924 fixed the standard rent at Rs. 232 per month holding that the fans, electric lights and fittings formed part of the premises.

An appeal was preferred against this order to the President of the Tribunal who held that a standard rent under the Rent Act could not be made to cover fans, light or any other thing not forming part of a building or hut.

He arrived at the same figure as the Rent Controller for the standard rent of the premises exclusive of fans, lights, etc.

The decision of the President was based on the definition of premises in s. 2 (e) of the Calcutta Rent Act and he held that the word premises could not cover fans and lights, etc., as they did not form part of the building.

Against the order of the President of the Tribunal the present Rule was obtained on the 24th April 1925. Premises in s. 2 (e) of the Calcutta Rent Act are defined as meaning any building or hut let separately for residential, charitable, educational or public purposes or for the purposes of a shop or an office and by s. 15 of the Act the Rent Controller is empowered to certify the standard rent of any premises.

In *Sewell v. Angerstein* (1), Wills, J., held that gasaliers formed part of the free hold. The finding was arrived at in the case of a lease which was conveyed or assigned by the defendant to the plaintiff and included in the conveyance or assignment were the fixtures which were held to include the gasaliers attached by screws to the gas pipes.

In *Smith v. Maclure* (2), Pearson, J., held that gas fittings, gasaliers and a table lamp screwed to a pipe were fixtures and that this expression included whatever articles were substantially part of the house so that they could not be removed without depriving the building of that which was intended to be used with it.

I cite these authorities not as authorities for showing what are or are not fixtures, as what are deemed fixture in England may not be fixtures according to Indian Law and *vice versa* but as showing that it depends on the intention of the parties and

(1) (1868) 18 L. T. 300.

(2) (1884) 32 W. R. 459.

on the nature of the agreement to be gathered from the same whether such findings as fans and lights are intended to go with and to form part of the premises or building demised.

I think that in the present case the fans and lights which were attached to the part of the building demised and which were intended to be used with it must be taken according to the intention of the parties to be part of the demised building for the purposes of the Rent Act and that it was open to the Rent Controller to fix a standard rent which comprised these.

The case of *Ellen Eveline Wells v. John Dickinson & Co.* (3) to which we were referred has, in my opinion, no bearing on the present case. In that case a furnished flat was demised and it was held that although the Rent Controller had jurisdiction under the Act to fix a rent for the premises apart from the furniture he had no jurisdiction to fix a standard rent which included the furniture.

That case is distinguishable. Early the furniture could by no stretch of imagination have been intended to form part of the building for the purposes of the let whereas in the present case the fans and lights which were attached to the building formed part of the building for the purposes of the demise according to the true intention of the parties as indicated in the agreement. I would make the Rule absolute with costs five gold mohurs. The matter will now go back to the President of the Tribunal in order that he may consider what is the standard rent of the premises including the fans and lights.

B. B. Ghose, J.—I agree.

Z. K.

Rule made absolute.

(3) 81 Ind. Cas. 853; 28 O. W. N. 774; (1924) A. I. R. (C.) 868.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 97 OF 1923.

December 15, 1924.

Present:—Mr. Victor Murray Coutts-Trotter, Chief Justice, and Mr. Justice Srinivasa Iyengar.

ERNEST WILLIAM ADAMS—

APPELLANT

versus

MESSRS H. S. F. GRAY AND ADMINISTRATOR-GENERAL OF MADRAS—

RESPONDENTS.

Will, construction of—Principles applicable—Be-

quest, vested or contingent—Gift over, effect of—De-feasance.

The first principle to be borne in mind in regard to the construction of a Will is that as far as possible, the real intentions of the testator as expressed in the Will should be gathered and ascertained and given effect to. The so-called rules of construction are merely aids to enable the Court to discern or discover the real intentions of the testator. [p. 6, col. 2; p. 7, col. 1.]

In construing a Will by an Englishman in the English language drawn up by a Solicitor and bristling with highly technical expressions and clauses, it must be assumed that the technical expressions employed were employed with the meaning and significance generally understood to attach to them in the particular branch of the law. [p. 7, col. 1.]

Leader v. Duffey, (1888) 13 A. C. 294; 58 L. J. P. C. 13; 59 L. T. 9, relied on.

A bequest to a person for life and *after his death* to his children, becomes vested in each child as and when he or she is born and the vesting is not postponed till the death of the life-tenant. The expression "after the death" is taken to indicate merely the time when the gift over becomes reduced to possession and not the time when the right to such possession vests. The principle underlying this rule is that a contingency is imported by the fact that the gift is given after a life-estate in the property bequeathed. As nothing is more certain than that every person who lives must die, the death of a life-tenant is an event not contingent but certain; and, therefore, a gift on the death of a life-tenant is a bequest to take effect not on a contingency but on an event certain to happen; and, therefore, the donees of the gift are held to obtain a vested interest in it as and when they come into being. But if from the words of the bequest the intention of the testator is clear that the persons taking should be only such persons as survive or are alive on the death of the life-tenant, then it is a contingent bequest contingent upon the donee surviving the life-tenant. In such a case till such contingency is fulfilled, there can be no vesting. The principle underlying this rule of construction is that though the death of the life-tenant is certain, still it is by no means certain that the donee will survive the life-tenant. [p. 9, col. 1.]

Hallifax v. Wilson, (1809) 16 Ves. Jun. 168; 33 E. R. 947; 10 R. R. 146 and *Maitland v. Chalie*, (1822) 6 Madd. 243; 56 E. R. 1084; 23 R. R. 209, relied on.

The law does not favour the divesting of an estate already vested and in any case the condition for divesting and the intention to divest should be clearly made out. If, however, from a gift over clause the intention of the testator is to be clearly gathered that any estate that may have vested previously should be divested on the contingency referred to in the gift over clause then such intention should be given effect to and not otherwise. [p. 11, col. 2; p. 12, col. 1.]

In re Hamlet, Stephen v. Cunningham, (1888) 39 Ch. D. 426 at p. 433; 59 L. T. 745; 37 W. R. 245 and *Young v. Turner*, (1861) 30 L. J. Q. B. 263; 1 B. & S. 550; 5 L. T. 56; 8 Jur. (N. S.) 52; 121 E. R. 819; 124 R. R. 645, relied on.

A testator made a bequest to his daughter as follows:—"As to the sum of Rs. 30,000 unto my daughter Alice Gray for her life for her sole and separate use and after her death in trust for the lawful children or any lawful child of the said Alice Gray who being sons or son shall attain the age of 21 years." A later clause provided: "If the said Alice

Gray shall die leaving no child living at her death who being a son shall attain the age of 21 years, then after her death and such default or failure of children, I bequeath the said monies and investments, or so much thereof as shall not have become vested, unto my son Campbell Gray whom I hereby appoint as my residuary legatee." Alice Gray died leaving no issue living, her only son having predeceased her after attaining 21 years of age. On her death the widow and representative of Campbell Gray, the son and residuary legatee, claimed the monies on the ground that there was no vesting in the deceased son and that in any case there was a defeasance, while the father and representative of the deceased son of Alice Gray claimed that the estate had vested in her son on his attaining 21 years of age:

Held, on a construction of the Will, (1) that the contingent bequest in favour of Alice Gray's son became vested in him on his attaining 21 years of age, without reference to the death of his mother; [p. 9, col. 2.]

(2) that the intention of the testator in the gift over clause was that it should not affect any interest already vested and that the clause did not operate to divest Alice Gray's son of the estate which had vested in him; [p. 11, col. 2.]

(3) that, therefore, the father and legal representative of Alice Gray's deceased son was entitled to the monies in dispute. [p. 13, col. 1.]

Appeal from the judgment of Mr. Justice Devadoss, dated the 19th September 1923, passed in the exercise of the Original Testamentary Jurisdiction of the High Court in the matter of the last Will and Testament of Charles Gray deceased and in the matter of the Administrator-General's Act III of 1913.

Messrs. Moresby and Taylor, for the Appellant.

Messrs. King and Partridge and the Administrator-General, for the Respondents.

JUDGMENT.—The task before us in this appeal is, as Lord Loughborough the Lord Chancellor observed in a case, to find out the meaning of words which the party using them did not understand. It relates to the construction of the Will of one Charles Gray. The matter came up before Mr. Justice Devadoss on the Original Side on a summons taken out by the Administrator-General of Madras for the purpose of construing the Will and determining the rights thereunder of two claimants on behalf of each of whom it was urged that in the events that have happened, he or she has become entitled to the part of the estate in question. There can be no doubt that the first principle to be borne in mind in regard to construction of Wills is that as far as possible, the real intentions of the testator as expressed in the Will should be gathered and ascertained and given effect to. The so-called rules o

construction to be found in such abundance, more especially in English decisions, are merely aids to enable us to discern, or discover the real intentions of the testator and not artificial rules which should be allowed to override in any given case the expressed intentions of the testator.

Lord Halsbury, the Lord Chancellor, referred in the case of *Leader v. Duffey* (1) to the modern view which he thought was in accord with reason and common sense that whatever the instrument, it must receive a construction according to the plain meaning of the words and sentences therein contained. Referring to this observation of the learned Lord Chancellor, Lord Justice Cotton in the case of *In re Hamlet, Stephen v. Cunningham* (2) observes that rules of construction are only intended to aid us where there is ambiguity and not to enable us to get rid of the express words of the testator if expressed in clear language. This would, undoubtedly, be so in the case of an instrument expressed in plain language by a layman. When, however, we come to an instrument, which having regard to the form and the technical language employed may aptly be described as being in a language which the party using did not himself understand, we come to a state of things in which we cannot altogether ignore even the technical rules of construction. The Will before us was not only by an Englishman and in the English language but was apparently drawn up by one of the leading Solicitors in Madras at the time, and bristles with technical expressions and clauses which are to be found in all common forms and in most of the cases. When such highly technical expressions are used in an instrument, it is not possible entirely to ignore the construction placed on such technical expression by eminent and learned Judges in the Courts of Chancery in England; because it must be assumed that the technical expressions employed have been employed with the meaning and significance generally believed to attach to them in the particular branch of the law.

We may observe in this connection that in view of the very difficult questions involved, we enquired of both the parties whether they did not consider it would be the better course to have the matters finally decided in an action instead of on an

application; but both of them have agreed that any decision come to on this application should have the same effect as a decision in a suit between them so as to bind them finally.

The facts are these:—The testator left a son and two daughters and the contest here relates to the sum of Rs. 30,000 left to the younger daughter Hester Alice Gray and her branch.

The clauses in the Will relating to the disposition of this sum of Rs. 30,000 are as follows: "And as to the sum of rupees thirty thousand a further part of the said investments upon trust to pay the dividends and interest and income arising from the same unto my daughter the said Hester Alice Gray for her life for her sole and separate use free from the debts and control of any husband that she may marry and her receipt alone to be a sufficient discharge for the same and after the death of the said Hester Alice Gray in trust for the lawful children or any of lawful child of the said Hester Alice Gray who being sons or a son shall attain the age of twenty one years or being daughters or daughter shall attain that age or marry, and if more than one in equal shares. Provided also that the said trustees or trustee may after the death of either of them the said Mary Harriet Annie Wilson or the Hester Alice Gray or previously thereto if she shall so direct in writing raise any part or parts not exceeding one half part of the then expectant, presumptive or vested share or fortune of any child under the trusts hereinbefore declared and apply the same for his or her advancement or benefit and I declare that the said trustees or trustee shall, after the death of the mother of any child entitled in expectancy under the trusts hereinbefore declared, apply the whole or such part as they or he shall think fit, of the annual income of the share or fortune to which any child shall for the time being be entitled in expectancy under the trusts hereinbefore declared, for or towards the maintenance or education of such child either directly or to his or her guardians without seeing to the application thereof or requiring any account of the same; and shall during such suspense of absolute vesting accumulate the residue (if any) thereof in the way of compound interest by investing the same and the resulting income thereof in or upon any such stocks, funds or securities as are here

(1) (1838) 13 A. C. 291; 58 L. J. P. C. 13; 59 L. T. 9.

(2) (1888) 39 Oh. D. 426 at p. 433; 59 L. T. 745; 37 W. R. 245.

inbefore mentioned for the benefit of the person or persons who under the trusts herein contained shall become entitled to the principal fund from which the same respectively shall have proceeded, with power for the said trustees or trustee to resort to the accumulation of any preceding year or years and apply the same for or towards the maintenance or education of the child for the time being presumptively entitled to the same respectively."

Later on in the Will there is the following clause:—"And if either of them the said Mary Harriet Annie Wilson and the said Hester Alice Gray shall die leaving no child living at her death who being a son shall attain the age of twenty-one years or being a daughter shall attain that age or marry, then after the death of either of them the said Mary Harriet Annie Wilson and the said Hester Alice Gray and on such default or failure of children, I bequeath the said monies and the investments representing the same or so much thereof as shall not have become vested or has been applied under the trust aforesaid unto my son Charles Thomas Campbell Gray whom I hereby appoint as my residuary legatee."

The facts material for the purpose of understanding the claims and contentions before us have been admitted. Hester Alice Gray died on the 28th of November 1922. When she died she had no issue living. Her only son E. G. Adams had died in June 1918 after having attained twenty-one years of age. The claimants before us are Mrs. Gray the widow and representative of Charles Thomas Campbell Gray son of the testator, and Rev. Mr. Adams the father and representative of E. G. Adams. The case for Mrs. Gray has been put in two ways and it is contended that in either of those two ways she would be the person entitled to the monies now representing the bequest aforesaid of Rs. 30,000. It is firstly contended that the interest created in favour of the children of Hester Alice Gray is a contingent interest and on a proper construction of the various clauses in the Will no child of Hester Alice Gray could get a vested interest in it, unless both of the two contingencies are satisfied, namely, completion of the twenty first year and surviving Hester Alice Gray the mother. On this it is argued that as E. G. Adams did not survive his mother but died before her, he took no vested interest although he

completed his twenty first year. In default therefore of any children of Hester Alice Gray taking it is said that Mrs. Gray who now represents the son of the testator has become entitled. Secondly, in the alternative, it is contended that assuming that E. G. Adams took a vested interest in the fund, the later clause in the Will above recited containing the gift over is in the nature of a defeasance clause and on a proper construction thereof when he did not survive his mother, his vested interest, if any became divested and devolved by way of gift over upon the representative of the testator's son.

The contention on behalf of Rev. Mr. Adams was that on a proper construction of the Will the son of Hester Alice Gray took a vested interest on his completing his twenty first year even before the death of his mother and that the gift over clause could not on a proper construction thereof operate by way of defeasance at any rate with regard to any interest already vested.

What we have, therefore, to decide is which of these two sets of contentions should be upheld as being the right one. The learned Judge on the Original Side came to the conclusion that as E. G. Adams did not survive his mother he took no vested interest in the estate and he accordingly decided that Mrs. Gray was entitled to the fund. We have heard full arguments from the learned Counsel on both sides and after a careful consideration of all the contentions we have come to the conclusion that the decision of the learned Judge was wrong.

The learned Judge appears to have misdirected himself by a consideration of the terms of the gift over clause in arriving at a conclusion with regard to the question of vesting. Holding that there was no vesting he concluded that the gift over clause should have operation.

The questions for solution, therefore, are, firstly, whether on a true construction of the several clauses in the Will, E. G. Adams obtained a vested interest in the fund in question, and secondly, if he did, whether such interest became divested by the gift over taking effect on his dying before his mother and not surviving her.

There is no dispute about the life-interest bequeathed to Hester Alice Gray. The remainder is given to the lawful

child of the said Hester Alice Gray who, being a son shall attain the age of 21 years. This is the clause, therefore, which has to be looked at for the purpose of determining the question regarding the nature of the estate given or bequeathed. And unless a contrary intention to be gathered from any other clause in the Will should be found to affect the nature of the estate given under this clause, it follows that the question whether or not E. G. Adams obtained a vested interest in the fund should be determined solely by reference to this clause. We shall advert later to the other clauses in the Will bearing in any manner on the present question. It is perfectly clear from all the text books and the decided cases that if a bequest is to a person for life and after his death to his children, the bequest becomes vested in each child as and when he or she is born and the vesting is not postponed till the death of the life-tenant. The expression "after the death" is taken to indicate merely the time when the gift over becomes reduced to possession and not the time when the right to such possession vests. See *Hallifax v. Wilson* (3). The principle underlying this rule is that no contingency is imported by the fact that the legacy is given after a life-estate in the property bequeathed. As nothing is more certain than that every person who lives must die, the death of a life-tenant is an event not contingent but certain; and, therefore, a gift on the death of a life-tenant is a bequest to take effect not on a contingency but on an event certain to happen; and, therefore, the donees of the gift are held to obtain a vested interest in it as and when they come into being. But if the bequest had been not merely after the death of the life-tenant but to such of her children as may survive her or should be alive at her death, then clearly the condition of surviving or being alive at her death would be a condition precedent to the vesting itself, and in such a case, therefore, no child that does not so survive will acquire a vested interest in the bequest. The obvious principle underlying this rule of construction is that though the death of the life-tenant is certain, still it is by no means certain that the donee will survive the life-tenant. And if from the words of the gift the intention of the testator is clear that the

(3) (1809) 16 Ves. Jun. 168; 33 E. R. 947; 10 R. R. 146.

persons taking should be only such persons as survive or are alive on the death of the life-tenant, then it follows necessarily that it is a contingent gift upon the donee surviving the life-tenant. Till such contingency is fulfilled, there can be no vesting. But there are no such words in the clause creating the bequest under reference. The words merely are "after the death of Haster Alice Gray" and there are no such words as "to such of the children of Haster Alice Gray as may survive her or should be alive at her death." It, therefore, follows that if the words of the gift had been merely "to Haster Alice Gray and after her death to her children or child" E. G. Adams would have taken a vested interest in the fund on his birth. But then there are further words in the clause, viz., "who being a son shall attain the age of 21 years". There can be no doubt whatever that the attaining of 21 years is clearly a condition and the intention of the testator was, (apart from other clauses in the Will, that no son of Hester Alice Gray who does not attain 21 years should take. The requirement, therefore, that the son of Hester Alice Gray to take should be one who had attained 21 years is a contingency and would make the bequest a contingent bequest. The position then is this: that a bequest to E. G. Adams which would otherwise have vested on his birth is made contingent on his attaining 21 years. It logically follows from this position that the contingency being fulfilled on his attaining 21 years the bequest becomes vested in him immediately on his attaining 21 years without any reference whatever to the death of his mother Hester Alice Gray whether such death takes place either after or before he should attain that age.

This was what was decided in *Maitland v. Charlie* (4). The principle or correctness of this case has never been doubted. Thus, it is clear that under the terms of the clause in the Will creating the bequest and on its proper construction, E. G. Adams obtained a vested interest in the fund on his attaining 21 years.

Having arrived at this result without any consideration whatever to the other clauses in the Will, we may now consider the bearing of such other clauses on this conclusion. The provision in the Will with regard to the application upto one half out of the

(4) (1822) 6 Madd. 243; 56 E. R. 1084; 23 R. R. 209.

corpus of the fund for the advancement of any child of Hester Alice Gray with her consent in writing during her lifetime and after her death at the discretion of the trustees, is also a clear indication of the intention of the testator as deduced above. For, it clearly points to a considerable benefit in the legacy accruing to such children even before the arrival of the period of distribution. Again it is significant that the testator in that part of the clause should have used the words "the then expectant, presumptive or vested share or fortune of that child"—words which are obviously calculated to suggest the possibility contemplated by the testator of a vesting in a child even before the death of the mother. The provisions in the Will in the succeeding clause relating to the gift of the interest or income relating to the share or fortune of each child is also a clear indication regarding the intention of the testator as to the vesting. This rule was laid down by Jessel, M. R. in *Fox v. Fox* (5).

In re Turney, Turney v. Turney (6), Lord Justice Lindley referred to this case of *Fox v. Fox* (5) and followed it as good law, and *In re Ussher, Foster v. Ussher* (7), Justice Astbury also followed it.

It is also significant that in this part of the Will the testator while referring to a minor child of Hester Alice Gray speaks of it as entitled in expectancy but at the same time refers to the share or fortune of each child as separate and the income accruing from it also as distinct. The provision for the accumulation of the interest and compound interest relating to the share of each child separately for its own benefit is absolutely inconsistent with the idea of the share not vesting in the child even before the child should attain 21 years of age. It is further very significant that the testator, should refer to the period of such accumulation as a period during which there is suspense of absolute vesting. From all these indications the inference is strengthened, which has been arrived at already independently of them, that the estate taken by E. G. Adams was a vested interest on his completing 21 years. There is no question in this case of the quantity of the interest so vested, because E. G. Adams was

admittedly the only son of Hester Alice Gray and what vested in him was the whole of the fund in question.

It only remains then to consider the question whether on this basis of the fund having vested in E. G. Adams on his attaining 21 years, there resulted any divesting under the clause containing the gift over.

The clause containing the gift over which has been contended to operate by way of defeasance or divesting any estate vested in E. G. Adams has already been set out. It is significant to begin with that in this clause there are no words of defeasance or divesting. But at the same time the words of the gift over are perfectly clear. According to the clause, in the event of there being no child living at the death of Hester Alice Gray the gift over is to take effect. If the words had been merely that on the death of Hester Alice Gray "without leaving children" there should be a gift over, those words "without leaving" children would by construed only as meaning "without leaving or having had children who have attained vested interest", and would not be held to be apt to disturb any vested interest as was held in the case of *In re Cobbold, Cobbold v. Lawton* (8). But the words are not merely "without leaving children" but "leaving no children living at her death", and there being no possible ambiguity about such words, it has been held that such words should be construed literally and be given effect to. The leading case on this point is the case of *In re Hamlet, Stephen v. Cunningham* (2). The learned Judge in the First Court following this case held that E. G. Adams did not obtain a vested interest in the fund in question. It is impossible to understand how the learned Judge treated this case as an authority for coming to the conclusion that he did that there was no vesting of the fund in E. G. Adams. The case is undoubtedly an authority with regard to the gift over clause. But as regards the vesting itself, Lord Justice Cotton in that case held that two of the children who had attained 21 years before their mother's death had acquired a vested interest. At page 432* he says this: "The daughter was under age and unmarried at the testator's death. She afterwards married and had several children, two of whom attained 21 and so acquired a vested interest." (8) (1903) 2 Ch. 299; 72 L. J. Ch. 588; 88 L. T. 745.

*Page of (1888) 39 Ch. D.—[Ed.]

(5) (1875) 19 Eq. 286; 23 W. R. 314.

(6) (1899) 2 Ch. 739; 69 L. J. Ch. 1; 48 W. R. 97; 81 L. T. 548.

(7) (1922) 2 Ch. 321; 91 L. J. Ch. 521; 127 L. T. 453.

terest; but all the children died before their mother." Again at page 435* the same learned Judge observes as follows: "The argument which appeared to me to deserve most consideration is that these words were to be considered as a mere continuation of the limitation which was to take effect if no vested interest was obtained by the children under the preceding words. Both the Counsel for the appellant relied on the words of the introduction. 'And in the case my said daughter' They said that those were not words which would be naturally used if the testator was defeating a previously vested interest. But I am struck with this, that in the latter part of the Will, where the testator disposes of the unsold part of his real estate, he first gives it to the children by words which clearly would give them vested interest on their births, and then introduces a gift over by the same words as those we are now considering. I do not much rely on that clause as showing us what his intention was, but only as showing us that he used the words "And in case" to introduce a limitation displacing a previous vested gift, a limitation which clearly was intended to *displace a previous vested interest*, and which could not be contended to be merely carrying out a series of limitations to take effect on failure of the previous objects of the gift." And further on at page 438* he states "but there is no inconsistency in a gift over defeating a previous vested interest" and concludes with the following sentence: "In my opinion, on the true construction of this instrument, the words express the event on which the gift over was to take effect too clearly. . . . notwithstanding any view we may have that it would have been much better if the testator had made a different disposition".

In re Hamlet, Stephen v. Cunningham (2), therefore, far from being an authority for the fund not vesting is strong authority in favour of its vesting. As regards the divesting, however, it is, no doubt, a clear decision in favour of the contention on behalf of the respondent. We should have felt ourselves bound to follow that decision and hold that the estate that had vested in E. G. Adams became divested by reason of his not surviving his mother but for the presence in the clause of the following words, namely: "Or so much thereof as shall not have be-

come vested". The law, it has been said, does not favour divesting, and in any case the condition for divesting and the intention to divest should be clearly made out. As it has been already pointed out there are no words in the clause indicating any defeasance or divesting. But as observed by Lord Justice Cotton in the case of *In re Hamlet, Stephen v. Cunningham* (2), if the gift over is absolutely clear it may necessarily involve a defeasance or divesting. The *raison d'être* of such decisions as *In re Cobbold, Cobbold v. Lawton* (8) is that such words as "leaving no children" should be construed merely as meaning "leaving or having had no children who have not obtained vested interest" and should be construed so as not to disturb or divest any vested interest. In other words, unless from the gift over clause the intention is perfectly unambiguous, clear and definite that any vested interest whatever should cease and become divested, the gift over will not be held to have that effect. In the present case, however, the intention of the testator is perfectly clear from the words he had used that the gift over should not operate in respect of any interest that has vested. It, therefore, follows from this that the intention of the testator in the gift over clause was not to divest any vested interest.

The learned Counsel for the respondents contended in effect that the gift over clause should be read as if the words "or so much thereof as shall not have become vested" were not there. We could not possibly accede to any such contention. He also relied strongly for his argument on the case of *Young v. Turner* (9). So far as the question of the gift over and divesting is concerned that case is undoubtedly a case quite similar to the case *In re Hamlet, Stephen v. Cunningham* (2).

This case of *Young v. Turner* (9) undoubtedly bears many points of resemblance to the case before us, and it, therefore, follows that if there were no points of distinction between that case and this, we might have felt bound to follow the decision in that case of the very learned Judges who constituted that Court.

The questions considered and decided in that case were exactly the same that have arisen for decision in this case, namely, whether in the first place any estate did vest in a child that attained 21 years but

(9) (1861) 30 L. J. Q. B. 968; 1 B. & S. 550; 5 L. T. 56; 8 Jur. (N. S.) 52; 121 E. R. 819; 124 R. R. 645.

*Pages of (1888) 39 Ch. D.—[Ed.]

died before the termination of the life-estate and in the second place, whether even if the estate did vest there was no divestment by the gift over if on the death of the life-tenant there should be no issue of her body alive. The main decision in the case was that even if there had been vesting, there was a divesting as the result of the clause containing the gift over. This is what Justice Blackburn who delivered the judgment of the Court in that case has said "And if an estate did vest in the issue of the body of the niece attaining twenty-one it would be divested upon the death of such issue in her lifetime under the terms of the Will." In this view it was unnecessary for the learned Judges to consider the question whether having regard to the terms of the particular Will the estate had or had not vested in such a child. We must take it that it is for that reason that the case is generally cited only as an authority for the position that the general rule that a gift over which is directed to take effect on the death of some person without leaving issue should not be construed in such a manner as to divest any estate already vested is not applicable to cases where the intention is perfectly clear from the language of the instrument that what was clearly intended was that the gift over should take effect if on the death of the life-tenant there should be no issue living of the deceased life-tenant. The rule laid down by this case is that if from the gift over clause the intention of the testator is to be clearly gathered that any estate that may have vested previously should be divested on the contingency referred to in the gift over clause then such intention should be given effect to and not otherwise.

It is the same rule that following this case of *Young v. Turner* (9) that was again laid down in *In re Hamlet, Stephen v. Cunningham* (2) and it is accepting the rules so laid down that we came to the conclusion that having regard to the particular words of the gift over clause in the Will before us the testator's intention clearly was that no estate which had become vested should be divested by the gift over clause. So far, therefore, as the construction of the gift over clause is concerned, the conclusion we have arrived at is clearly in consonance with the rule laid down in the case of *Young v. Turner* (9).

But that case was also sometimes refer-

red to as an authority with regard to the question of vesting though the decision in the case as already observed turned only on the construction of the gift over clause. It is clear, however, that in that case Justice Blackburn delivering the judgment of the Court found that the object of the testator was to provide only for such of the issue of his niece as may be living at the time of her death. The words in the Will before the Court were "and if my said niece shall depart this life leaving only one child of her body lawfully begotten, then I give and devise the property unto such only child and his or her heirs as soon as he or she attains the age of twenty-one years aforesaid." From the terms apparently of this clause of the Will the Court came to the conclusion in that particular case that the intention of the testator was that only such children should take as survived the mother. So far, therefore, as the question of vesting is concerned: *Young v. Turner* (9) should be deemed to belong to that class of cases where having regard the language used in the particular instrument it was held that the intention of the testator was that surviving the mother or being alive at her decease was one of the conditions of the vesting of the estate.

We have already referred to that class of cases and held that on the language of the Will before us it was clear that E. G. Adams obtained a vested interest in the fund. If, therefore, the intention of the testator in the gift over clause was that the clause should not affect any interest already vested it necessarily follows that any estate vested in E. G. Adams could not be held to be vested or defeated by anything contained in the gift over clause.

The learned Counsel for the respondent contended that in the view taken by us of the gift over clause there could be no case of vesting of a part of the estate as would seem to have been contemplated in the words in the gift over clause already referred to, namely, "or so much thereof as shall not have become vested." But what we have been concerned with was the intention of the testator; and we cannot adopt a construction which would have the effect of defeating the clear intention of the testator merely because the words used by him might refer to a contingency which might never arise, more especially having regard to the fact that no one can be certain in the case of such complicated pro-

visions what contingencies may or may not arise.

In our judgment, therefore, the learned Judge below was wrong and the appeal succeeds and should be allowed. It will be declared that the estate having become vested in E. G. Adams there was no divesting of that estate and that, therefore, on his death it passed to his representative his father. Having regard, however, to the extremely difficult nature of the questions involved, we think this a proper case in which we should direct that the taxed costs as between attorney and client of both parties in this appeal also should come out of the estate. We certify for two Counsel on both sides.

V. N. V.

Z. K.

Appeal allowed.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 64 OF 1923.

August 15, 1923.

Present:—Justice Sir Lallubhai Shah, Kt.,
Acting Chief Justice, and Mr. Justice Kemp.

BHAGCHAND DAGADUSHA

GUJARATI AND OTHERS—PLAINTIFFS

—APPELLANTS

versus

SECRETARY OF STATE FOR INDIA

AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bombay District Police Act (IV of 1890), ss. 25, 25A, 26, 79, 80, 81—Bombay General Clauses Act (I of 1904), s. 21—Bombay Revenue Jurisdiction Act (X of 1876), s. 4(f)—Civil Procedure Code (Act V of 1908), s. 80—Suit against Secretary of State and Public Officer—Injunction, suit for—Notice, whether necessary—Suit instituted before expiry of period of notice, maintainability of—Disturbance—Compensation, levy of—Police charge, levy of—Notification, alteration in terms of, legality of—Suit for declaration of illegality of notification, whether maintainable—Irregularity in notification, effect of—"Final" in s. 25A (4), meaning of—Power of Courts to interfere with action of Government and District Magistrate.

Per Shah, J.—The rule contained in s. 80 of the C. P. C. is a rule of procedure and does not affect in any way the cause of action or the rights of the parties. Where the cause of action requires an immediate remedy by way of injunction the Courts have power to entertain the suit before the expiry of two months specified in the section, where they are satisfied as to the need of an immediate remedy by way of prevention of the wrong complained of. [p. 21, col. 2.]

Where a class of persons is taxed heavily and the payment of the tax is about to be enforced by measures which would cause serious apprehension in

the minds of the persons taxed that irremediable damage might be caused to their business unless the enforcement of the orders imposing the tax were stopped at once, the remedy by way of injunction is appropriate and necessary to safeguard their interests, and in such a case the suit might be entertained even if instituted before the expiry of the period limited in s. 80 of the C. P. C. [p. 23, cols. 1 & 2.]

Section 81 of the Bombay District Police Act provides an additional remedy which the party concerned may follow but it does not bar a suit, which it may be otherwise open to the party to file. [p. 23, col. 2.]

Government is not empowered by s. 25-A of the Bombay District Police Act to levy any cess or rate. Section 4 (f) of the Bombay Revenue Jurisdiction Act refers to a cess or a rate authorized by Government and not to a cess or rate authorized by the District Magistrate with the previous sanction of the Commissioner such as is contemplated in s. 25-A of the Bombay District Police Act. [ibid.]

Section 4 (f) of the Bombay Revenue Jurisdiction Act applies to a cess or rate which is legally authorized by Government. It does not apply to a case in which the legality of the order of the Government is questioned. [ibid.]

Section 21 of the Bombay General Clauses Act is intended to be of general application and applies to a notification issued by the Government under s. 25 of the Bombay District Police Act. It is, therefore, open to the Government to alter the terms and operation of a notification issued under the latter provision if minded to do so. [p. 24, col. 2.]

Under s. 25 of the Bombay District Police Act Government has no power to call upon A to make a payment on behalf of B. It is open, however, to the Government under sub-s. (2) (b) of the section to charge any section or sections or class or classes of persons, and under the powers mentioned in s. 21 of the Bombay General Clauses Act, it is open to them to add to, amend, or vary a previous order on this point. So long as in substance the tax or rate is a tax or rate levied on another class of persons living within area concerned, it is within the legal authority of the Government to make the alteration. [p. 24, col. 2; p. 25, col. 1.]

The Court is not concerned with the propriety of the tax or rate; it is concerned only with its legality. It is for the Government to consider its propriety, as the Legislature has laid the obligation of determining the questions mentioned in the section upon that authority. [p. 25, col. 1.]

The mere fact that a notification, under s. 25 of the Bombay District Police Act, calls upon the Collector to collect the rate or tax imposed and does not in the first instance call upon the Municipality to pay the amount as required by sub-s. (4) of the section does not render the notification illegal. The direction to the Collector to make the collection is in the nature of an irregularity which does not affect the legality of the tax or rate imposed. [p. 25, cols. 1 & 2.]

The express provision as to the finality of an order made by a District Magistrate under sub-s. (1) of s. 25-A of the Bombay District Police Act which is contained in sub-s. (4) of the section excludes the application of s. 21 of the Bombay General Clauses Act to such an order. [p. 26, col. 2.]

Quære:—Whether the Commissioner has power to revise such an order from time to time and to introduce changes into it?

Where, however, the District Magistrate has not yet made a requisition on the Collector under sub-s. (1)

(b) of the section, the stage of finality contemplated by the provisions of sub-s. (4) has not been reached and the subject is still open to the District Magistrate. [p. 28, col. 1.]

It is for the District Magistrate with the previous sanction of the Commissioner to require the Collector under s. 25-A (1) (b) of the Bombay District Police Act, to recover the amount of compensation determined under the section in such proportions as he may, with the like sanction, draw from all inhabitants of the area declared under sub-s. (1) (a) (ii) or from any section or sections or class or classes of such persons and it is for the Government to determine the same questions under s. 25 of the Act with regard to Police charges. A Civil Court can interfere only when the discretion is exercised in such a manner as to enable the Court to say that it is not an exercise of the discretion within the meaning of these sections. [p. 30, col. 2; p. 31, col. 1.]

Section 25-A of the Bombay District Police Act does not provide for any enquiry as to an order under sub-s. (1) (b) of the section. The words "after such enquiry as he deems necessary" are to be found in sub-s. 1 (a) and do not govern cl. (b). [p. 31, col. 1.]

The omission to hold an enquiry departmentally arranged is not sufficient to vitiate a direction given by the District Magistrate under s. 25-A (1) (b). The provisions of s. 79 of the Bombay District Police Act would condone such an irregularity in the procedure. [*ibid.*]

An obligatory provision in a Statute cannot be allowed to be ignored without adequate grounds. [p. 25, col. 2.]

Per *Kemp, J.*—So far as a suit against the Secretary of State is concerned the words of s. 80 of the C. P. C. are imperative and make no exception in the case of suits for an injunction and a Court of Law is not entitled to graft on to the plain wording of the section a qualifying clause excepting suits for an injunction from the operation of the section. Relief by way of injunction is a kind of relief which must have been in the contemplation of the framers of the Code when the section was drafted and re-drafted. It makes no difference that the injury apprehended is immediate or irreparable. No suit may be instituted against the Secretary of State until the expiration of the two months' notice required by the section. [p. 31, col. 2.]

Where, however, a suit is for an injunction against a public servant in respect of a *threatened* act, the section has no application and no notice is necessary under the section before the institution of the suit. [p. 32, col. 1.]

Section 4 of the Bombay Revenue Jurisdiction Act does not stand in the way of a suit in respect of a wholly illegal and unauthorized cess or rate purporting to be authorized by a Government or a Public officer. [p. 33, col. 1.]

Section 80 of the Bombay District Police Act refers to suits for damages against a Commissioner, Magistrate, or Police Officer and has no application to a suit for an injunction restraining the District Magistrate from collecting a rate or tax illegally imposed by the Government or by the District Magistrate, nor does such a suit fall within the purview of s. 81 of the Act. [p. 33, cols. 1 & 2.]

There is nothing in s. 25-A of the Bombay District Police Act to suggest that no fresh order can be passed by the District Magistrate in accordance with the revision of his first order by the Commissioner. The word "final" in sub-s. (4) of the section does not mean

that the District Magistrate can only make his order under that section once and for all. The use of the word "final" merely excludes the jurisdiction of the Courts and not the power of the Commissioner or the District Magistrate to alter an order passed under the section. [p. 31, cols. 1 & 2.]

The finality provided for an order under s. 25-A cl. (4) of the Bombay District Police Act means to give a final effect to the ultimate order which the District Magistrate, with the previous assent of the Commissioner may, subject to the revision of the Commissioner or in accordance with any such revision, pass. The clause is not intended to exclude the powers which by s. 21 of the Bombay General Clauses Act are included in a power to issue an order. [p. 35, col. 1.]

If a charge for Additional Police levied under s. 25 of the Bombay District Police Act is not a rate on property, it is a tax, however it may be described in the notification and is, therefore, within the powers of Government to levy under the section. Any objection to the form of such a notification is cured by s. 79 of the Bombay District Police Act. [p. 35, col. 2.]

The Courts are not concerned with whether Government or the District Magistrate have judged correctly the party who should pay the Police charge, or the amount of compensation under ss. 25 and 25-A of the Bombay District Police Act, provided the Government or the District Magistrate has exercised its or his judgment on the point. That is a matter left to Government under s. 25 and to the District Magistrate, with the previous sanction and subject to revision by the Commissioner, under s. 25-A. Section 25-A was not intended to permit the Court to enquire into the question as to who were the persons really responsible for the occurrences in respect of which the cess is levied. [p. 36, cols. 1 & 2.]

First appeal against a decision of the District Judge, Nasik, in Suit No. 3 of 1922.

Sir *Chimanlal Setalvad*, Messrs. *G. N. Thakore* and *R. J. Thakore*, for the Appellants.

Messrs. *Kanga*, (Advocate-General) and *S. S. Patkar*, Government Pleader, for the Respondents.

JUDGMENT.

Shah, Ag. C. J.—This is an appeal from the judgment of the District Judge of Nasik in a suit filed by 58 shop-keepers of Malegaon against the Secretary of State for India in Council and the Collector of Nasik. The suit was filed for a declaration that the Government Notification, dated 6th June 1922, directing a levy of the costs of certain additional Police and of the amount of compensation from the shop-keepers of Malegaon whether Hindus or Muhammadans was illegal and for an injunction restraining the defendants from making the recoveries authorised by the said notification.

It will be necessary to state in some detail the facts which led to this notification. But before doing so, I may state that the suit was defended on various grounds which

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are indicated by the issues raised at the trial. The first five issues relate to the preliminary objections to the suit, and the next four issues (Nos. 5 to 8) relate to the merits of the case. The learned District Judge found that the suit was barred by s. 80 of the C. P. C. as it was filed before the expiration of two months after the notice of action was given and that the suit was barred by the provisions of s. 81 of the Bombay District Police Act (IV of 1890 as amended by various subsequent Acts.) Issues Nos. 2, 3 and 4 were found in favour of the plaintiffs. On the merits the issues were decided against the plaintiffs. In the result the suit was dismissed with costs.

It may be mentioned that original plaintiffs Nos. 4, 10, 11, 24, 27, 46, 53, 54, and 55 withdrew from the suit; and it was heard as regards the remaining 48 plaintiffs.

They have all appealed to this Court, and practically all the points raised in the lower Court have been raised in the course of the arguments before us. We have heard the parties fully and we have been assisted by the clear arguments of the learned Counsel on both sides. Broadly speaking the important points are two. One is a preliminary point relating to the notice required by s. 80 of the C. P. C., and the other relates to the legality of the new tax or rate levied on the plaintiffs (a) in respect of the additional Police and (b) in respect of the amount of compensation determined under s. 25-A of the Bombay District Police Act. The other preliminary issues are not so important, and the point relating to the merits covers a number of points of varying degrees of importance, which I shall notice when I come to deal with the question.

The facts which led to the notification and then to the suit have been fully stated in the judgment of the lower Court. I shall, however, state them briefly, confining the detailed statement only to the essential facts.

At the outset I may state that two letters one of the 7th December 1921 and the other of the 15th December 1921 by the District Magistrate to the Commissioner have been put in here. The learned Counsel for the appellants made an oral application for the production of these letters in the course of the argument, and the learned Advocate General for the defendant No. 1 expressed his willingness to put them in. As these

letters were referred to in the correspondence which was already put in, as they were likely to be useful for a general understanding of the facts from beginning to end and as the parties consented we have admitted them in evidence in appeal.

The facts are briefly these. Serious riots took place at Malegaon on the 25th of April 1921, which resulted in the loss of a life and some property. A notice was issued on the 13th May by the District Magistrate relating to an inquiry under s. 25-A of the Bombay District Police Act inviting all the persons to be present with proof of their claims for compensation which had been duly presented and all persons who wished to oppose the same (Ex. 102). On the 17th May the Commissioner, C. D. authorised the District Magistrate to declare the area included within the boundaries of the Municipality of Malegaon as the local area inhabitants of which had caused or contributed to the riots and unlawful assemblies at Malegaon on the 25th and 26th April and to determine the amount of compensation awardable under the section; and he further authorized the District Magistrate to require the collection to recover the amount so determined from the adult male Muhammadan inhabitants of the said local area.

Further proposals from the District Magistrate as to the proportions in which the compensation should be recovered from such inhabitants were awaited. In communicating this authority to the District Magistrate he gave the following further directions:—

“(2) The Commissioner does not think that participation by Hindu merchants in the collecting and accounting of *Khilafat* Fund subscriptions affords sufficient ground for making them liable to contribute to the compensation.

The Commissioner agrees that the recovering authority should be the Collector and not the Municipality.

* * * *

(4) The District Magistrate should himself personally conduct the enquiries for determining the amount of compensation recoverable.

For this purpose he should hold regular public proceedings and should allow to all parties concerned or their Pleaders full opportunity for stating their case and for cross-examining witnesses. These proceedings should be held at Malegaon. A finding

should be separately recorded and published on each claim for compensation." (Ex. 101).

On the 20th May 1921 the declaration as to the area under s. 25-A (a) (ii) was made by the District Magistrate. (Ex. 142). The previous sanction of the Government there referred to appears to be a mistake for the sanction of the Commissioner.

On the 4th July 1921, after making the necessary inquiry the District Magistrate decided the questions of compensations and sent the file of the proceedings to the Commissioner (Ex. 102).

On the 17th August 1921, the Commissioner varied the amounts in some of the awards and confirmed all the other awards. The total sum sanctioned by him amounted to Rs. 5,04,546 (Ex. 104).

On the 16th August the Commissioner also settled the list of exemptions under s. 25-A, sub-s. (2) and passed the following order:—

"The total amount of compensation payable according to the awards as finally revised by the Commissioner under s. 25-A of the District Police Act, 1890, comes to Rs. 5,04,546.

2. This amount should be assessed and recovered in the following manner subject to the exemptions of which a list is hereto attached, from the following two classes of male adult Muhammadan inhabitants of the town of Malegaon in the Nasik District and such other inhabitants of the said town as may be hereafter notified.

Class 1—Payers of income-tax—Each to pay 9 times the amount of the income-tax payable by him in 1920-21.

Class 2—All others—Each to pay an equal share of the balance of the total charges after deduction of the amounts recoverable from persons of class 1.

Provided that if any person in this class is the owner of more than one hand loom he shall pay an extra share for every loom owned by him in excess of one.

3. The amounts due to be recovered in instalments spread over three years ending July 31st, 1924." (Ex. 134). The only thing that remained for the District Magistrate to do at the time was to give a direction to the Collector to realise the amount of compensation in the above proportion under s. 25-A, (1) (b). But apparently that was not done.

The Government also acted under s. 25 and imposed additional Police upon Male-

gaon. On 1st July 1921 the Government issued a notification directing additional Police of the strength indicated therein to be employed at Malegaon for one year and ordering "the cost of such additional Police to be defrayed wholly by a tax imposed on the male adult Muhammadan inhabitants of the said town as may be hereafter notified by a rate assessed on their property." The estimated cost of such Police was about Rs. 46,174 (Ex. 96).

On the 11th July 1921, they further directed that the cost of the additional Police should be recovered as follows:—

"Class I—Payers of income-tax—Each person to pay an amount equal to the amount payable by him as income-tax for the years 1920-21.

Class II—All others to pay in equal share the balance of the charges after deduction of the amounts recoverable from person in class I.

Provided that if any person in this class is the owner of more than one hand loom he shall pay an extra share for every loom owned by him in excess of one." (Ex. 97).

On the 21st July 1921, the District Magistrate communicated this notification to the Municipality under s. 25, sub-s. (4) with the letter from the Commissioner dated 19th July and gave direction as to the method of collection (Ex. 100).

On the 8th October 1921, the Government slightly altered the first notification according to which the cost of the additional Police was Rs. 46,473 (Ex. 98).

The Municipality was unable to make the collections as required. The President of the Municipality wrote to the Collector on the 1st December 1921 explaining at length the difficulties of the Municipality the unwillingness and objectionable conduct of the Momins to make the payments and the poverty of a large number of the Momin adults at Malegaon, and asking for advice as to what should be done. This is a long letter and explains the situation as it then existed according to the President of the Municipality (Ex. 105).

Then the District Magistrate wrote two letters, one on the 7th December and the other on the 15th December 1921, which are admitted in evidence in appeal. He practically agreed that the Municipality would not be able to make the collection and suggested that both the collections—the Police charges and compensation—should be lumped together to be collected by the

Collector by taking the saris woven by the Momins, that is by taxing the shop keepers, who purchase saris from them. He observes at the end of the second letter as follows:

"The shop-keepers were easily made to collect the *Khilafat* Funds. Let them now be made to Collector our compensation." (Exhibits A and B in appeal).

On 30th December the Commissioner wrote the Collector pointing out the difficulties in accepting his suggestions as to the shop-keepers being made to pay as it would result in shifting the burden from the Momins to the shop-keepers who were not covered by the notifications and were in fact excluded by the Government. He suggested some method of collecting the amounts by taxing the sari as it would be sold by the Momins to the shop-keeper. The Collector's endorsement dated 6th January 1922 on this letter shows, however, that he thought that the Commissioner's suggestion was practically the same as his suggestion (Ex. 146). The Commissioner then wrote to the Government on the 14th January 1922 recommending in effect that the Collector's recommendations might be accepted (Ex. 147). It seems that the matter was making slow progress for reasons which may not be all known on this record and it is possible that they were waiting for the final result of the appeals to the High Court by those who were convicted and sentenced in the Malegaon riot cases as it appears from the letter of the 7th December.

Then comes the confidential letter of the 7th March addressed by the District Magistrate to the Commissioner in which he reviewed the whole question and recommended that the shop-keepers should be taxed. The whole of this letter is important and is really the genesis of the new notification which forms the bone of contention between the parties. I shall only state that in para. 4 he explains that the suggestion of the Commissioner made in the letter of the 30th December is unworkable, and suggests in para. 5 the reasons for taxing the shop-keepers. In that paragraph he suggests the following inquiry in the case of the Hindus if necessary:—"If it be suggested that the non-Mohammadans are not to be held responsible for any payment and that this proposal brings in a certain number of Hindus then I go back to the original issue between Mr. Simcox and Mr. Pratt and would suggest that the views of Mr. Simcox based on many years' knowledge of Malegaon and concur-

red in by every local official, be now accepted by Government, namely, that the Hindus were either actively behind the *Khilafat* movement (as shown, for example, by their collecting money for the *Khilafat* Paisa Fund) or passively sympathised with it and in any case took no line in support of law and order and that, as a matter of fact, the whole town should be held responsible for the mis-deeds of certain of its inhabitants unless any individual can prove that he was actively and publicly on the side of Government throughout the trouble. Not one of these shop-keepers and shop-keepers is known to come within this category. Nevertheless to prevent any injustice being done to the Hindus, I would propose that the Deputy Collector in charge of Malegaon Sub-Division should hold a summary inquiry at which the Hindu shop-keepers in these two lists should be called upon to be present and that they should be given any opportunity of furnishing proof, that before, during and after the riots they were actively and publicly on the side of Government: the decision of the Deputy Collector on confirmation by the District Magistrate to be final and conclusive."

He proposes a scheme and in para. 7 summarises the arguments.

"7. In support of this scheme I would summarise the following argument.—

(1) The shop-keeper who actually makes the payments will not be out of pocket. He will naturally pay less for the sari to the Momin from whom he buys it and in selling he may put up the price of the finished article and he will charge the Momin more for the yarn which he sells to him. He will cover himself at every point and the maker of the sari will pay as Government intend. Therefore, there is no hardship in making the shop-keeper, the agent for the collections.

(2) Instead of having to deal with a whole community we confine our collections to not more than 84 men. The machinery for collection is made correspondingly easier and cheaper.

(3) The Momin weaver, even if he did not abandon the town in large numbers, as he conceivably might if recoveries were to be made direct from him, would be a certain defaulter, and none of the coercive measures of the Land Revenue Code for recovery would be practicable or advisable. His moveable or immoveable property is negli-

gible and to put him in the Civil Jail would provoke a riot.

(4). On the other hand the shop-keepers own both moveable and immoveable property, they are residents of the town, they are few in number and coercive measures can be used against them. Since it has been shown that they can shift the burden on to others it is reasonable to assume that they will do so, and will pay what is demanded of them rather than make themselves liable to such measures. Contumacy, on their part is less likely to provoke a riot and to cause any disturbance." (Ex. 107)

The Commissioner sent this letter to the Government on the 9th March endorsing the Collector's recommendations (Ex. 107). The Government wrote to the Commissioner on the 5th April 1922 approving of the District Magistrate's suggestions as follows:— With reference to correspondence ending with your memorandum No. P. O. L. 3-181 dated the 9th March 1922, on the subject noted above, I am directed to inform you that Government approve all the District Magistrate's proposals contained in his letter No. P. O. L. 100-A, dated the 7th March 1922. The Collector should be told that His Excellency the Governor has personally read his report and thinks it excellent.

2. I am to forward herewith a copy of the opinion of the Remembrancer of Legal Affairs and to request that you will be so good as to submit revised draft notifications. Your report should indicate the grounds for holding that the Municipality has made default in accordance with the proviso to s. 26 of the District Police Act IV of 1890. Meantime the summary inquiry proposed by the District Magistrate Nasik, in para. 5 of his letter quoted above should be proceeded with." (Ex. 146.)

* * * *

The District Magistrate wrote to the Commissioner with reference to the above letter (Ex. 109) on the 21st April and on the same day directed the Sub-Divisional Magistrate to make an inquiry in the terms of the following memorandum:—

"The Sub-Divisional Magistrate, Malegaon, is informed that Government have approved all the proposals made by the District Magistrate in his letter No. P. O. L. 100-A of 7th March 1922 for recovering the monies due from the people of Malegaon. The necessary notifications authorising the recoveries are being prepared and as soon

as they are issued by Government, the work of recovering must be taken in hand. The Sub-Divisional Magistrate will remember that in all sum of Rs. 2,14,619 is to be recovered before July 31st.

2. Meanwhile the summary inquiry proposed in para. 5 of the original letter should be taken in hand, and the Sub-Divisional Magistrate is requested to arrange to hold this inquiry at Malegaon at as early a date as possible. The inquiry should be conducted summarily. The Sub-Divisional Magistrate will see that no inquiry is necessary in the case of the Momins whose names are in the lists, as to their liability to make payment since this point was determined last year. The inquiry as to the liability only extends to the Hindus. On the other hand the estimate of the number of *saris* and of the bales of yarn is to be made in respect of all the persons, both Momins and Hindus, and if the Sub-Divisional Magistrate thinks that the assistance of the Income-Tax Inspector will be of advantage to him in making these estimates he should apply for it.

3. Each man's case should be taken up separately and orders recorded and these should be reported to the District Magistrate who will pass final orders under s. 25(a) (1) (b) of the Police Act.

4. The District Magistrate hopes that it will be possible for the Sub-Divisional Magistrate to finish these inquiries by the time that the notifications are issued by Government, so that the orders to the Collector for the recovery of the sums due can forthwith be issued.

5. Both the Sub-Divisional Magistrate and the *mamlatdar* are requested to give as wide a publicity as possible to the principle on which Government have now decided to recover the charges. The more generally these principles are known the easier it should be for the money to be recovered, and in any case there need be no secrecy about the matter." (Ex. 108).

The Sub-Divisional Magistrate issued the following public notice:—

"All the people of the town of Malegaon are hereby informed as follows:—The amount of costs of additional Police and the compensation amount in connection with the riots that took place at Malegaon in the year 1921 are to be recovered as herein below set forth:—

The shop-keepers who sell yarn to the Momins of Malegaon or who purchase

saris from them are to be considered as agents for the purpose of the recovery of these amounts.

From every such shop-keeper purchasing saris or selling yarn, annual recovery will be made for three years on behalf of the Momins at the rate of 6 annas per sari purchased and of Rs. 5 per bale of yarn sold. Before such recovery is made, we shall give notices to the respective shop-keepers in that behalf and make inquiries at Malegaon on the date fixed. This inquiry will commence very shortly. May this be known. Date the 21st April 1922". (Ex. 89).

It may be mentioned that there was no reference either in Ex. 108 or Ex. 109 to the nature of the summary inquiry proposed by the District Magistrate in his letter as to the liability of the Hindu shop-keepers; and it is noticeable that Ex. 89 is practically silent on the point of this summary inquiry as to the Hindu shop-keepers. On the 25th April the Sub-Divisional Magistrate issued notices to the individual shop-keepers which related to the proposed amount of the tax (Exhibit 92). On the 20th May 1922, the District Magistrate published the following public notice:—"All the people of the town of Malegaon are hereby informed as follows:—It has been decided to recover the amount of cost of additional Police and the amount of compensation for damages sustained in the riots that took place at Malegaon on the 25th and 26th of April in the year 1921 from the shop-keepers dealing in yarn and saris by levying a rate on each bale of yarn sold and on each sari purchased at Malegaon. And pending publication of Government notification authorising the levy of such rate, the people concerned are hereby informed by the District Magistrate, Nasik, that the amount to be recovered in the first year will be recovered in three equal instalments instead of in one instalment as originally proposed and the said amount will be recovered at the rate of Rs. 5 per bale of yarn and at the rate of 3 annas per sari instead of 6 annas per sari as originally proposed.

The amounts to be recovered in the next two years will be recovered in those years. But it will be determined later on as to in how many instalments and at what rate those amounts are to be recovered.

The dates of instalments and the amounts to be paid by individual merchants as settled by the Sub-Divisional Magistrate, Malegaon, on a recent enquiry made by him as regards the annual average dealings of merchants dealing in yarn and saris will be duly communicated to the persons concerned by notice. May this be known. Date the 20th May 1922." (Ex. 90).

On 6th June 1922 the Government published the notification, the legality of which is in question.

The material terms of the notification are these:—
"No. 152:—Whereas it appears to His Excellency the Governor in Council that the conduct of the inhabitants of the town of Malegaon in the Nasik District has rendered it expedient to employ additional Police in the said town, the Governor in Council in supersession of Government Notifications Nos. 6423 dated 1st July 1921, 6801, dated 11th July 1921 and 9911, dated 5th October 1921, is pleased in exercise of the powers conferred by s. 25 of the Bombay District Police Act, 1890, (Bom. IV of 1890), (1) to direct the employment in local area of the said town of additional Police of the strength and cost herein below set forth for a period up to the 31st May 1923 with effect from 1st July 1921, and (2) to direct the cost of such additional Police as here-in-below set forth shall be defrayed wholly by a tax imposed on the Muhammadan income-tax payers who are inhabitants of the said town and by a rate assessed on the property of such other inhabitants of the said town as are here-in-below notified in the manner here-in-below set forth":—

* * * *

[The annual charges for the additional Police are estimated at Rs. 46,437].

"The Governor in Council is pleased further to direct that the cost of the additional Police as above set forth and the total amount of compensation of Rs. 5,04,546 awarded by the District Magistrate, Nasik, to claimants who suffered damages in the riots of 25th and 26th April 1921, under s. 25 A of the said Act, shall be assessed and recovered as here-in-below set forth:—

Class I—Payers of Income-tax—Each person to pay nine times the amount of the income-tax payable by him in 1920-21, to be recovered in three equal instalments.

payable on the 1st August 1921, 1922 and 1923.

Class II—The balance of the combined charges, after the amount recoverable from persons of class I has been deducted, shall be recovered on behalf of the Momin adult weavers of Malegaon, from both Muhammadans and Hindu shop-keepers of Malegaon dealing in *saris* and yarn, who shall pay every year upto 31st May 1923 beginning from 1st July 1921 a rate calculated by the District Magistrate, Nasik, at a sum not exceeding 6 annas multiplied by the average number of *saris* hitherto purchased by them from Momin weavers of Malegaon annually or a sum not exceeding Rs. 5 multiplied by the number of bales of yarn hitherto sold by them to Momin weavers of Malegaon annually, as the case may be.

And whereas the Municipality of Malegaon has made a default in the recovery of charges on account of the said additional Police, the Governor in Council is pleased to direct, under the proviso to s. 26 (1) of the said Act, that the recovery of the said charges shall be made by the Collector of the District, along with the compensation money as an arrear of land revenue due by the persons as described in classes I and II". (Ex. 99).

After the notification was published the District Magistrate wrote to the Collector (Ex. 110) asking him to make both the recoveries. The direction as to Police charges is given under s. 26 and that is really the direction of the Government communicated to the Collector. As regards the compensation it is mentioned in para. 3 of the letter that the Municipality is unable to recover the said amount. But it may be remembered that as regards the compensation from the beginning it was decided by the Commissioner that the amount should be recovered by the Collector (see Ex. 101).

On the same day several merchants of Malegaon presented a petition to the Collector (Ex. 111) in which they complained of the illegality and injustice of the Government notification of the 6th June, but they were informed orally by the Collector that the orders would not be changed. Notices were served on the same day upon the merchants to pay the respective amounts. Exhibit 94 is a sample of these notices. After referring to the Government notification each merchant was in-

formed as to what was payable by him for the year ending 30th June 1922, and that it was payable in three instalments falling due on 1st July 1922, 1st October 1922 and 1st January 1923. The merchants were further informed that in case of default in the payment of any of the instalments the whole amount for the three years will be liable to be recovered at once as an arrear of land revenue. On the 24th June 1922, some of the shop-keepers sent a memorial to the Government through the Collector (Ex. 120).

On the 26th June the notice of this action required by s. 80 of the C. P. C., was given. It was received by the Collector on the 27th. The present suit was filed on the 27th June and an application for temporary injunction was made on the same day. On 30th June the application was rejected by the District Court. The plaintiffs appealed to the Court from the order of the 30th June. On 22nd September 1922 this Court granted a temporary injunction on the plaintiffs giving security on the grounds indicated in the judgment (Ex. 25). There were two other similar suits (Nos. 4 and 5 of 1922) in that Court but there are no appeals in those suits: and we are no longer concerned therewith. The written statement need not be detailed as the defences are indicated by the orders. I may, however, quote para. 6 of the statement in which the defence as to the nature of the new tax or rate has been stated in these terms:—With further reference to para. 7 and with reference to paras. 8 and 9 of the plaint, defendants submit that the words "on behalf of the Momin adult weavers of Malegaon" occurring in the said Government Notification No. 152 dated the 6th June 1922 and certain words to the same effect occurring in a notice issued by the Sub-Divisional Magistrate on 21st April 1922 have been wrongly construed by the plaintiffs. The true intention of the order as finally passed by Government under s. 25 and those passed by the District Magistrate and the Commissioner under s. 25-A was that payments should be made by both the Hindu and Muhammadan shop-keepers and merchants dealing in *saris* and yarn in their own individual capacity as being primarily responsible therefor and not as agents for the weavers. It was, however, intended that the said shop-keepers and merchants should be at liberty to recover the payments made by them from the weavers by charging them more for the *saris* they purchased

from them and the yarn sold to them. It is not correct to say that the Hindu and Muhammadan shop-keepers as a class were held not to be responsible for the riot, directly or indirectly. It is also not correct to say that the notification was made to operate retrospectively. The additional Police was entertained from 1st July 1921. The cost thereof was accordingly payable on and from that date".

The defences are sufficiently indicated by the following issues raised in the lower Court:—

"1. Whether the suit is bad for want of due notice as required by s. 80 of the C. P. C.?

2. Whether the suit is liable to be dismissed for failure to give a notice as required by s. 80, cl. 4 of the Bombay District Police Act, 1890?

Note:—Mr. Akut states that this issue can affect defendant No. 2 only.

2-A. Whether the suit is liable to be dismissed under s. 81 of the Bombay District Police Act, 1890?

3. Whether the suit is barred under s. 4 cl. (f) para. 3 of the Bombay Revenue Jurisdiction Act of 1876?

4. Whether this Court has jurisdiction to decide legality or otherwise of the Notification No. 152 of the Home Department dated the 6th June 1922 and other orders passed under the Bombay District Police Act, 1890?

Note:—This issue has reference to s. 79 of the Bombay District Police Act of 1890.

5. Whether the Government Notification No. 152 of the Home Department dated the 6th June 1922 is *ultra vires*?

6. Whether the said Notification contemplates retrospective effect? If so, whether this portion of it is legal?

Note:—Mr. Akut objects to the form of this issue.

7. Whether the amounts have been arbitrarily and illegally fixed behind the back of the plaintiff?

8. Whether a permanent injunction as prayed for should be granted?

9. What order should be made as to costs?

10. What should be the valuation for Pleaders' fees?

11. What should the decree be?"

I have already referred to the findings and the result of the suit.

I shall first deal with the preliminary points raised in the arguments before us in

appeal. The most important among them is the point as to notice under s. 80 of the C. P. C. The section provides as follows:—

"No suit shall be instituted against the Secretary of State for India in Council, or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been, in the case of the Secretary of State in Council, delivered to or left at the office of, a Secretary to the Local Government or the Collector of the district, and, in the case of a Public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims..."

There is no objection to the form of the notice given in this case: but it is urged that as the suit was instituted before the expiration of two months next after the notice, it should be dismissed. On the one hand it is urged that it makes no difference whether the suit be against the Secretary of State for India in Council or against a Public Officer and that whatever the nature of the suit, it cannot be instituted before the expiration of two months. On the other hand it is urged that the principle of not requiring the aggrieved party to wait for two months when the circumstances require that the proposed act should be immediately prevented with a view to stop an irremediable loss to the party the Courts have entertained suits in spite of the peremptory provisions as to notice in the interests of justice and various decisions have been referred to in support of that view. It is urged that the provision is a rule of procedure and does not affect the right; and where the right requires an immediate remedy the Courts have entertained the suits, where they have been satisfied as to the need of an immediate remedy by way of prevention of the wrong complained of.

After considering the arguments on both sides, I am content to accept the view taken by this Court in *Secretary of State for India v. Gajanan Krishna* (1) and *Secretary of State for India v. Gulam Rusul* (2) as to the powers of the Court to entertain suits for injunction against the Secretary of State for India before the expiration of two months from the service of

(1) 10 Ind. Cas. 637; 35 B. 362; 13 Bom. L. R. 273.

(2) 31 Ind. Cas. 535; 40 B. 392; 18 Bom. L. R. 213.

notice. As I understand the observations in *Dagal Khushal v. Secretary of State for India* (3) they do not in any way conflict with or modify the view taken in the two cases just referred to. As regards a similar suit against a public officer in respect of any act purporting to be done by such public officer, I accept the view taken by this Court in *Naginlal Chunilal v. Official Assignee* (4). The question whether a suit for injunction could be filed against the Secretary of State for India in spite of the provisions of s. 80 of the Code before the expiration of two months from the date of the notice was not decided in *Agar Hari v. Secretary of State for India* (5), but the case was decided on the ground that in that suit and under the circumstances of that case no injunction could be claimed against the Secretary of State. The observations in that case at page 451* that the Court should, if possible, always require notice, however short, to be given related to an *ex parte* injunction during the pendency of the proceedings and has nothing to do with the point we have to consider.

I am aware of the weight due to the contrary view taken in *Secretary of State for India v. Kalekhan* (6) and in *Muradally Shamji v. Long* (7). I have carefully considered these decisions, and the wording of s. 80 in the light of the arguments urged at the Bar; but I still think that the view taken in the Bombay decisions, which I have above referred to is the right view. I agree that the words, "in respect of any act purporting to be done" apply to the "public officer" only and not to the Secretary of State for India in Council. But as I understand the principle underlying the decisions, which I am prepared to follow, it is independent of these words and in my opinion, applicable to suits against the Secretary of State for India as well as to suits against public officers. The really difficult question is whether the imperative provisions of the section do not exclude the application of the principle based upon such considerations as may arise in suits for injunction where the necessity for the remedy by way of an injunction is made out. In applying this principle, this Court has

(3) 59 Ind. Cas. 122; 22 Bom. L. R. 1089.

(4) 17 Ind. Cas. 876; 37 B. 243; 14 Bom. L. R. 1148,

(5) 27 B. 424; 5 Bom. L. R. 431.

(6) 16 Ind. Cas. 947; 37 M. 113; 23 M. L. J. 181; (1912) M. W. N. 786; 12 M. L. T. 224.

(7) 53 Ind. Cas. 627; 44 B. 555; 21 Bom. L. R. 980.

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followed the *ratio decidendi* of the English decisions in *Attorney-General v. Hackney Local Board* (8) and *Flower v. Local Board of Low Leyton* (9). In the sections which were under consideration in these two cases, the provisions as to notice were not less imperative than the words of s. 80 of the Code; and the decisions were not in any sense dependent upon the view whether the expression was "act purporting to have been done" or "purporting to be done". They are based on the broad consideration of the object of the notice and of the necessity for a speedy remedy according to the nature of the wrong complained of. It is true that in virtue of the provisions of the Public Authorities Protection Act, 1893 (56 and 57 Vict. c. 61) these English decisions have not the same value now as they had before the Act was passed so far as their actual application is concerned. When this Court adopted that view in dealing with the point as to notice under the old District Municipal Acts of 1873 and 1884 it was based upon this broad consideration though partly it was based upon the effect of the words "anything done or purporting to have been done" used in s. 48 of Bombay Act II of 1884. [See *Shidmallappa Nurandappa v. Gokak Municipality* (10) and *Harilal Ramchandlal v. Himat Manekchand* (11)]. The rule contained in s. 80 is a rule of procedure and does not affect in any way the cause of action or the rights of the parties. If the cause of action requires an immediate remedy by way of injunction, and if s. 80 is literally applied, the party aggrieved would have no remedy. It seems to me that this Court has accepted a view which is in consonance with justice, equity and good conscience, which is not in any sense based upon any technical rule of English Law, and which is in accordance with the rule that has been followed in England in cases where the provisions as to notice were no less stringent than we have here.

It is desirable that this question should be decided one way or the other in a manner which would be practically final and leave no scope for such elaborate argument as is unavoidable under the present state of the decisions. I have not overlooked the desirability of having this question considered

(8) (1875) 20 Eq. 626; 44 L. J. Ch. 545; 33 L. T. 244.

(9) (1877) 5 Ch. D. 347; 46 L. J. Ch. 621; 36 L. T. 760; 25 W. R. 545.

(10) 22 B. 605; 11 Ind. Dec. (N. S.) 985.

(11) 22 B. 636; 11 Ind. Dec. (N. S.) 1006.

[90 L. O. 1925]

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by a Full Bench of this Court, but under the circumstances of this case, we both agree, it is not necessary to do so.

It remains to consider whether this is a case, in which the relief by way of injunction was essential to meet the requirements of the case. On a consideration of the admitted facts it seems to me that it was. It appears that the shop-keepers as a class were not taxed in 1921 either as to the additional Police or compensation charges. In April and May 1922 the Sub-Divisional Magistrate made enquiry as to the extent of their business in *saris* in the next preceding year; and in the result in June 1922 the shop-keepers were required to pay Rs. 92,874 for Police charges and Rs. 5,04,546 during three years ending with June 1924. The amount payable for the first year was one-third of the total amount and it was payable in three instalments. In default of payment of any one instalment, the whole amount for all the three years was to become payable. It appears that the plaintiffs, (exclusive of the plaintiffs who have withdrawn from the suit) had to pay on the 1st July 1922 a substantial sum; and in default of payment they were liable to pay the whole amount for all the three years (see notice Ex. 94). We also know that on the 12th June the Collector had told them that the orders were not likely to be modified. We also know that when the temporary injunction was refused on the 30th June, the Collector immediately proceeded to enforce the notices, with the result that the shop-keepers had either to pay the 1st instalment or to incur the risk of the liability to pay the whole amount at once. It is urged that after all it was a case of money payment, and plaintiffs could have waited for two months. It appears, however, that the waiting would have been more or less formal so far as the defendants were concerned, as it is clear from the conduct of the Revenue Authorities immediately after the temporary injunction was refused by the Trial Court that they were not going to reconsider the question. In a case of this kind where a class of persons is taxed heavily, as in this case, it would not be fair to treat the position as one of ordinary pecuniary liability of an individual only. I am satisfied that this is a case in which at the date of the suit a situation had arisen which was calculated to cause serious apprehension in the minds of the plaintiffs that irremediable damage might be caused

to their business as dealers in *saris*, unless the enforcement of the orders were stopped at once. The remedy sought by way of injunction was appropriate and necessary to safeguard their interests under the circumstances. I think, that the suit is not open to the objection based on s. 80 of the O. P. C.

The other preliminary objections raised on behalf of the defendants may be briefly dealt with. It is urged that ss. 80 and 81 of the District Police Act are a bar to this suit. I do not think that this argument is sound. Section 80 is no application as this is not a suit of that character contemplated by s. 80 sub-s. (4). As regards s. 81 also it seems to me that it creates no bar to the present suit. The orders published by the Government do not require a particular class of persons to perform some duty or act or to conduct or order themselves in a particular manner. It is an order practically directing the Collector to recover the particular amounts from a class of persons. That does not appear to me to be an order to any particular class of persons (*i. e.*, in this case the shop-keepers) to perform any duty or act or to conduct or order themselves in a particular manner. Besides it seems to me that s. 81 provides an additional remedy which the party concerned may follow but it does not bar a suit, which it may be otherwise open to the party to file.

It is further urged that the suit is barred by s. 4 cl. (f) of the Bombay Revenue Jurisdiction Act, as it is in effect a suit to set aside a cess or rate authorised by Government, under the provisions of the Bombay District Police Act. This clause cannot apply in terms to the order as to compensation amount as the Government is not empowered by s. 25 A of the Bombay District Police Act to levy any cess or rate and the section refers to cess or rate authorised by Government and not to cess or rate authorised by the District Magistrate with the previous sanction of the Commissioner. Apart from this ground it is clear that the provision cannot apply where the legality of the order of the Government is questioned. It would apply to a cess or rate which is authorised, that is, legally authorised by the Government. In the present case the legal basis for the action of Government is questioned, and I think that the suit is not barred by this clause even as regards the tax relating to the additional Police charges, provided it

is established that the rate is not legal. Thus the objection would apply to the Police charges, if it be proved that the rate is legally authorised. It is necessary, therefore, to determine the merits of the objections as to the legality of the rate or tax.

As regards the merits it will be convenient to deal with the questions as to the additional Police, and the compensation money quite separately. The provisions of ss. 25 and 25-A, though similar in certain respects, are different in material particulars and in order to avoid confusion I shall deal with the two matters quite independently of each other.

As regards the additional Police, the authority of the Government is derived from ss. 25 and 26.

* * * *

The objections taken to the legality of the Government Notification of the 6th June, 1922 so far as it relates to the Police charge are these :—

(a) First that the Government having once decided to levy the Police charges from the male adult Momins of Malegaon, they could not alter the order and direct the whole of it to be levied from the shop-keepers.

(b) That the Government have no power under the section to make A pay for B, and that the order requiring the shop-keepers to pay on behalf of the Momins is illegal.

(c) That after the Municipality made a default in payment of the rate levied in the first instance the Government could direct the Collector to recover such rate or tax but the Government could not impose a new tax or a rate instead of the first rate or tax and ask the Collector to recover it directly without first calling upon the Municipality to pay the amount or assess the rate under sub s. (4) of s. 25.

(d) That the rate in question is not a rate on property ;

(e) That the powers are not exercised by the Government fairly but wantonly, arbitrarily and oppressively :

(f) And lastly that no retrospective operation could be given to the notification.

As regards the first objection it is true that the Government first ordered the additional Police for one year and ordered the charges to be levied by a tax imposed upon the male adult Momins of Malegaon. The Momins are weavers and form nearly three-fourths of the population of that town.

The second notification directed employment of the Police in effect for two years. As regards the second year's charges the objection would not apply. But that is not a sufficient answer to the objection. Under the section the Government have the power to give directions as to how the charges shall be recovered: and s. 21 of the General Clauses Act (Bombay Act I of 1904) provides that "Where by any Bombay Act, a power to issue notifications, orders..... is conferred, then that power includes a power, exerciseable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any notifications, orders..... so issued". If this section applies it affords a complete answer to the objection raised on behalf of the plaintiffs. The Act was passed long after the Bombay District Police Act of 1890, and unless it were clear that this provision applies to Acts already passed it would not help the defendants. The scheme of the Act is to distinguish between the provisions which are intended to apply to all Bombay Acts and those which are intended to apply to Bombay Acts made after the commencement of the Act. The use of the words "any Bombay Act" in s. 21 indicates that the section was intended to be of general application. Therefore, it was perfectly open to the Government to alter the first Notification if minded to do so.

The second objection is more difficult. It is clear that the Government have no power under the section to call upon A to pay for B as an agent of B. It is open to the Government under sub-s. (2) cl. (b) to charge any section or sections or class or classes of persons, and under the powers mentioned in s. 21 of the General Clauses Act it is open to them, to add, to amend or vary the first order on this point. But under the section the Government cannot call upon A to pay on behalf of B. The proposition as thus stated is not seriously contested by the learned Advocate-General. The plaintiffs' case rests upon the use of the words "on behalf of the Momins" in the notification and the facts disclosed in the correspondence commencing with 7th December, 1921 and ending with the notification of the 6th June, 1922, between the District Magistrate, the Commissioner and the Government. The notice issued by the Sub Divisional Magistrate refers to the new class of persons as agents of the

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Momins, and the evidence of the District Magistrate (Ex. 131) shows that the plaintiffs were regarded as the agents of the Momins. The use of expression "on behalf of the Momins" in the Government notification is consistent only with that view. If the matter rested there I think the objection would be good, as the plaintiffs or the shop keepers of Malegaon are in no sense the agents of Momins.

But the effect of the notification in law is clearly to impose a new tax on the shopkeepers. In the written statement this is made clear. I have already quoted that passage from the written statement and in my opinion, this paragraph has been justly criticised by the learned Counsel for the plaintiffs as involving a change of front on the part of the defendants. That, however, does not enable him to get over the difficulty of the notification. We have to consider the true legal effect of the notification; and taking its effect to be that a new tax or rate is imposed upon shopkeepers of Malegaon, it is within the powers of the Government, under the section. It is hardly reasonable to declare it to be illegal, when on that footing it is within the powers of the Government to impose the tax or rate which has been imposed. I am, therefore, unable to allow this objection as the effect of the notification is within the scope of the authority of the Government. It may be said that this view is subject to the criticism that it is practically allowing the Government to substitute a new notification for one which cannot be justified in its entirety. But so long as in substance it is a tax or rate on another class of persons living within the area concerned, it is within the legal authority of the Government and as the Government have sought to support it on that footing, I do not see how it can be declared to be illegal. I need hardly observe that the Court is not concerned with the propriety of the new tax or rate. We are concerned with its legality and that is the only point with which I am dealing. It is for the Government to consider its propriety as the Legislature has laid the obligation of determining the questions mentioned in that section upon that authority.

As regards the objection (c) it is clear that under sub-s. (4) the Government have to ask the Municipality of Malegaon to pay the amount and assess the tax or rate conformably to their orders. In the present

case the Government asked the Municipality to recover the tax or rate levied in the first instance (Ex. 96). The Municipality was unable to recover it from the Momins and made a default in payment. The Government then reconsidered the position and imposed a tax or rate which was a new tax on a different section or class of inhabitants. If the Government were re-imposing the old tax or rate they would be justified in acting upon the default of the Municipality which had undoubtedly taken place. But if the tax is to be levied as a different tax or rate and not the old rate on the Momins the legality of the course adopted by the Government must be considered on that footing. It is clear under the proviso to s. 26, sub-s. (2), that the Government can ask the Collector to recover the tax or rate in respect of which the Municipality has made a default. And I think it was obligatory upon the Government to ask the Municipality under sub-s. (4) of s. 25 to recover this amount; but in the notification they acted upon the default already made by the Municipality. As a practical proposition it may be a correct view to take; and even legally it would be correct if the same tax or rate were to be levied. But in the present case the legality of the tax or rate can be established only on the footing of its being a different tax or rate on another section or class of the public of Malegaon; and the Municipality was not called upon to pay or to recover that tax. We have to consider the effect of this omission. I think that an obligatory provision in the Statute cannot be allowed to be ignored without adequate grounds. The effect of this omission on the legality of the levy by the Collector is a question of some difficulty. In the present case, it is clear, that the Municipality had been unable to do anything in the first instance; and the Municipality had in effect said so. I am not prepared to hold that though the tax or rate may be legal its recovery by the Collector is illegal under the circumstances. At least as regards the class of income-tax payers undoubtedly there was a default by the Municipality and to that extent the direction to the Collector is quite regular. And when it is partially legal, for the rest the direct reference to the Collector is in the nature of an irregularity, which cannot affect the legality of the tax.

The objection that it is not a rate on

property as described by the Government in the notification has no substance in it. It does not matter to my mind whether it is a tax or rate on property. It is a tax determined on the footing of the extent of the business done during the previous years by the shop-keepers. It is in no way dependent upon their continuing the business during the period of the recovery of the rate: nor does it depend upon the extent of the business actively done during the period. Therefore, it is preferably a tax on the shop-keepers as a class of persons living in the Malegaon; but it is undoubtedly one of the other and the objection appears to be to be profitless.

The next objection is that this tax or rate on the shop-keepers is wanton, arbitrary, and oppressive. This objection can be more appropriately dealt with along with the similar objection as to compensation charges.

As to the last objection about the retrospective operation of the notification I doubt whether it is really retrospective for it is an order to recover during the period after the notification certain charges incurred and to be incurred. But whether retrospective or not in its operation it is clear that it is within the powers of the Government under s. 25 read with s. 21 of the General Clauses Act. I hold, therefore, that the notification so far as it relates to the Police charges is not illegal or *ultra vires*.

As regards the compensation charges the powers of the authorities are defined by s. 25-A which is as follows:—

* * * * *

The facts about the compensation money have been already stated. It is relevant to note that after the Commissioner passed his orders on the 16th and 17th August (Exs. 134 and 104), there is nothing to show that under s. 25-A, sub-s. (1), cl. (b), the District Magistrate asked the Collector to realise the amount as had been directed by the Commissioner. The District Magistrate does not appear to have been satisfied with the Commissioner's orders as to the method of realisation; and whether on that account or for any other reason he refrained from taking the step required by sub-s. (1), cl. (b). Then in December the District Magistrate started the correspondence again. Ultimately in March 1922 the District Magistrate re-opened the subject with the result that the Government issued

the notification in question and then the Commissioner and the District Magistrate were all agreed as to how the amount was to be recovered. Then on the 12th June the District Magistrate took for the first time the step contemplated by sub-s. (1), cl. (b) and he wrote to the Collector to recover the amount in the manner indicated in his letter of the 12th June (Ex. 110). It is not obligatory to ask the Municipality to recover the amount under this section. It may also be observed that the authorities mentioned in the section are the District Magistrate and the Commissioner and not the Government.

The objections urged against the notification so far as it relates to this amount are these:—

(a) The District Magistrate having once decided the question and the Commissioner having passed his orders on revision the question as to who were liable to pay was finally settled and could not be re-opened.

(b) The Government have no power to interfere in this matter under s. 25-A.

(c) The direction that the money should be recovered from the "shop-keepers" on behalf of the Momins is illegal.

(d) That the powers are arbitrarily, wantonly and oppressively exercised by the District Magistrate and the Commissioner in so far as they make shop-keepers pay the whole amount, which is justly payable by the Momins.

(e) That no further inquiry was made as is contemplated by s. 25-A or as was suggested by the District Magistrate in his letter of 7th March 1922 before the plaintiffs were taxed.

As regards the first objection the Advocate-General has relied upon s. 21 of the Bombay General Clauses Act; but there is a difficulty in holding that s. 21 applies to orders made by the District Magistrate under s. 25-A, sub-s. (1). Sub-section (4) provides that every declaration, assessment, direction and order made by the District Magistrate under sub-s. (1) shall be subject to revision by the Commissioner but save as aforesaid shall be final. The express provision as to finality would apparently exclude the application of s. 21 of the Bombay General Clauses Act. It is difficult to reconcile this provision as to finality with the idea of his being able to vary it from time to time. The question whether the Commissioner can revise it from time to time is more difficult. Having regard

to the nature of the powers conferred by the section, it has been argued that with the reference to the orders and the directions made under sub-s. (1) the Legislature intended finality and that the idea of revising the same from time to time is repugnant to the scheme and purpose of the section. I do not desire to decide this point, as in the view I take of the facts of the case on this point, it is not necessary to do so. Assuming, without deciding, that the declarations, orders, etc., made under sub-s. (1) with the previous sanction of the Commissioner would be final, and that the Commissioner could not revise the same from time to time thereafter, in the present case it is not shown that the District Magistrate passed any orders under sub-s. (1) cl. (b) requiring the Collector to recover the amount in any particular proportions from the inhabitants of the local area or from any defined class before he wrote the letter of the 12th June 1922 (Ex. 110). It is true that the Commissioner passed his orders on or before the 17th August 1921: but as apparently there was a difference between the District Magistrate and the Commissioner as to the class of persons from whom and the proportion in which the compensation money was to be recovered, the District Magistrate appears to have waited until he got an opportunity to re-open the matter on the 7th December. But finally the matter was taken up by his successor in March 1922, and as a result the Government and the Commissioner accepted the District Magistrate's proposals. Then with the sanction of the Commissioner for the first time the District Magistrate required the Collector to recover the amount on the new basis. Whether the District Magistrate was thus justified in waiting from August 1921 to June 1922 in taking action under cl. (b) is quite a different matter. In determining the legality of the present orders I am not concerned with the propriety of that attitude on the part of the District Magistrate. But the order of 12th June 1922 made with the sanction of the Commissioner and communicated to the Collector is the first order of its kind on the record. I may here refer to Ex. 150 which is a memo signed by the District Magistrate and Collector and addressed to the *Mamlatdar* asking him to realise the amounts to be recovered from the class of income-tax payers who were Momins.

It is to be remembered that the Commissioner had specified two classes of the Momins adults of Malegaon. As regards class I, there was no difference between the District Magistrate and the Commissioner. Though there is no letter by the District Magistrate asking the Collector to recover the amount payable by the income-tax payers under class I, this memo would indicate that without any formal compliance with the requirements of s. 25-A. (1) (b), the District Magistrate and Collector ordered the *Mamlatdar* to realise the amount or that this letter itself was a formal requisition in respect of this class of persons. At any rate the fact remains that as regards class II there was no letter from the District Magistrate to the Collector before 12th June 1922. As regards the class of income-tax payers the letter (Ex. 150) was the first intimation to the local officer at Malegaon to recover the amount payable by that class under the Commissioner's order dated 16th August 1921 (Ex. 134). There is no such intimation in the case of class II, as to which the correspondence had been started again by the District Magistrate by his letter of the 7th March 1922. As against this it may be urged that the letter of the 30th December 1921 addressed by the Commissioner to the Collector would not be appropriate unless the District Magistrate had already written to the Collector to recover the compensation. I do not think that such an inference can arise, as the letter relates to the Police charges also, with respect to which it is clear that no intimation could have been given to the Collector to realise the charges. It is true that s. 25-A makes a clear distinction between the District Magistrate and the Collector. In fact the same officer occupies two capacities. This circumstance at times tends to obscure the essential legal distinction in official correspondence. But on the present record it is a fair inference that until the 8th March 1922 no attempt whatever was made to recover the amount and that until 12th June the District Magistrate did not require the Collector to recover the amount as provided in s. 25-A (1) (b). This inference is consistent with and derives support from the wording of para. (4) of the memorandum of the District Magistrate (Ex. 108), in which he refers to the orders to be issued to the Collector for the recovery of the sums due.

Therefore, the final direction under sub-s. (1) (b) revised by the Commissioner as contemplated by sub-s. (4) is that given by Ex. 110 at least as regards class II of shop-keepers.

Apart from this consideration it is clear that when the Commissioner made his order of the 16th August, 1921, a reservation was made as to "such other inhabitants of the said town as may be hereafter notified". But as the new class of shop-keepers now notified is not in addition to the class of Momins but in the place of the law in substitution of class II of the adult male Muhammadan inhabitants other than income-tax payers as previously notified, it involves a substantial change: and its validity must depend upon the Commissioner's power to alter it. As the stage of finality contemplated by the provisions of sub-s. (4) was not reached, and as the subject was still open to the District Magistrate in consequence of his having made no requisition on the Collector under sub-s. (1) (b), it does not matter to my mind whether there was any such reservation in the Commissioner's order of the 16th August. This objection, therefore, fails.

As regards the second objection the section does not refer to the Government at all. The Commissioner was substituted for the Government in the section by Bombay Act III of 1915: and while the position that the District Magistrate and the Commissioner may consult the Government is intelligible, the Government has no authority under the section in the purely legal aspect of the question. The District Magistrate and the Commissioner are the authorities we are concerned with under s 25-A, and the legality of their action as such is to be considered.

As regards the third objection I would not repeat what I have said with reference to the same objection as to Police charges. The really effective document in this matter is not the Government notification, but the order that was communicated by the District Magistrate on the 12th June 1922 with the sanction of the Commissioner as disclosed in the correspondence. As I have already pointed out the order to make A pay for B would not be legal: but the simple order to make A pay would be legal. That is the effect of the order: and I take the same view, as in the case of Police charges, on this point. It does not matter whether A is able to recover it in

any indirect form from B or not; nor does it matter whether ultimately A is able to recoup himself in trade by taxing the article in his dealings with any other persons. So far as the legality of the tax is concerned, in my opinion, it does not matter whether the intended economic adjustment takes place as between the persons taxed and those who deal with them in saris and yarn at all and if so, to what extent.

This brings me to the next objection that this tax or rate is wanton, arbitrary and oppressive and as such not legally recoverable. Sir Chimanlal Setalwad has relied upon the observations of West, J., in *Nagar Valab Narasi v. Municipality of Dhandhuka* (12) and generally upon the summary given in Maxwell on Interpretation of Statutes under the heading "Construction to prevent abuse of powers" in Ch. IV, s. II (pages 226-34, 6th Edition.). It is necessary to bear in mind the basic principle of interference by Civil Courts in matters which are assigned primarily to the discretion of public authorities by the Legislature. Different Judges have expressed in different language what appears to me to be the same principle, the language being adapted to the requirements of the particular case. I shall quote a few passages as containing an enunciation of the principle which underlies the particular objection:

In *Duke of Bedford v. Dawson* (13) Sir George Jessel, M. R. (page 358*) observes:—"This means that when the words 'for the purpose', are used, that does not imply what the plaintiff or some body else may think the purpose, or what the Court may think is for the purpose, but it means what the public body entrusted with the power by the Legislature may in their honest and reasonable exercise of judgment think necessary for the purpose. They are to be the Judges, subject to this, that if they are manifestly abusing their powers, and purporting to use the land for a purpose for which manifestly it is not intended, the Court will say it is not a fair and honest judgment, and will not allow it. But subject to that limit they are the persons to decide." It may be stated in the words of Lord Esher, M. R. in *R. v. Vestry*

(12) 12 B. 490; 6 Ind. Dec. (N. S.) 810.

(13) (1875) 20 Eq. 353; 41 L. J. Ch. 549; 33 L. T. 156.

*Page of (1875) 20 Eq.—[Ed.]

of *St. Pancras* (14) (page 375*) "If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion." In *Sharp v. Wakefield* (15), Lord Halsbury, L. C. observes as follows (page 179†):—"An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and 'discretion' means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: *Rooke's case* (16), according to law and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself." I have selected these passages as indicating the range of the Court's powers to interfere with matters confided by the Legislature to public authorities.

In dealing with this point we have to bear in mind the special purpose of s. 25-A, the extent of the powers given to the District Magistrate and the Commissioner for determining the amount and fixing the proportion in which it may be recovered from different classes and the manner of recovering it, and the wide discretion given to them to meet the exigencies in a disturbed area. This is equally true of the powers conferred upon the Government under s. 25 also. On the other hand we have the fact that a large sum of nearly 5,00,000 (in round figures) on account of compensation, and if we include about Rs. 93,000 for the Police charges for two years nearly six lacs were to be recovered. It was the view of the public authorities at least of the Commissioner and the Government in 1921, that the inhabitants of this area responsible for the amount were the Momins and they were proposed to be taxed then in two ways: income-tax payers to pay on certain scale and the adult male Momins to pay equally, provided

(14) (1390) 24 Q. B. D. 371; 51 L. J. Q. B. 211; 62 L. T. 440; 38 W. R. 311; 54 J. P. 339.

(15) (1891) A. C. 173; 60 L. J. M. O. 73; 61 L. T. 180; 30 W. R. 551; 55 J. P. 197.

(16) 5b Co. Rep. 93 at p. 103a; 773 R. 203.

*Page of (1811) 24 Q. B. D.—[Ed.]

†Page of (1801) A. C.—[Ed.]

that a Momin having more looms than one was to count as an extra unit for each loom in excess of one. Apparently there was difficulty felt by the Municipality in realising even the amount of about Rs. 50,000 (fifty thousand), which was then the only charge under s. 25, and apparently no effort was made to recover the bigger sum of compensation, under s. 25-A. When this difficulty was realised the authorities on a re-consideration taxed the inhabitants in a different way within the limits prescribed by law as now found. The class of income-tax payers kept exactly the same: but for class of adult male Momins a comparatively small class of shop-keepers was substituted and they were required to make up the whole of the balance of both the charges in three years. This class consisted of Momins and non-Momins. In effect about a hundred shop-keepers were called upon to pay nearly six lacs of rupees in three years: and if we exclude Rs. 38,000 the total amount payable by the class of income-tax payers according to the figures supplied by the learned Advocate General, the balance payable by the shop-keepers would be, nearly, 5,60,000.

Out of 102 shop-keepers 48 are Hindu shop-keepers and their total liability compared to the total liability of the Muhammadan shop-keepers would be roughly in the ratio of 17 to 7 that is the Hindu shop-keepers would have to pay nearly 3,96,000 and the Muhammadan shop-keepers would have to pay about 1,64,000. I have taken this ratio from the figures given by the Advocate-General, according to which out of a total of Rs. 2,37,000 and odd the Hindu shop-keepers (48 in number) would have to pay Rs. 1,68,000 and odd and the Muhammadan shop-keepers would have to pay Rs. 68,000 and odd which works out roughly the ratio of 17 to 7. Both the ratio and the figures are rough and intended only to indicate broadly the effect of the orders passed in June 1922. In a population of about twenty-five thousand persons only about 100 people are selected to pay up such a heavy amount. The Momins generally, who according to the authorities even now are responsible but from whom it is either inconvenient or impossible to recover the amount, are to be left practically exempt so far as the direct taxation is concerned. They will have to pay indirectly to some un-

certain extent if they are effectively taxed through the medium of the *saris*. It is also pointed out that this class of shop-keepers is determined without any special inquiry with the result that the list includes according to the appellants three or four persons and according to both sides one person in whose (favour) an order for compensation has been in fact made. This has been stated on a comparison of the lists Exts. 164 and 166. In view of these facts it is urged for the appellants that the tax is *wanton*, arbitrary and oppressive. On the other hand we have the fact that the amounts are to be levied from the inhabitants of Malegaon. An attempt to recover it from the adult male Momins had failed in the case of Police charges and for the compensation money such an attempt was not or could not be made. The levy was of an emergent nature and for nearly one year nothing could be done. The Government and the authorities had to decide upon the best method of recovering it under difficult and somewhat baffling circumstances. They acted upon a basis which is intelligible. I have referred to these facts as representing the other side of the question. But we have to consider only whether there is any sufficient ground to hold that their judgment is so unreasonable under the circumstances as to make it practically not a valid decision under the sections, or, in the words used in *Duke of Bedford v. Dawson* (13) whether it amounts to a manifest abuse of the powers conferred upon the authorities. I am of opinion that no manifest abuse of power by the authorities is made out; nor can I say that they have taken into consideration any matter which it was not legally proper for them to consider. To adopt the words of the argument urged on behalf of the appellants I am unable to hold this tax to be *wanton* or arbitrary. There is a method in the taxation which is intelligible and according to the opinions of the authorities, the adult male Momins will be taxed indirectly. As regards its being oppressive it must be remembered that there is a certain degree of hardship in such punitive taxation in a disturbed area, which may be treated almost as a normal incident of it. We need not take that into account. There is no doubt a certain degree of extra hardship, and in my opinion a real hardship, in such taxa-

tion when only a small group is selected to make up such a large amount. But what we have to consider is whether its operation is calculated to be oppressive so as to render it liable to be set aside. On the materials on this record I am unable to hold that it could be justly described as oppressive in that sense. In my opinion the evidence led on behalf of the plaintiffs to prove that this has dislocated the business of some shop-keepers is not satisfactory and I hold that the allegation is not proved. But the nature of the tax still has to be considered with references to its probable effect upon those who are taxed. It is clear that the nature of the tax is certain in its operation as regards the shop-keepers and very uncertain in its operation as regards its ultimate adjustment among the dealers with the shop-keepers. After all it is a point in favour of the appellants that the class of shop-keepers is taxed more because the amount cannot be recovered from the adult male Momins than because the shop-keepers are themselves primarily liable. It is clear, however, that the orders represent an honest effort on the part of the authorities to arrive at the best working method of recovering the amounts leviable under the two sections, and they have proceeded with calculation and consideration in dealing with a difficult situation. I am, therefore, unable to accept the contention that these orders of the authorities are illegal on the ground of their being *wanton*, arbitrary and oppressive. I must say that I have found this point more difficult than the other questions of law in the case. It is difficult to draw the line beyond which Civil Courts cannot examine this question. We have not to consider whether this is a proper and just mode of taxing the inhabitants or any class of inhabitants within the area. It is for the District Magistrate with the previous sanction of the Commissioner to require the Collector under s. 25-A (1) (b) to recover the amount so determined in such proportions as he may, with the like sanction, draw from all inhabitants of the area declared under sub-s. (1) cl. (a) (ii) or from any section or sections or class or classes of such persons and it is for the Government to determine the same questions under s. 25 as to Police charges. A Civil Court can interfere only when the discretion is exercised in such a manner as to enable the Court to say that

it is not an exercise of the discretion within the meaning of these sections. I am unable to hold that the discretion is exercised in that manner in this case. Beyond this I express no opinion either as to the justice or the propriety of the direction given by the District Magistrate under s. 25-A (1) (b) or by the Government under s. 25, sub-s. (2).

As to the mistake of including a person or persons in whose favour compensation is allowed, I have no doubt it can be and will be corrected by the Commissioner under s. 25-A (2). In dealing with a large number of persons a casual mistake of this kind is apt to occur; and it cannot be accepted as a ground for holding that the discretion is not validly exercised.

As regards the omission to make any inquiry it may be pointed out that s. 25-A does not provide for any inquiry as to orders under s. 25-A (1) (b). The words "after such inquiry as he deems necessary" are to be found in sub-s. (1) cl. (a) and do not govern cl. (b). There is no legal basis for this contention. The District Magistrate referred in his letter of the 7th March 1922 to some kind of inquiry as regards the Hindus; and the Government in their letter of the 5th April required the District Magistrate to make such inquiry. No such inquiry has been made. The Sub-Divisional Magistrate made inquiry as to the extent of the business done by each shop-keeper. I agree with the view of the Trial Court that this inquiry was fair, though it is possible that in such rough and ready calculation of the extent of the business some mistakes might have crept in. But the Sub-Divisional Magistrate Mr. Hulyal says in his evidence (Ex. 135, para. 9) that he made no other inquiry. Thus in point of fact even the inquiry suggested by the District Magistrate was not made. But as there is no legal obligation for making such an inquiry, I cannot attach any real importance to this omission. I cannot agree that the omission to hold an inquiry which was only departmentally arranged, is sufficient to vitiate the direction given by him under s. 25-A (1) (b). The provisions of s. 79 of the District Police Act would condone such an irregularity in procedure.

Lastly, I may mention that the point that it is not a rate on property was raised with reference to this part of the case also.

But the point has been already dealt with; and I doubt whether it can apply to the compensation charges. Clause (b) of s. 25-A (1) is silent on this point. It does not refer to tax or rate assessed on property as sub-s. (2) of s. 25 does.

It is not suggested before us on behalf of the appellants that it was obligatory upon the District Magistrate to require the Municipality to assess and recover the amount of compensation under sub s. (1), cl. (c); and I do not see how it could be suggested in view of the wording of that clause.

I may mention that a notification issued in May 1923 was referred to in the argument. It reduces the police charges to some extent, and imposes the additional Police for the third year. In other respects it proceeds on the same lines as the notification in question, and does not affect the decision in this suit.

The result is that the appeal fails.

As to costs, though it may be said that the wording of the notification affords a basis for the suit, I do not think that there is any good ground to depart from the usual rule that the costs must follow the event.

I would confirm the decree of the lower Court with costs.

Kemp, J.—[After setting out the facts His Lordship proceeded:—] The first point raised is the question of notice under s. 80 of the C. P. C., (Act V of 1908). The suit here is against two defendants, the Secretary of State and the District Magistrate and Collector. So far as the Secretary of State is concerned the words of the section are clear. No suit may be instituted against him until the expiration of the two months' notice required by the section. The terms of the section are imperative and make no exception in the case of suits for an injunction and I do not consider that a Court of Law is entitled to graft on to the plain wording of the section a qualifying clause excepting suits for an injunction—a kind of relief which must have been in the contemplation of the framers of the Code when the section was drafted and re-drafted. Nor does it to my mind make any difference that the injury apprehended is immediate or irreparable. On this point I entirely agree with the judgment of Sadasiva Ayyar, J. in *Secretary of State v. Kalekhan* (6).

The case of a public officer requires a little more consideration. The Secretary of State acts through his subordinates and

an injunction against his subordinate can afford sufficient relief. The words of the section restrict in the public officer's case the necessity of the notice to a suit for an act purporting to be done by him in his official capacity. The appellants contend that there was no such act by the District Magistrate or Collector but merely a threatened act. They say that at the date of the suit the District Magistrate had rejected their petition (Ex. 111) to him and that what they are suing him for is to prevent him carrying on in his capacity as District Magistrate the order (Ex. 110) to the Collector to carry out the Government Notification No. 152 of 6th June 1922 and in his capacity as Collector the notices (Ex. 94) to the separate shop-keepers demanding the amounts at which they had been assessed under the same Government notification. They say the suit is in respect of something the 2nd respondent is *going to do* not in respect of something he *has done*. It is not in respect of the order Ex. 110 or the notices Ex. 94 but in respect of the further acts *threatened* under them. Paragraph 10 of the plaint states the appellants' grievance on this point and prayer (b) of the plaint prays that both the defendants may be restrained from making the recoveries which were demanded by the Collector (purporting to act pursuant to Government Notification No. 152 of 6th June 1922 in Ex. 94). In my opinion, therefore, no notice is necessary so far as the suit is one for an injunction against the 2nd defendant in respect of the amount of compensation mentioned in prayer (b) of the plaint.

I think, however, in so far as the suit is for the declaration in prayer (a) so far as it relates to the compensation which is imposed under s. 25-A of the Bombay District Police Act, 1890, by the District Magistrate with the previous sanction and subject to revision by the Commissioner, the suit is one in respect of an act purporting to be done by the District Magistrate and Collector in his official capacity. The act purporting to be done in the case is, as regards this particular relief, the passing of Ex. 110 and the notices Ex. 94. So far, therefore, as this relief is concerned notice under s. 80 of the C. P. C. is necessary.

The case of *Flower v. Local Board of Low Layton* (9) cannot be relied upon in considering the question of notice to the Secretary of State as the wording of s. 80, C. P. C., is, so far as the Secretary of State

is concerned, entirely different to the wording of the particular Statute in that case.

I think that those decisions of the Bombay High Court which have been cited in the argument and which hold that where the damage threatened is immediate or irreparable, no notice is necessary either in the case of the Secretary of State or of any public officer in respect of an act purporting to be done by such public officer in his official capacity can be explained on the recognition of the application of equitable principles to the case of an act operating harshly or in a manner in which it was not intended to operate. Assuming that such equitable considerations could be admitted to override the plain words of s. 80 where the Secretary of State is sued, I am of opinion, for the reasons given hereafter, that the present is not a case of irreparable damage.

The respondents contend that the suit does not lie by virtue of the Bombay Revenue Jurisdiction Act (X of 1876), s. 4 (f) which provides that no Civil Court shall exercise jurisdiction as to certain matters one of which in cl. (f) is claims against Government to set aside any cess or rate authorised by Government under the provisions of any law for the time being in force. The appellants say that this is not a cess and that in so far as it is, if at all, a rate it is, as regards the order for compensation under s. 25-A of the District Police Act (Bom. Act IV of 1890) an order which it is only competent for the District Magistrate with the previous consent of the Commissioner to pass and not one that can be authorised by Government. They also say that the Act does not apply where an order is wholly illegal or *ultra vires*. [See *Maganchand v. Vithalrao* (17) and *Gangaram v. Dinkar Ganesh* (18)]. They further say that under s. 5 (a) of Act X of 1876 where they contest the liability altogether the Court may entertain the suit. To understand this last argument it must be mentioned that Government Notification Ex. 94 of 6th June 1922 makes these charges under it recoverable as an arrears of land revenue under s. 26 (2) of Bombay Act IV of 1890; and by s. 3 of the Bombay Revenue Jurisdiction Act (X of 1876), the definition of "land revenue" would cover such charges.

I think in so far as the objection that the compensation must be imposed by the

(17) 17 Ind. Cas. 148; 37 B. 37; 14 Bom. L. R. 793.

(18) 20 Ind. Cas. 526; 37 B. 542; 15 Bom. L. R. 665.

District Magistrate with the previous consent of the Commissioner under s. 25-A of Act (IV of 1890) is concerned, Exs. Nos. 107, 108, 109, 90 and 110 and the Government Notification No. 152 (Ex. No. 99) show that even if Government notified the charge by Government Notification No. 152 the District Magistrate was the originator of the proposal and adopted the terms of the Government notification in his letter to the Collector Ex. 110, dated 12th June 1922 under the terms of s. 25-A (b). Any defect there may have been in this procedure was, in my opinion, cured by the provisions of s. 79 of Bombay Act IV of 1890. The proposal for the recovery of the compensation emanated from the District Magistrate was ultimately approved by the Commissioner and notified by Government.

It seems, however, on the decided cases in this Court that there is more substance in appellants' contention that the Bombay Revenue Jurisdiction Act (X of 1876), s. 4, does not stand in the way of a suit in respect, of a wholly illegal and unauthorized cess or rate purporting to be authorized by Government or a public officer [See *Maganchand v. Vithalrao* (17), *Gangaram v. Dinkar* (18)]. The validity of the respondents' objection on this point would, therefore, depend on the illegality of the Government Notification No. 152.

As, however, appellants contend they are not the persons liable to pay the charges on the ground that they are not the persons responsible for the riot the Court has, under s. 5 (a) of the Bombay Revenue Jurisdiction Act, jurisdiction to entertain this suit. Nor can the respondents' objection apply to the compensation which is imposed by the Commissioner and the District Magistrate under s. 25-A of the Bombay District Police Act, 1890 and not by Government.

Then the respondents contend that the suit is barred for want of notice under s. 80 (4) of Bombay Act IV of 1890. Section 80, however, seems to refer to suits for damages against a Commissioner, Magistrate or Police Officer, and as this is not a suit of such a character, cl. (4) of s. 80 would not apply.

Nor does s. 81 of the same Act bar this suit. That section refers to orders of the nature of those mentioned in s. 38 of the same Act. The Advocate-General was constrained to admit that s. 81 had no application to the present case. Moreover, the

order as to compensation has to be made by the District Magistrate under s. 25-A of Bombay Act IV of 1890 and not by Government.

The respondents' next contention is that the District Magistrate's order under s. 25-A (1) of Bombay Act IV of 1890 is final under cl. (4) of that section, i. e., it cannot be questioned by a Civil Court. The appellants say it can, and further, that the District Magistrate having once made his order under s. 25-A, cannot review it by passing a fresh order under Government Notification No. 152, dated 6th June 1922 (Ex. 99). The order, too, says, the District Magistrate first made his order under the Commissioner's order on 25th August 1921 (Ex. 134). Now it will be seen that the scheme of s. 25-A of Bombay Act IV of 1890 is that the District Magistrate can make orders with the previous sanction of, and subject to revision by, the Commissioner. With these qualifications the District Magistrate's order is to be final. The Commissioner is the reviewing authority. Now what were the facts here? On 16th August 1921 the Commissioner passed his order Ex. 134 and the appellants say that the District Magistrate must have given effect to it by passing an order under s. 25-A in accordance with its terms. I may point out, incidentally, that there is no such order of the District Magistrate on the record. Exhibit 146 dated 30th December 1921 which has been relied on, is 4 months later, and in any case is no such order. Exhibit 150 dated 8th March 1922 is still later and refers to the Muhammadan income-tax payers whose liability is continued in the Government Notification No. 152, dated 6th June 1922 (Ex. 99). Assuming, however, he made such an order, could the District Magistrate legally pass the fresh order of 12th June 1922 (Ex. 110) in review of the first order? I think with the previous sanction of the Commissioner and subject again to revision by him the District Magistrate may. In effect, he obtains the revision of the reviewing authority. That the District Magistrate's order, Ex. 110 was approved by the Commissioner is clear because the latter passed the District Magistrate's proposals on to Government and signified his agreement with them in his letters Ex. 107, dated 9th March 1922, and Ex. 147, dated 14th January 1922. The review of the first order was clearly, therefore, by the authority

having power to review. Indeed, I am not at all certain that under the General Clauses Act (Bom. Act I of 1904), s. 21 the District Magistrate himself may not review his first order subject to the prior assent of and revision by the Commissioner. That it had such assent, I have already pointed out, is clear from Ex. 107, dated 9th March 1922, and, Ex. 147, dated 14th January 1922. Further, I wish to point out that although the Commissioner by his order, dated 16th August 1921 (Ex. 107), specifically provided for other inhabitants of the town being assessed for compensation by any subsequent order that might be passed, if it be contended he substituted another class of persons, the District Magistrate passed no orders on Ex. 134.

I see nothing in the scheme of s. 25-A to suggest that no fresh order can be passed by the District Magistrate in accordance with a revision of his first order by the Commissioner. It might lead to unfortunate results to adopt such a construction because the Commissioner and District Magistrate would be unable to correct any order passed under s. 25-A on a misapprehension of the true facts or by mistake. To understand the way in which the word "final" is used by the Legislature, it is permissible, though with caution, to look at other instances in which the Legislature has used the word. In s. 629 of the C. P. C. of 1882 an order made under that section was described as "final" i. e., non-appealable. The new C. P. C., of 1908, O. XLVII, r. 7, substituted the word "shall not be appealable" for the word "final." This was merely a verbal alteration and shows the Legislature meant to exclude any appeal from the order. See also the use of the word in the Court Fees Act (VII of 1870) s. 5 and the case of *Balkaran Rai v. Gobind Nath Tiwari* (19); and in the Public Demands Recovery Act (Ben. Act I of 1895) s. 19, sub-s. (4) and the case of *Matangini v. Girish Chunder* (20). A similar meaning is given to the use of the word "final" in s. 13 of the Bombay Revenue Jurisdiction Act (X of 1876); and to the word "determinative" in s. 121 of the Land Revenue Code (Bom. Act V of 1879). [*Bai Ujam v. Valiji Rasulbhai* (21)]. But if we limit the scope of the discussion

to the Bombay District Police Act (Bom. Act IV of 1890), s. 25-A alone—and the case of the *Bank of England v. Vagliano* (22) lays down that the particular Statute should be considered with reference to its language—I see nothing in that section or in the Act to suggest the word "final" means the District Magistrate can only make his order under that section once and for all. To adopt this construction would limit the power of the Commissioner to exercise of a single revision and the words of this clause do not justify this. In Stroud's Judicial Dictionary, Second Edition, the word 'final' is defined thus:—"Where a Statute provides that a specified determination shall be 'final,' e.g., the decision of a Poor Law Auditor *qua* an untaxed Solicitor's Bill, s. 39, 7 & 8 Vict. c. 101—it is not open to review even though the Court does not see the reasonableness of the provision." It might easily be that facts might come to the notice of the District Magistrate after passing an order under s. 25-A which would require it to be reviewed by a fresh order. The scheme of the section is to make the Commissioner and not the Court the reviewing authority. Clause (5) of the same section specifically excludes a suit in respect of loss or injury for which compensation has been granted under the section. I think this shows that the jurisdiction of the Courts was intended to be excluded. The order of the District Magistrate, Ex. 110, dated 12th June 1922, under s. 25-A not having been revised by the Commissioner is, therefore, as regards the recovery of compensation final and cannot be reviewed by the Court.

Then, the appellants contend that Government having once declared by Government Notifications 6423 (Ex. 96) and 6801 (Ex. 97) who were responsible for the riots and, therefore, to pay the additional Police charges and the Commissioner by Ex. 134 having decided who was to pay compensation under s. 25-A no fresh order under Government Notification No. 152, Ex. 99, could be passed. In other words, that the powers given, once exercised, were exhausted. Moreover, they say that it was not open to the Commissioner in Ex. 134 to make a reservation for others to be brought in afterwards as liable to compensation. As regards this it will be noted that both with regard to the additional Police charges

(19) 12 A. 129; A. W. N. (1890) 39; 6 Ind. Dec. (N. S.) 831 (F. B.).

(20) 30 C. 619; 7 C. W. N. 433.

(21) 10 B. 456; 5 Ind. Dec. (N. S.) 692.

(22) (1891) A. C. 107; 60 L. J. Q. B. 145; 64 L. T. 353; 39 W. R. 657; 55 J. P. 676.

and the compensation the right to include others is reserved (see Ex. 96 and 134). I see nothing wrong in this. As to the power once exercised being exhausted it seems to me that the case is covered by s. 21 of the General Clauses Act (Bom. Act I of 1904). The finality provided for an order under s. 25-A, cl. (4) of Bombay Act IV of 1890 means, in my opinion, to give a final effect to the ultimate order that the District Magistrate with the previous assent of the Commissioner may, subject to revision by the Commissioner, or in accordance with any such revision pass. Clause (4) is not, in my opinion, intended to exclude the powers which by s. 21 of Bombay Act I of 1904 are included in a power to issue an order.

The next objection raised by the appellants is that when the Government Notification No. 152 Ex. 92 was passed it lay on the Municipality in the first instance under s. 25, cl. (4), of Bombay Act IV of 1890 to attempt to recover the tax and rate for the additional Police. Whatever obligation there may have been on Government or the District Magistrate [I note that it has not been contended that the District Magistrate's "discretion" in s. 25-A (1) (c) is only for one of the two alternatives of a tax or a rate] to use the Municipality in the first instance as the collecting agency, it is clear from the correspondence that the Municipality were afforded an opportunity to recover the cost of additional Police and were utterly unable to collect it. Government were, therefore, justified in directing the Collector under s. 26 (1) proviso to recover it. There was no point in directing the Municipality again to recover the charges after the fresh Government Notification No. 152 (Ex. 99) when it was clear the same circumstances existed then as prevailed when the Municipality attempted to recover the cost of additional Police after the Government Notification No. 6801 (Ex. 97) of 11th July 1921. On 19th July 1921 the District Magistrate wrote to the President of the Municipality asking the Municipality to raise the cost of the additional Police by a rate on the male adult Muhammadans of Malegaon. The Municipality appears to have made every effort to do so but without success. The failure of their attempt is recorded in the President of the Municipality's letter of 1st December 1921 (Ex. 105), and the Collector himself recognized that the Municipality

was powerless in the matter. Any attempt to raise the money by indirect taxation of the Momins through the shop-keepers must have met with the same fate. Nor am I satisfied that any liability there may have been in this respect is not covered by s. 79 of Bombay Act IV of 1890. Moreover, the Municipality has neither paid the charge from the Municipal fund nor assessed the rate under s. 25, cl. (4) of Bombay Act IV of 1890. The obligation is on them to do so and there has, therefore, been a default in recovery under s. 26 (1) proviso of the Act. The force of this argument might, however, be affected by the fact that although the Municipality had notice of Government Notification No. 152 of 6th June 1922, that Government Notification requires the compensation to be recovered by the Collector. The objection cannot affect the validity of the Government Notification No. 152 (Ex. 99 itself).

Again, the appellants urge that the rate under Government Notification No. 152 of 6th June 1922 levied on the purchases of saris and sales of yarn by the shop-keepers was not a rate on property. In this connection it is to be noted that s. 25-A does not require the rate for the compensation to be assessed on property although the word "rate" would seem to imply the ownership of property. The point, however, is immaterial as if the charge for additional Police is not a rate on property, it is a tax, however it may be described and is, therefore, within the powers of Government to levy under s. 25. Any objection to the form of this Government Notification is, in my opinion, cured by s. 79 of Bombay Act IV of 1890.

A further point has been raised by the appellants that there was no summary enquiry as required by s. 25-A of Bombay Act IV of 1890. This refers to the compensation. But it appears that on 21st April 1922 the District Magistrate by Ex. 108 directed the Sub-Divisional Magistrate to make the summary enquiry. Such an enquiry was held. It was such an enquiry as the District Magistrate "deemed necessary" and there was no obligation on him, that I can see, to repeat it after the Government Notification No. 152 of 6th June 1922.

We now come to the appellants' main contention. Shortly put, it may be illustrated by the proposition that Government cannot tax A to recover a tax or charge

due by B. Appellants say that the real offenders responsible for the riots were the Momin weavers of Malegaon and that Government so regarded them and have merely taxed the Muhammadan and Hindu shop-keepers referred to in order to make them a collecting agency for the amounts the Momins refused to pay. I think the correspondence shows clearly the charges could not be recovered from the Momins. It is unnecessary to refer in detail to the letters on this point. Exhibit 105, dated 1st December 1921 from the President of the Municipality to the Collector clearly states the reasons for the cost of additional Police cannot be recovered from the Momins. Obviously, an attempt to recover the compensation charges from the Momins would have been equally futile. Government Notification No. 152 of 6th June 1922 speaks of recovering the balance of the charges from the shop-keepers "on behalf of the Momin adult weavers". Exhibit 106 dated 7th March 1922 calls the shop-keepers "agents for collection". But in para. 6 of the written statement defendants plead they intended to recover the charges from the shop-keepers in their own individual capacity as being primarily responsible and not as agents for the weavers. Certainly Government and the District Magistrate apparently considered it would be a good thing to punish the weavers but I think Government also acquiesced in the suggestion to tax the shop-keepers because the District Magistrate in his letters of 7th December 1921 (Ex. A), 15th December 1921 (Ex. B) and 7th March 1922 (Ex. 106) considered the shop-keepers had fostered the movement which led to the disturbances and should, therefore, participate in the collection of the charges imposed. It is not, therefore, a case of taxing an innocent party A for a guilty party B but a case of recovering the charges for which both A and B were answerable by making A recover B's share of the charges. If Government thought, rightly or wrongly, that they could recover the charges to be imposed on both the shop-keepers and Momins by recovering them from the shop-keepers leaving them to recover wholly or in part from Momins that surely was a case of leaving the parties responsible to decide between themselves how they should apportion the payment. The Court is not concerned with whether Government have judged correctly the party who

should pay, provided Government has exercised its judgment on the point. That is a matter left to Government under s. 25 and to the District Magistrate, with the previous sanction and subject to revision by the Commissioner under s. 25-A. Section 25-A was not, I think, intended to permit the Court to enquire into the question of who were the persons really responsible for an outbreak of this sort. There seem ample grounds for holding that the shop-keepers were not the innocent persons they profess they were. The majority of them are Muhammadans and as the persons to whom the Momins sold *saris* and from whom the Momins bought yarn were in a position to have exercised control over them. The contention that they were coerced into subscribing to *Khilafat* Funds and ranging themselves on the side of those actively assisting in fomenting discontent in Malegaon is theoretically untenable, whatever may have been the real facts, because theoretically there was always the protection of the law to fall back upon, and if the authorities were tolerant of the activities of the fomentors of trouble in Malegaon that was no reason for the shop-keepers to lend their influence to the forces of disorder and discontent in the town. I am unable, therefore, to hold that the imposition of these charges on the shop-keepers was tyrannical, oppressive or arbitrary. If the appellants had come before this Court as admittedly innocent parties the position might have been different.

I have held that Government had power to make the Government Notification No. 152 of 6th June 1922, at any rate as regards the charges for additional Police, and that the District Magistrate may be considered under the circumstances as having passed the order for compensation under s. 25-A. The order in the Government Notification to recover the compensation was made at the direct request of the District Magistrate and with the consent of the Commissioner (see Exs. 109 dated 21st April, 1922, 147, dated 14th January 1922 and A, dated 7th December 1921). The Collector, who in this connection is also the District Magistrate, was also responsible for the suggestion to lump the two charges together (Ex. 147), dated 14th January 1922 and Ex. B dated 14th December 1921). The District Magistrate on 12th June 1922 (Ex. 10) subsequently asked the Collector to carry out the Government Notification

of 6th June 1922. Both impositions were, therefore, according to law and I fail to see how the lumping of the two sums for the purposes of recovery into one—which after all is a defect that could in any case be cured by s. 79—is a breach of the terms of cl. (1) (b) of s. 25-A. The convenience of the procedure adopted speaks for itself.

Therefore, I think, the orders passed were not illegal or *ultra vires*. This really disposes of the appeal.

We may, however, consider whether the injury threatened by defendants was irreparable. Here, I wish to observe that the appellants all had an opportunity of objecting to the manner in which they have been assessed. Section 25-A (2) gives any person aggrieved the right to apply to the Commissioner for exemption. Admittedly, none of the appellants availed themselves of this right. They preferred to come to the Courts. Appellants complain that the effect of collecting these charges has been to compel many shop-keepers to close their businesses and will drive others to do the same. I will review the oral evidence on this point. Champalal, the 4th plaintiff and the manager of the shop of Rangildas Devchand, says his shop has been assessed at 90,000 *saris* and he has stopped purchasing *saris* since the Sub-Divisional Magistrate served the notice dated 21st April 1922 (Exs. 89-91) on him. He also says other firms have also stopped purchasing *saris*. He does not say whether this was by way of passive resistance or inability or reluctance to recover the tax from the Momins. We are asked to *infer* his business has been ruined. It appears from his evidence that from 1st July 1921 to 30th June 1922 his shop purchased 27,103 *saris*. He has been assessed in 90,000 *saris*. It appears that he did not care to attend even under protest before the Sub-Divisional Magistrate to assist in calculating the amount at which he should, if liable at all, be charged. If he has been over-assessed it looks to me that, having the opportunity of going to the Commissioner and appearing before the Sub-Divisional Magistrate he preferred to cease purchasing *saris*. As to the amount at which he has been assessed I cannot see that under the circumstances I can now listen sympathetically to his complaint. The next witness Bhika Dugdu, apparently the 25th plaintiff, of the firm of Bajirao Ramchandra was assessed by the Sub-Divisional Magistrate at 5,000 *saris*. He

says he purchased on 798 *saris* between 1st July 1921 to 5th September 1921. He was arrested for not paying the amount claimed from him and committed to the civil Jail. It appears that the shop of Bajirao his master was going on and making purchases of *saris*. The witness says that he stopped when the suit was filed. The next witness is Lala Tarachand, the *muni* of the firm of Lalchand Lakmi and is apparently the 39th appellant. He says that his business in *saris* stopped after the imposition of punitive charges. He appeared before the Sub-Divisional Magistrate and says he told him that only 13,558 *saris* had been purchased whilst he has been assessed in 25,000 *saris*. The Sub-Divisional Magistrate has given evidence showing how he arrived at the calculation of the amount due from such shop-keepers. He swears that the shop-keepers are making the collection of the cess and that since 21st April 1922 no new merchant has come to Malegaon to trade in *saris* and yarns.

On this evidence, the distress and general imminent stoppage of business alleged by the appellants sinks to insignificant proportions. Only 3 witnesses for the appellants swear to stopping their own businesses. One of them, Bhikoba Dagdu, admits that his master's business is still going on and making purchases of *saris*. Nor does any of these witnesses swear that his business was stopped as it was ruinous to carry it on any longer. They merely swear they have stopped business. I am not at all satisfied on this evidence that the stoppage of these three businesses is unconnected with the desire to defeat the recoveries which the authorities are attempting to make. Champalal says other firms have stopped purchasing *saris* but none of the representatives of the other firms has been called to give evidence; which is surprising. Nor has a single witness been called to prove that new firms have ousted the old ones in consequence of the action taken by the District Magistrate and Collector. In fact, this complaint of oppression and injustice appears to me, on investigating the evidence, to be without foundation. No irremediable damage appears to have threatened or done. In my opinion, the suit was properly dismissed and I would confirm the order of the lower Court and dismiss this appeal with costs.

Z. K.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 327-B OF 1923.

April, 1924.

Present:—Mr. Ankhedde, A. J. C.

SITARAM—PLAINTIFF—APPELLANT

versus

HIMATRAO—DEFENDANT—RESPONDENT.

Evidence Act (I of 1859), s. 35—Perepatraks, value of—Admissibility.

The very underlying idea of preparing *Perepatraks* is to know year by year how much land has been under crop and how much left fallow, with a view to know the actual state of cultivation in each village.

Perepatraks are, therefore, admissible in evidence for the purpose of ascertaining the area under crop.

Appeal against the decree of the Additional District Judge, Amraoti, dated the 9th July 1923, in Civil Appeal No. 7 of 1923.

Dr. H. S. Gour and Mr. M. B. Niyogi, for the Appellant.

Messrs. G. L. Subhedar and D. T. Mangalmurti, for the Respondent.

JUDGMENT.—The First Court had dismissed the plaintiff's claim for possession of 3 *gunthas* of land out of S. No. 217, *Pot Hissa* No. 1, area 1-32-G. of M. Ganori and for mesne profits. The lower Appellate Court has decreed the claim. Hence this second appeal by the defendant.

The decree is challenged on the ground that it is not based on evidence proper for consideration. The lower Appellate Court has found that plaintiff has shown that he is owner of 7A-31-G. of land and that he was in possession of it till 1914 or thereabout, and that the defendant has failed to prove the contrary.

Attempt is made to show that in arriving at this finding the lower Appellate Court has taken an erroneous view of the evidence on record and it is also said that what is regarded as evidence is no evidence. I have gone through the evidence both oral and documentary and I am satisfied that the finding is well-supported by evidence proper for consideration. Exhibits P-3 and P-4 which are *Perepatraks* are sought to be discredited on the ground that it is not the duty of the *patwari* to specify the area under crops in them. No authority is shown to me in support of this contention. On the contrary I would consider that the very underlying idea of preparing *Perepatraks* is to know year by year how much land has been under crop and how much left fallow, with a view to know the actual state of cultivation in each village.

The oral evidence which has been discarded by the lower Appellate Court is being pressed against the finding and it is contended that the oral evidence does not justify it. I am not at all prepared to disturb the finding arrived at by the lower Appellate Court after fully considering the legally admissible evidence on record.

On the whole the conclusion arrived at by the lower Appellate Court is correct and I uphold the same. The appeal stands dismissed with costs. The costs in the lower Courts will be paid as already ordered.

K. S. D.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 152 OF 1925.

August 26, 1925.

Present:—Mr. Wazir Hasan, A. J. C.

SITA RAM SINGH AND OTHERS—

DEFENDANTS—APPELLANTS

versus

ANSARI LAL—PLAINTIFF—RESPONDENT.

Oudh Rent Act (XXII of 1886), s. 108 (10)—Civil Procedure Code (Act V of 1908), O. VII, r. 10—Suit to recover possession of land filed in rent suit—Objection to jurisdiction of Court—Order directing return of plaint for presentation to proper Court—Suit instituted in Civil Court—Defendant, whether can object to jurisdiction of Civil Court—Estoppel.

A suit for the recovery of a plot of land and for damages was instituted in the Rent Court as a suit falling under s. 108 (10) of the Oudh Rent Act. The defendants objected to the jurisdiction of the Rent Court to entertain the suit with the result that the Rent Court returned the plaint to be presented to the Civil Court. The suit was accordingly laid before the Civil Court and the defendants objected that the Civil Court had no jurisdiction to entertain the suit:

Held, that the Rent Court having returned the plaint for presentation to the Civil Court as the result of the defendants' objection to the jurisdiction of the Rent Court, they could not be permitted to turn round and object that the Civil Court had also no jurisdiction to entertain the suit.

Second appeal from the judgment and decree of the Sub-Judge, Unao, dated the 9th December 1924, upholding that of the Munsif, Safipur, District Unao, dated the 28th July 1924.

Mr. M. A. Khan, for the Appellant.

JUDGMENT.—This is the defendants' appeal in a suit for possession of plot No. 280, measuring 2 *bighas* 11 *biswas*,

situate in *patti* Din Singh of village Bawahua, *pargana* Safipur, in the District of Unao and for damages. The suit was instituted in the Court of the Munsif of Safipur and was decreed by that Court. On an appeal by the defendants the decree of the Munsif was confirmed by the Subordinate Judge of Unao.

The only point urged in support of this appeal is that the cognizance of the suit by the Civil Court was barred by cl. (10) of s. 108 of the Oudh Rent Act. It appears that originally a suit for the relief now claimed was instituted by the plaintiff in the Rent Court as a suit falling under s. 108, cl. (10) of the Oudh Rent Act. The defendants, that is the present appellants, objected to the jurisdiction of the Rent Court to entertain that suit. The result was that the Rent Court returned the plaint to be presented to the Civil Court. The suit was accordingly laid before the Civil Court as already stated. The defendants cannot be permitted now to turn round and say that the Civil Court had no jurisdiction to entertain it. The appeal fails and is dismissed.

Z. K.

Appeal dismissed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2663 OF 1921.

February 26, 1925.

Present:—Mr. Justice LeRossignol and
Mr. Justice Fforde.

SARDARI MAL—PLAINTIFF—APPELLANT
versus

ABDUL SAMAD—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 16—Undue influence of third person, effect of—Debts incurred by profligate young man consolidated into mortgage—Undue influence, proof of.

Undue influence exercised by a third person over a mortgagor is no defence to the mortgagee's claim on the mortgage. [p. 40, col. 2.]

The facts that a mortgagor was a profligate young wastrel unaccustomed to the possession of any money, that on his father's death he embarked upon a career of debauchery and that the mortgagee, a professional money-lender, advanced him moneys on various documents, which debts were subsequently consolidated in the mortgage in suit, do not justify a finding of undue influence. [*ibid.*]

First appeal from a decree of the Sub-Judge, Delhi, dated the 5th August 1921.

Messrs. Sardha Ram and Shamair Chand,
for the Appellant.

Messrs. Badr-ud-di
Chand; for the Respon

JUDGMENT.—

this appeal arises with to recover Rs. 5,363 defendant on a mortgage of the principal sum of Rs. 5,000 and interest. The mortgage was executed on the 30th July 1919 and on the 31st August of that year the defendant's only plea was that he had just attained majority and that the plaintiff had taken undue advantage of him and had received by him Rs. 300, which sum was the only consideration received by the defendant for the mortgage. The Trial Court found that the plaintiff knew that the defendant was frequenting bad company and that he deliberately lent money to a young man to enable him to continue a life of gambling and debauchery and the learned Judge gave the plaintiff a decree for Rs. 780 only being Rs. 600 which he found to have been received by the defendant and Rs. 180 interest at the rate of Rs. 1-4 per cent, stipulated in the contract.

From this decree the plaintiff has appealed to this Court and having gone through the record and heard Counsel we have no hesitation in holding that the appeal must succeed. The consideration for the mortgage is recited in the instrument of mortgage as follows:—

Rs. 2,001 paid before the Sub-Registrar, and balance due on various documents, promissory notes, receipts and bonds marked Exs. P-1 to P-15.

Now it is defendant's story that he did not receive a pie at the time of the execution of these documents Exs. P-1 to P-15 and that at the time of the execution of the mortgage-deed he received only Rs. 300. These documents Exs. P-1 to P-15 all bear the thumb-impression of the defendant. They all have been proved by the attesting witnesses before whom they purport to have been executed by the defendant and there is the usual evidence that these documents were executed for the consideration therein set forth. This evidence the Trial Court has completely rejected on what we hold to be very inadequate grounds. Inasmuch as the signatures of the witnesses appear to be written with a different ink and pen from that used to write the body of the document it comes to the conclusion that the witnesses were not present when the documents were

Kureshi and Sagar
ent.

The action out of which the mortgage was granted on the 30th July 1919 and on the 31st August of that year the defendant's only plea was that he had just attained majority and that the plaintiff had taken undue advantage of him and had received by him Rs. 300, which sum was the only consideration received by the defendant for the mortgage. The Trial Court found that the plaintiff knew that the defendant was frequenting bad company and that he deliberately lent money to a young man to enable him to continue a life of gambling and debauchery and the learned Judge gave the plaintiff a decree for Rs. 780 only being Rs. 600 which he found to have been received by the defendant and Rs. 180 interest at the rate of Rs. 1-4 per cent, stipulated in the contract.

executed. Although is remarks apply to Ex. P-1 also the Judge nevertheless concludes that the Rs. 9 referred to in Ex. P-1 were actually paid. The learned Judge appears to be under impression that if a money-lender advances loans to a young wastrel knowing that the money will be squandered he has no right to recover. This is a case which is not set up by the defendant himself. The only defence set up by the defendant is his pleas was that, as a matter of fact he had received only Rs. 300 as consideration for execution of a document which is reported to be a mortgage for Rs. 5,000. Neither the defendant is illiterate and a person in no position and were the plaintiff attempting to prove his debt merely on the documents Exs. P-1 to P-15 it might be held that the proof tendered by him was scarcely adequate; but the plaintiff's case reposes not merely on the documents Exs. P-1 to P-15 but on the registered mortgage-deed at the registration of which the defendant admitted before the Registrar full receipt of consideration.

The defence witnesses called by the defendant are, generally speaking, men of low position and their evidence such as it is does not go much further than to establish that the defendant was squandering money on drink and prostitutes. There is an attempt to suggest that the plaintiff was joining with the defendant in these pastimes but this was not pleaded by the defendant and in view of the fact that the plaintiff was a big money-lender and 62 years of age and that he has died during the pendency of the suit we hold this part of the defendant's evidence to be entirely without foundation. The defendant's own evidence as a witness for himself is quite general. He does not give any details of the circumstances in which he executed the documents, Exs. P-1 to P-15. His statement suggests that he was intoxicated on every occasion when the documents Exs. P-1 to P-15, were executed but this suggestion has been repudiated before us by his Counsel whose arguments we have had some difficulty in following. He admits that there was no undue influence, no coercion and no fraud, and his suggestion is that the defendant took Rs. 300 and executed the mortgage for Rs. 5,000 in the exuberance of sentiment generated by slight intoxication. He further urges that it was the duty of the plaintiff to come into the witness-box and produce his books. We do not doubt that the

plaintiff would have been well advised to produce his books but he was not called upon before issues to exhibit his books to the defendant nor was he summoned by the defendant to appear as a witness and disclose the state of his business books.

Undue influence is not even suggested. It is even denied before us and it would be hard to maintain the contention that there was undue influence because the terms of the contract in themselves are by no means exorbitant. The gist of the learned Counsel's argument before us so far as we could gather was that the defendant was prepared to sign any document because the dancing girl of whom he was enamoured exercised undue influence over him and was waiting for money. Undue influence of a third person is no defence to the plaintiff's claim.

Our conclusion is that the defendant was a profligate young wastrel unaccustomed to the possession of any money, that on his father's death he embarked upon a career of debauchery and that the plaintiff, a professional money-lender, advanced him monies on various documents which debts were subsequently consolidated in the mortgage in suit. We accept the appeal, set aside the decree of the Court below and decree for plaintiff with costs throughout. The decree shall be in the form prescribed in O. XXXIV, rr. 4 and 5. The property mortgaged shall be sold if the decree is not paid within three months.

Z. K.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 177
OF 1922.

May 5, 1925.

Present:—Justice Sir Hugh Walmsley,
Kt., and Mr. Justice B. B. Ghose.

Hafez AHMED YAR KHAN—

DEFENDANT—APPELLANT

versus

DINA NATH SADHUKHAN AND

ANOTHER—PLAINTIFFS—RESPONDENTS.

*Bengal Land Revenue Sales Act (XI of 1859), ss. 2, 3,
33—Limitation Act (IX of 1908), Sch. I, Art. 12—
Sale for arrears of rent held before last date on which
rent could be paid, legality of—Suit to set aside sale,
whether necessary—Limitation.*

In the case of a tenant paying rent into the Collectorate, where it appears that the practice of the Collector is to receive the rent of each *Bengali* year in May or June of the following year, a sale of a holding held by the Collector on account of arrears of rent under the provisions of the Bengal Land Revenue Sales Act before the last date of the month of June of the year following that in respect of which the rent is due, is illegal.

Where a revenue sale is illegal, there is no need to bring a suit to set it aside, and the provisions of s. 33 of the Bengal Land Revenue Sales Act or of Art. 12 of Sch. I to the Limitation Act have no application.

Appeal against a decree of the Subordinate Judge, First Court, 24-Pergunnahs, dated the 26th April 1922.

Messrs. Mahendra Nath Ray, S. C. Mukerji and Babu Indu Bhusan Mukerjee, for the Appellant.

Babus Baranashibashi Mukerjee and Someswar Prosad Mukerji, for the Respondents.

JUDGMENT.

Walmsley, J.—This appeal arises out of a sale of a holding situated in *dihi* Panchannagram. The plaintiff was the owner of a portion of the holding No. 166. The share of rent which he had to pay was Rs. 1-3-9 per annum. The *kabuliyat* executed in respect of the whole holding No. 166 is dated the 6th February 1873. According to that, the tenant undertook to pay the agreed rent annually on or before the 28th day of June into the Collectorate. Now, it would be tedious to narrate the facts of the case of Haji Elahi Buksh which led to an alteration in the notification passed under s. 3 of Act XI of 1859. It is enough to record the fact that there has been a change made. The question of what is the latest date has been considered by the learned Judge, but, for the present purpose, I think the only point which we have to consider is what was the date on which the rent of each year was payable to the Collector. It has been urged before us that the stipulation in the *kabuliyat* means that the rent for 1320 B. S. would be payable by the tenant on the 28th of June 1913. That would be the interpretation which I should have placed on the *kabuliyat* if it had stood by itself. But the plaintiff has been able to produce a *jamawasilbaki* kept in the Collector's office containing entries of no less than six years and studying that *jamawasilbaki* I have come to the conclusion that it was the practice of the Collector to receive the rent of each *Bengali* year in May or June of the following year; that is

to say, that the rent of 1320 B. S. would have been accepted if paid in May or June 1914. Now, if that was the practice, then I think it follows that the sale held by the Collector was not in accordance with law. The new notification under s. 3 of Act XI cannot apply to the subject-matter of this suit, if the rent for 1320 was not due to be paid into the Collectorate until the end of June 1914, it follows by a reference to s. 2 and the old notification that a sale held in the following May was not a good sale. The conclusion, therefore, to which I reached is that the learned Judge of the Court was right in holding as he did that the sale was not a good sale.

The other point which has been argued before us is one of limitation. It is said that the suit is really a suit to set aside a sale held under the provisions of Act XI (B. C.) of 1859, and that, under s. 33 of that Act, it should have been brought within one year of the date of the confirmation of the sale or, under Art. 12 of the Limitation Act, it should have been brought within one year again. The answer to that is that the sale was not a sale at all and, therefore, there was no need to bring in a suit to set it aside so that neither provision applies. The suit was brought within much less than 12 years of the date on which possession was given to the purchaser and consequently it is not barred by limitation.

In my opinion, the decision of the lower Court should be affirmed and this appeal dismissed with costs.

B. B. Ghose, J.—I agree.

Z. K.

Appeal dismissed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 307 OF 1921.

April 22, 1925.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Fforde.

GURDITTA MAL AND OTHERS—PLAINTIFFS
APPELLANTS

versus

MUHAMMAD KHAN AND OTHERS—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 4 (1), 4 (2)—Representative of deceased respondent already on record—Appellant, whether relieved from making application—When whole appeal abates—Practice—Order of Division Bench, whether can be questioned before another Division Bench.

The mere fact that the deceased respondent are not relieve the appellant if an application under O. II, r. 4 (1), C. P. C. [p. 42, col. 2.]

Lilo Sonar v. Jhagru, 853; (1925) A. I. R. (Pat. R. 97, followed.

Kartar Singh v. Lal Singh, 66 Ind. Cas. 24; *Jahan Khan*, 50 P. R. 19; *Po v. Ma Shwe Ma*, 84 I. A. I. R. (R.) 95, not follo

Where the responder action against them is appeal abates if the re not impleaded in time

If an appellant of Division Bench off apply for an order appeal, under O. XXII, r. 4, C. P. C., it is not open to him to question the correctness of the order of the Division Bench wh his application is laid before another Division Bench for disposal. [p. 42, col. 2.]

First appeal from a decree of the Senior Subordinate Judge, Shahpur at Sargodha, dated the 3rd November 1920.

Messrs. Nanak Chand and C. L. Mathur, for the Appellants.

Lala Ram Chand Manchanda and Lala Nanwa Mal, for the Respondents.

JUDGMENT.—This was a suit for a declaration that defendants Nos. 5-17 had no share in the *shamilat* land and that they were merely *qabza maliks* having purchased lands in certain *khatas* mentioned in the plaint without any share in the *shamilat* land measuring 10,523 *kanals khewat* No. 177. The suit was dismissed. Thereupon the present appeal was preferred by the plaintiffs. The defendants were made respondents.

The appeal came up for hearing before a Division Bench constituted by Mr. Justice Harrison and Mr. Justice Campbell on the 7th February 1925 when a preliminary objection was raised to the effect that inasmuch as respondent No. 28 Muhammad Akram and respondent No. 16 Musammat Jalal Bibi had died and their legal representatives had not been brought on the record within the period of limitation, the appeal had abated. The learned Judges made the following order:—It is shown by the affidavit of Muhammad Khan, which is not contested, that this appeal has abated against Musammat Jalal Bibi and Muhammad Akram, the former being shown to have died in 1922. Mr. Nanak Chand asks for an adjournment to enable him to apply for an order setting aside the abatement. Fresh date to be given, i. e., the 3rd March conditional on pay-

egal representatives of a ready on the record does in the necessity of making II, r. 4 (1), C. P. C. [p. 42,

, 85 Ind. Cas. 25; 3 Pat. 6 P. L. T. 313; 3 Pat. L.

59 Ind. Cas. 238; 11 P. L. *afiz-un-nissa v. Jawahir* C. 374, *Haidar Khan v.* P. L. R. 1902 and *Maung* Cas. 992; 2 R. 445; (1925)

e joint and the cause of a joint one, the whole ntative of one of them is 43, col. 1.]

, an adjournment from a gh Court to enable him to aside the abatement of his 4, C. P. C., it is not open to correctness of the order of the his application is laid before another Division Bench for disposal. [p. 42, col. 2.]

ment of Rs. 50 costs by the appellant to respondents."

Mr. Nanak Chand, Counsel for the appellants, filed a petition on the 2nd of March 1925, by which instead of applying under O. XXII, r. 4, C. P. C., for the setting aside of the abatement, he contested the correctness of the order of the Division Bench dated the 17th February 1925 on the ground that no abatement had taken place at all inasmuch as the legal representatives of the deceased respondents were already on the record and that it was not necessary to make a formal application for the substitution of their names on the record in their character of the legal representatives of the deceased. When the appeal came on for hearing before us on the 17th March 1925 this application was placed before us and the following points were urged by Mr. Nanak Chand:—

(1) that the order of the 17th February 1925 was wrong.

(2) that, inasmuch as the right of appeal had survived against the surviving defendants-respondents alone it was not necessary to make an application under O. XXII, r. 4, C. P. C.

(3) that in any case the appeal must be held to have abated against the deceased respondents alone and that against the remaining respondents it could go on.

As regards the first point, we are clearly of opinion that it is not open to the appellants to question the correctness of the order passed by another Division Bench.

As regards the second point urged, in our opinion, the right of appeal had not survived against the surviving respondents alone but it had survived against the surviving respondents and the legal representatives of the deceased respondents. The mere fact that the alleged legal representatives were already parties to the appeal did not relieve the appellants from the necessity of making an application under O. XXII, r. 4 (1), C. P. C. Clause (2) of r. 4 provides that "any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant." This clearly indicates that the legal representative of a deceased defendant will have a right to make a defence appropriate to his character as legal representative only when he is substituted as such. Supposing no application is made to substitute as the legal representative of a deceased respondent the name of the legal representative

who happens to be already on the record how is he to know that it has become necessary for him to file an appropriate defence? It is quite possible that he may already be a party to the suit and yet may not know of the death of a defendant whose legal representative he may be. How will he then file an appropriate defence? Our view is supported by a decision of the Patna High Court in *Lilo Sonar v. Jhagru Sahu* (1). A contrary view was expressed by one of us in *Kartar Singh v. Lal Singh* (2), but the question was not fully considered and no reasons were assigned for the view expressed. Similarly, a contrary view taken by the Oudh Judicial Commissioner's Court in *Hafiz-un-nissa v. Jawahir Singh* (3) is not supported by any reasoning. The same remarks apply to the case of *Haidar Khan v. Jahan Khan* (4) and *Maung Po v. Ma Shwe Ma* (5) was decided upon special facts, and moreover no reasons were assigned for the contrary view taken in that case also.

The next question, which we have to decide is whether the whole appeal has abated or not. It is clear that defendants Nos. 5-17 were joint owners and that the cause of action against them was a joint one. According to the test laid down in various cases decided in this Court what we have to see is whether the suit could proceed in the absence of the deceased defendants-respondents. It is obvious that it could not, *vide Sardari Lal v. Ram Lal* (6) and *Jamna v. Sarjit* (7). We must, therefore, hold that the whole appeal has abated. The respondents are entitled to their costs.

S. D.

Appeal abated.

(1) 85 Ind. Cas. 25; 3 Pat. 853; (1925) A. I. R. (Pat.) 123; 6 P. L. T. 313; 3 Pat. L. R. 97.

(2) 59 Ind. Cas. 238; 11 P. L. R. 1921; 9 P. W. R. 1921.

(3) 66 Ind. Cas. 24; 24 O. C. 374.

(4) 50 P. R. 1902; 65 P. L. R. 1902.

(5) 84 Ind. Cas. 992; 2 R. 445; (1925) A. I. R. (R.) 95.

(6) 57 Ind. Cas. 199; 1 L. 225; 1 L. L. J. 225; 143 P. L. R. 1920.

(7) 52 Ind. Cas. 510; 67 P. R. 1919.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 318-B of 1923.

September 3, 1923.

Present :—

BALKRISHNA

RAGHUNATH.

—K

Berar Land Revenue from year to year—Suit whether necessary.

A suit for ejectment previous notice to quit 1 year to year.

Kesheo v. Mansha, 44 Ir. distinguished.

Bhiwaji v. Tukaram, 39 referred to.

Appeal against a decree of the District Judge, Amraoti, dated 30th June 1923, in Civil Appeal No. 11 of 1923.

Mr. M. R. Indurker, for the Appellant.

Mr. M. Y. Sharif, for the Respondents.

JUDGMENT.—The plaintiff, a holder of a 2-annas share in the Jaghir village, sued to eject the defendants, alleging them to be annual tenants of the lands in suit which were his; he also sued for $\frac{1}{2}$ the *batai* valued at Rs. 1,035 in accordance with the terms of the contract, and for Rs. 650 the rent for 1920-21, for which year he had let the land to another tenant, who was prevented from taking possession by the defendants.

The defendants pleaded that they were tenants of antiquity and not liable to be ejected. They also pleaded the absence of notice under s. 79 of the Berar Land Revenue Code and objected to the amount of *batai*.

The First Court, Subordinate Judge, Yeotmal, held that defendants failed to prove that they were tenants of antiquity and passed a decree for ejectment and for Rs. 1,300 as *batai* and damages.

On appeal the District Judge, East Berar held that the defendants were not tenants of antiquity and that the damages were wrongly estimated by the lower Court, but that the suit must fail for want of notice under s. 79 of the Berar Land Revenue Code, the defendants having the status of annual tenants within that section, and he accordingly reversed the decree and dismissed the plaintiff's suit.

The plaintiff makes this second appeal and the defendants put in cross-objections as to the finding that they are not tenants of antiquity.

Baker, J. C.

PLAINTIFF—APPELLANT

OTHERS—DEFENDANTS

de, 1896, s. 79—Tenancy

ejectment—Notice to quit, maintainable without a case of a tenancy from

s. 212; 14 N. L. R. 129,

as. 15; 13 N. L. R. 11,

of the District

30th June 1923,

11 of 1923.

It is contended on behalf of the appellant that plaintiff states defendants are annual tenants, meaning tenants for one year, and Exs. P-7 and P-13 show the same. No notice is, therefore, necessary under the ruling in *Kesheo v. Bhiwaji* (1), where it is held that a tenant for a year requires no notice for its termination. This ruling has been considered by the learned District Judge who has dismissed it, as also *Bhiwaji v. Tukaram*.

The distinction between the two cases is that no notice is necessary under the ruling in *Kesheo v. Mansh* (2), in the case of a tenant for one year, whereas it is necessary in the case of a tenancy from year to year. The District Judge has found on the admissions of plaintiff in cross-examination that defendant has been cultivating the fields since 1912 and 1915 respectively as an annual tenant, that the lease was not for a definite period of one year and, therefore, defendants could not be ejected without notice. This is a finding of fact, and as the District Judge has correctly stated the law the suit must fail and the appeal be dismissed on this point.

As regards the finding about the defendants not being tenants of antiquity, this is also a finding of fact. The onus of proof is on defendants as the lower Appellate Court holds. It is contended that the lower Appellate Court should not have gone into this question, but as this was a matter directly in issue between the parties it was fully justified in doing so.

The finding about the measure of damages is, of course, a pure finding of fact.

It is not shown that the Berar Alienated Villages Tenancy Law, 1921, applies to the village in question.

The result is that the decree of the lower Appellate Court is confirmed and the appeal and cross-objections are dismissed with costs.

K. S. D.

Appeal dismissed.

(1) 44 Ind. Cas. 212; 14 N. L. R. 129.

(2) 39 Ind. Cas. 15; 13 N. L. R. 11.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 1018 OF 1924.

February 18, 1925.

Present:—Mr. Rupchand Bilaram, A. J. C.

REWACHAND FATEHCHAND—

PLAINTIFF

versus

KARACHI MUNICIPALITY—DEFENDANTS.

Bombay District Municipal Act (III of 1901), s. 167—Limitation Act (IX of 1908), ss. 15 (2), 29—Suit against Municipality to recover refund of house tax—Limitation, commencement of—Notice, period of, whether can be excluded—Refusal to re-consider previous order, whether affords new cause of action.

Section 167 of the Bombay District Municipal Act prevents a claimant from commencing his suit after six months from the date of the act complained of and thereby expressly excludes time being extended under s. 15, cl. (2) of the Limitation Act. The period of a month's notice required to be given by the section cannot, therefore, be added to the said period of six months in counting the period of limitation. [p. 45, col. 2.]

Corporation of Calcutta v. Shyama Charan Pal, 32 C. 277; 9 C. W. N. 217, distinguished.

Plaintiff's claim for the refund of a certain sum of money paid by him as Municipal house tax was rejected on the 29th March by the Managing Committee of the defendant Municipality, to whom the powers of the General Body with reference to such matters had been delegated. The resolution of the Managing Committee was communicated to the plaintiff in a letter by the Chief Officer of the Municipality dated 10th April which was received by the plaintiff on 22nd April. Thereafter the plaintiff again addressed the President and the members of the Municipality requesting them to re-consider the matter whereupon the papers were re-submitted to the Managing Committee who, on July 25th, refused to re-consider the matter. Plaintiff instituted a suit on 30th October for the recovery of the amount from the defendant Municipality:

Held, (1) that assuming that the period of limitation under s. 167 of the Bombay District Municipal Act commenced from 22nd April when the resolution of the Managing Committee was communicated to the plaintiff, the suit was barred by time under the provisions of that section; [p. 45, col. 1.]

(2) that the refusal by the Managing Committee to grant a refund and not its subsequent refusal to re-consider the matter was the act which afforded the plaintiff his cause of action and that the limitation for the suit commenced from the date of the refusal of the Managing Committee and not from the date of their refusal to re-consider their previous refusal. [p. 46, col. 1.]

Mr. Kimatrai Bhojraj, for the Plaintiff.

Mr. Kundanmal Dayaram, for the Defendant.

JUDGMENT.—The plaintiff has instituted this suit for recovery of Rs. 1,200 as refund of Municipal house tax for the years 1922 and 1923 which he states was permissible to him under the rules of the defendants and was not paid to him though demanded.

The defendants have *inter alia* raised the plea that the suit is barred by limitation under s. 167 of the Bombay District Municipal Act III of 1901 having been filed more than six months after the act complained of.

The issue of limitation has been tried as a preliminary issue.

It appears from the correspondence Exs. 5-1 to 5-18 that the Chief Officer of the defendants definitely refused to pay him the refund on March 24, 1923 (Ex. 5-6). Thereafter the plaintiff carried on correspondence with the President who again by his letter dated May 29, 1923 (Ex. 5-9) informed the plaintiff that his claim for refund could not be admitted. As a result of some further correspondence carried on by the plaintiff and his Pleaders Messrs. Harchandrai and Co. with the President he placed the subject before the Managing Committee of the defendant for orders, the powers of the General Body with reference to such matters having been delegated under the rules by the General Body to the Managing Committee. On March 29, 1924 the Managing Committee passed a resolution that the refund was not admissible and could not be allowed. This resolution was communicated to the plaintiff by the Chief Officer's letter dated April 10, 1924 (Ex. 5-15) which according to his own admission was received by him on April 22, 1924. The plaintiff was again persistent and sent a letter addressed to "the President and members Karachi Municipality" requesting the President to re-consider the matter. This letter was received in the Municipal Office on July 2, 1924 and on August 7, 1924 the plaintiff was informed by the Chief Officer's letter No. 5/17 that the papers on the subject were re-submitted to the Managing Committee who at their meeting held on July 25, 1924 resolved that they adhered to their previous resolution and were not prepared to deviate from it.

The plaint in this suit was presented in Court on October 30, 1924. Assuming for the moment that the previous refusal of the Chief Officer afforded no cause of action to the plaintiff and that the period of limitation commenced from April 22, 1924 when the resolution of the Managing Committee of the defendants who were the final authority in the matter was communicated to the plaintiff, his claim became Statute barred on October 24, 1924.

The learned Pleader for the plaintiff has attempted to show that this suit is within time on two grounds. The first ground

urged by him is that 167 of the Municipal Act requires as one of its conditions that a claimant should give one month's previous notice to the Municipality of the institution of his suit; the period of six months provided by this section, therefore, extends by one month beyond the period prescribed by s. 29 of the Limitation Act as recently amended by Act X of 1922. Section 1 of the Limitation Act makes the general provisions of the Limitation Act contained in Sections 9 to 18 applicable in computing the period of limitation prescribed by any special or local law subject, however, to the proviso that provisions "are not expressly excluded by such special or local law." The provisions of s. 15, cl. (2) are relied on in this case as extending the period of limitation. It is, therefore, necessary to examine s. 167 of the Municipal Act to see if s. 15, cl. (2) of the Limitation Act is not expressly excluded by it. This section prescribes two absolute unqualified and independent conditions precedent to the maintainability of a suit contemplated by it. It provides that "no suit shall be commenced.....without giving such Municipality.....one month's previous notice in writing of the intended suit and of the cause thereof, nor, after six months from the date of the act complained of." Unlike s. 634 of the Calcutta Municipal Act III of 1899 the second part of this section does not provide for the suit being filed within six months from "the accrual of the right to sue" which has been held not to mean "the accrual of the cause of action." *Corporation of Calcutta v. Shyama Charan Pal* (1). The plaintiff cannot, therefore, plead that so long as he has not served the requisite notice on the Municipality there is no accrual of the right to sue and that the period of limitation commences to run after the expiry of the month's notice. This section in plain and unambiguous terms prevents the claimant from commencing his suit after six months from the date of the act complained of and thereby expressly excludes the time being extended, under s. 15, cl. (2) of the Limitation Act. Public interests require such suits should be instituted without any delay and the period of six months is sufficiently long to enable a claimant to comply with both the conditions precedent required by s. 167 of the Municipal Act. This ground, therefore, fails.

The second ground is equally untenable. The subsequent request to the President and the Municipality for re-consideration in effect an appeal to the action of the Managing Committee and that so long as that request was not considered and finally refused, litigation did not run against the plaintiff and that even otherwise it affords a fresh cause of action. This argument is incorrect. Mr. Kimatrai has not been able to refer to any rule of the Municipal Rules or to any provisions of the Municipal Act permitting an appeal against the decision of the Managing Committee to the Board in respect of the exercise of power reservedly delegated by the Board to the Managing Committee. The plaintiff's letter though addressed to the President and members was a request for re-consideration by the Managing Committee and not an appeal to the Board. It was so dealt with. As an appeal to the Board it has not been disposed of upto now and cannot, therefore, be relied on as affording a separate or fresh cause of action. There is also nothing in the rules or in the Act making the filing of an appeal or its rejection by the Board a condition to the maintainability of this suit. The act complained of which affords the plaintiff his cause of action is the refusal to grant a refund by the authority competent to do so. It is not necessary for the purposes of this suit to decide if the Chief Officer was such competent authority. Assuming that he was not so competent, there is no doubt that the Managing Committee was the competent authority. The refusal by the Managing Committee and not its subsequent refusal to re-consider the matter is the act which affords the plaintiff his cause of action.

To yield to the somewhat ingenious and persuasive argument of Mr. Kimatrai that every application for re-consideration filed by his client afforded him a fresh cause of complaint would be to render the provisions of s. 167 of the Act nugatory and would enable a litigant to revive stale claims by repeating his requests.

The suit fails on the preliminary issue and is dismissed with costs.

Z. K.

Suit dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 406 OF 1924.

August 20, 1925.

Present:—Mr. Dalal, J. C.

AGENT, ROHILKHAND AND KUMAON RAILWAY—DEFENDANT—APPELLANT

versus

GAURI LAL—PLAINTIFF—RESPONDENT.

Railway Company—Goods consigned for carriage—Risk Note Form "H"—Wilful neglect—Failure to place lock on wagon.

A Railway Company to whom goods are consigned for carriage under Risk Note Form "H" is liable for the loss of the goods only if the consignment is lost through the wilful neglect of the Railway Administration or through theft by or wilful neglect of its servants. [p. 46, col. 2.]

Failure of the Railway Company to place a lock on the wagon in which the goods are being carried does not amount to wilful neglect within the terms of the Risk Note. [p. 47, col. 1.]

Appeal against a decree of the Additional Sub-Judge, Sitapur, dated the 6th August 1924, affirming that of the Munsif, Sitapur, dated the 10th December 1923.

Mr. R. K. Bose, for the Appellant.

Mr. H. Husain, for the Respondent.

JUDGMENT.—Gauri Lal plaintiff sued for the recovery of damages from the Rohilkhand and Kumaon Railway Company. The Agent of that Company was sued. The plaintiff had suffered loss of 20 tins of ghee in transit in a train of this Company running between Mailani and Kaurila Ghat. There can be no doubt that these tins were stolen while the train was running.

The goods were booked under Risk Note Form "H" which is on the record. By signing such Risk Note and taking upon himself part of the risk of loss in transit, the consignor secures reduction of freight. Under the contract of such a Risk Note the Railway Company is liable for the loss only if the consignment is lost through the wilful neglect of the Railway Administration or through theft or wilful neglect of its servants. The two Subordinate Courts held that there was wilful neglect of the Railway Company in this case because no lock was placed on the wagon.

The learned Judge of the lower Appellate Court has further stated that the lock was particularly necessary while the train was passing through the Oudh forest where such thefts are matters of common occurrence. I have looked through the record but find no evidence that the train was passing between these two stations through any locality known as the Oudh forest or

that in this particular locality thefts were a matter of common occurrence. No other instance of running train theft between these two stations appears to have been cited in the Trial Court.

It was argued by the respondent's learned Counsel that the finding of the lower Court is a finding of fact under the circumstances of the present case. The finding, however, is vitiated by the lower Court importing reasons not supported by any evidence. It quoted a ruling of this Court reported as *Rohilkhand and Kumaon Railway v. Bij Lal* (1) but omitted to notice the distinction that in that case the wagon was not sealed either. In the present case evidence was led to prove that the wagon was sealed.

Wagons are not locked on any Railway system and security is obtained for the contents of the wagon by bolting it and having it sealed. It will be throwing an unwarranted burden on the Railway Company if it were held that they will be guilty of wilful neglect whenever the wagons are not locked. One can well-understand the difficulty of locking when the contents of the wagons have to be taken out at the destination. Either locks will have to be used of a common pattern of key which would, therefore, be easily available to the thieves or there would be no possibility of opening the lock when the wagon arrives at the destination. I disagree with the lower Appellate Court's deductions of wilful negligence from the fact that the wagon in which theft was committed was not locked.

I hold that the loss was not due to the wilful negligence of the Railway Company, set aside the decree of the lower Appellate Court and dismiss the plaintiff's suit but without costs in any of the Courts.

Z. K.

Decree set aside.

(1) 72 Ind. Cas. 428; 10 O. L. J. 58; 9 O. & A. L. R. 421; (1923) A. I. R. (O.) 212.

CALCUTTA HIGH COURT.

APPEAL FROM A LATE DECREE

No. 237 1922.

April 25.

Present:—Justice S. Hart Greaves, Kt.,
and Mr. Justice Cuming.SURESH CHANDRA SAMADDAR
AND OTHERS—PLAINTIFFS—APPELLANTS

re.

MATHURA NATH GAIN AND OTHERS
—DEFENDANTS—RESPONDENTS.Landlord and tenant—Dispossession of tenant from
portion of holding—Rent, suit for, whether maintain-
able.

Where a tenant has never been put in possession of the whole area comprised in the demise but has taken possession of a portion only of the area, the Court has power to fix a rate of rent for the area actually taken possession of by the tenant, to be paid by the tenant, on the ground that although he has contracted for the whole area he has elected to go into possession of a portion only of the area. Where, therefore, under circumstances over which the landlord had no control the tenant has not been given possession of the whole area, the Courts have decreed the rent in proportion to the area of the land of which the tenant has obtained possession. [p. 48, cols. 1 & 2.]

Where, however, a tenant has been in possession of the whole demised area and has subsequently been deprived of a portion thereof by the action of the landlord, it is not open to the landlord to come to Court and ask the Court to fix the rent for the portion of the area which remains in the possession of the tenant. In such a case the landlord is not entitled, after dispossessing the tenant from a portion of the demised area, to sue for rent in respect of the whole or of any portion thereof, where the rent is fixed for the whole holding and not at so much per *bigha*. [p. 48, col. 2.]

Appeal against a decree of the Officiating Subordinate Judge, Backergunj, dated the 7th June 1922, affirming that of the Munsif, Third Court, Perojpur, dated the 23rd December 1920.

Dr. Sarat Chandra Basak and Babu Radhica Ranjan Guha, for the Appellants.

Mr. Gunada Charan Sen and Babu Someswar Prasad Mukerji, for the Respondents.

JUDGMENT.

Greaves, J.—This is an appeal by the plaintiffs against a decision of the Additional Subordinate Judge of Backerganj confirming a decision of the Munsif, of the Third Court of Perojpur. The plaintiffs sued for rent for the years 1322 to 1325 under a lease dated the 5th March 1879 whereby in respect of the demised area of 8 *bighas* rent at the rate of Rs. 35 a year was reserved for the whole area comprised in the demise. The defence of the defendants was firstly, that the rent had been paid and secondly, that after the lease the plaintiffs in the year 1897 let out a portion of the land comprised

in the demise of 1877 to other persons. Consequently, they contend, and the Courts have so found, that the defendants were dispossessed of nearly half of the demised area and they accordingly say that under these circumstances they are not liable to pay rent. Both the Courts have taken this view and have dismissed the suit.

Various arguments were urged before us on behalf of the appellants. Firstly, it was stated that the rent had been paid by the defendants at the rate reserved in the *kabuliyat* even after the dispossession at any rate, from the year 1902 when the Courts found that the dispossession had taken place, and accordingly, it is urged before us that it would be inequitable that we should now hold that the rent should remain in suspension because a portion of the originally demised area has been taken away from the defendants and we were referred, in support of this argument, to the case of *Ram Narain Chuckerbutty v. Poolin Behary Lall Singh* (1). In that case the Chief Justice in delivering the judgment of the Court held that as 24 years had elapsed since a portion of the demised area had been taken away and the rent during that period had been paid at the old rate the Court would assume that there had been some arrangement in spite of the decrease of area and that the rent should be paid at the old rate. It is noticeable in that case that dispossession was not due to the direct act of the landlord but to the fact that a portion of the land was taken for the construction of a Railway. But in any case we do not think that it is possible for us to act on this view for there is no finding by either of the Courts below that the rent had been paid at the rate reserved by the *kabuliyat* since the date of dispossession in the year 1902 and in the absence of such a finding we do not think that we should be justified in presuming in second appeal that the rent had always been paid at this rate from the year 1902.

Then it was contended on the basis of certain decisions to which we were referred that in any case there should not be suspension of the whole rent but merely an abatement of rent corresponding to the area by which the tenancy has been diminished and we have been referred to numerous cases. We think broadly that the decisions lay down, that where a tenant has never

been put in possession of the whole area comprised in the demise but has taken possession of a portion thereof, the Courts have fixed a rate of rent for the area taken possession of, to be paid by the tenant on the ground that although he has contracted for the whole area he has elected to go into possession of a portion only of the area. And where under circumstances over which the landlord had no control the tenant has not been given possession of the whole area the Courts have decreed the rent in proportion to the area of the land of which the tenant has obtained possession. But we do not think that there is any case which has decided that where a tenant has been in possession of the whole demised area and subsequently has been deprived of a portion thereof by the action of the landlord it is open to the landlord to come to Court and ask the Court to fix a rent for the portion of the area which remains in the possession of the tenant. We think that in all such cases the Courts have held that the landlord is not entitled after dispossessing the tenant from a portion of the demised area to sue for rent in respect of the whole or for any portion thereof.

In this view of the state of the law we think that the appeal must fail and that as the tenants have been dispossessed by the action of the landlord of a portion of the holding and as the rent is fixed for the whole holding and not at so much per *bigha* the landlord is not entitled either to the whole rent or to rent in proportion to the land which now remains in the possession of the tenants.

The appeal accordingly fails and is dismissed with costs.

Cuming, J.—I agree.

Z. K.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.
June 12, 1925.

Present:—Lord Sumner, Lord Blanesburgh, Sir John Edge, Mr. Ameer Ali and Lord Salvesen.

NOWROJI RUSTOMJI WADIA—
PLAINTIFF—APPELLANT

versus

THE GOVERNMENT OF BOMBAY—
DEFENDANT—RESPONDENT.

Land Acquisition Act (I of 1894), s. 54—Valuation.

question of—Appeal to Privy Council—Interference with decision of Indian Courts—Practice.

The value to be placed at a given moment on a plot of land, which is not in the market or the subject of bargain and sale, but owes a large part of any value it possesses to the prospective results of development work, to be undertaken thereafter at an uncertain time and at an estimated cost, is not only in its essence a question of fact but is one upon which, almost above any other, opinions will differ, without its being possible to give irrefragable reasons for any particular conclusion. [p. 49, cols. 1 & 2.]

The Privy Council will not review the decree of an Indian Appellate Court merely upon a question of valuation. Where their Lordships have neither the materials nor the experience on which to found an opinion of their own, in a matter where the opinions of competent Courts in India differ (and *a fortiori* where they concur), it is not their practice to interfere as an Appellate Tribunal, unless there appears to be some error in law or miscarriage of justice. [p. 50, col. 1.]

Appeal from a decree of the High Court (Macleod, C. J. and Shah, J.), dated the 20th September 1921, modifying that of the same Court (Kajiji, J.), dated the 30th August 1920.

Sir G. Lowndes, K. C., and Mr. E. B. Raikes, for the Appellant.

Messrs. A. M. Dunne, K. C., and A. M. Talbot, for the Respondent.

JUDGMENT.

Lord Sumner.—In 1917 the Municipality of Bombay acquired a plot of land for purposes connected with an existing hospital, and the usual statutory proceedings took place before the Collector of Bombay to fix the amount of compensation to be paid for the land. The owner, being dissatisfied with the amount awarded, *viz.*, Rs. 98,724, claimed a reference to the High Court, and in 1920 Kajiji, J., varied the Collector's award by increasing the rate to be allowed per square yard superficial from Rs. 8 to Rs. 10. This raised the total compensation to Rs. 1,39,970. Upon an appeal by the Municipality the High Court set aside the learned Judge's decree and dismissed the reference. They thus in effect confirmed the Collector's award. From this decision the claimant now appeals.

The value to be placed at a given moment on a plot of land, which is not in the market of the subject of bargain and sale, but owes a large part of any value it possesses to the prospective results of development work, to be undertaken thereafter at an uncertain time and at an estimated cost, is not only in its essence a question of fact but is one upon which, almost above any other, opinions will differ, without its

being possible to give irrefragable reasons for any particular conclusion.

It has been decided in decisions of the Board, by which their Lordships are now bound, that appeals in valuation cases will only be entertained on questions of principle. *Secretary of State for India v. Indian General Steam Navigation & Ry. Co. (Rangoon Botatoung Co., Ltd. v. Collector Rangoon (2), per Lord Macnaghten; Khan (3), per Lord Buckmaster—“this Board will not interfere with any question of valuation”—Secretary of State for India (4).* Errors in law, including errors in appreciating or applying the rules of evidence or the judicial methods of weighing evidence, are matters that can and may be dealt with on appeal by this Board, but when, as in the present case, a difference of opinion has occurred between two Indian Courts upon the number of rupees per yard to be allowed for a plot of land, as to which their Lordships can form no opinion of their own, it would be alike unprofitable and impracticable to embark on a comparison of the decisions of these Courts. In cases relating to the acquisition of land the whole matter, both of fact and law, is a proper subject of appeal in India, for their local knowledge and experience enable the learned Judges to form useful judgments upon the whole case. The amending Act of 1921 declares awards under the Land Acquisition Act, 1894, to be decrees, so as to bring them within the general rules as to appeals to this Board, but it does not prescribe any special mode, in which they are to be treated. This Board has found it necessary to limit the extent of the inquiry, in order to spare the parties costly and fruitless litigation. Just as in cases where there are concurrent find-

(1) 4 Ind. Cas. 448; 36 C. 967; 10 C. L. J. 281; 11 Bom. L. R. 1197; 14 C. W. N. 134; 19 M. L. J. 645; 36 I. A. 200 (P. C.).

(2) 16 Ind. Cas. 188; 39 I. A. 197 at p. 201; 16 C. W. N. 961; 12 M. L. T. 195; (1912) M. W. N. 781; 16 C. L. J. 245; 23 M. L. J. 276; 14 Bom. L. R. 833; 10 A. L. J. 271; 5 Bur. L. T. 205; 40 C. 21; 6 L. B. R. 150 (P. C.).

(3) 57 Ind. Cas. 606; 47 I. A. 255 at p. 264; 39 M. L. J. 195; 28 M. L. T. 149; 2 U. P. L. R. (P. C.) 124; 18 A. L. J. 1095; 22 Bom. L. R. 1370; 13 L. W. 49; 25 C. W. N. 289; 3 P. W. R. 1921; 48 C. 110 (P. C.).

(4) 86 Ind. Cas. 556; 23 A. L. J. 113; 2 O. W. N. 137; 48 M. L. J. 386; (1925) A. I. R. (P. C.) 91; L. R. 6 A. (P. C.) 64; 27 Bom. L. R. 783; 6 L. 69; 29 C. W. N. 822 (P. C.).

ings of fact in the Indian Courts, it has long been the general rule of the Board not to allow such findings to be re-opened here, *Naraguntty Lu-gama Naidoo* (5), *Irshad Husain* (6), and as now been settled that this Board will review the decree of an Indian Appellate Court merely upon questions of value. Where their Lordships have neither the materials nor the experience on which to form an opinion of their own, in a matter where the opinions of competent Courts in India differ (and *a fortiori* where they concur), it is not their practice to interfere, as an Appellate Tribunal, unless there appears to be error in law or miscarriage of justice.

In view of the practice the present case may be shortly dealt with. The plot to be acquired was irregular in shape and contour. Except at one point, and there only by a narrow passage, it had no access to any road. Part of it was hollow and low-lying, so that in the rains water accumulated there to the depth of several feet. No transactions were proved in respect of land closely adjacent to or precisely similar to this plot and such transactions as had occurred were cases of development and sale at dates not at or about the material time, *viz.*, 1917. The question, whether or not there had afterwards been an upward trend in market values generally, was not only highly disputable as a matter of opinion, but was not affirmatively supported by any satisfactory proof.

Both parties admitted that the most satisfactory use, to which the land could be put, was the erection of workmen's dwellings, and the value of the land for this purpose accordingly became the question to which both directed their attention. Development of this kind required the dedication of a considerable part of the surface, in order to provide an access road, and also the raising of the whole surface to one level, free from risk of flooding, by permanently filling in the cavities with suitable loose material. Estimates of the area of land required for the road and of the cost of filling in per cubic yard were accordingly prepared, and were agreed on both sides. It does not appear, however,

that any allowance was made for the time required to enable the made ground to settle, or for the risk that unexpected settlements might take place, and probably these factors were beyond any exact estimation. Of course the circumstances that might exist, when the work was done and the realisable value of the developed site could be ascertained, were alike beyond human foresight.

Kajiji, J., appears to have addressed himself to the question of the fair compensation for land taken in 1917, to be allowed as at that date, as if it were an algebraic problem, which could be solved by an abstract formula. He sought to ascertain what value per yard the land might be supposed to have, if improved at some uncertain date by treating the cost of filling in the cavities as a determined sum, to which there could not be any addition, and by deducting this sum alone from the supposed realisable value after future development. From these somewhat abstract factors he arrived at a concrete rate per superficial yard to be paid presently by way of compensation. In doing so he took no account of the factor of interest on the cost of the filling in and the other development work during the uncertain interval before the time of realisation might arrive.

From his conclusions thus arrived at the High Court dissented. Their reasons are not very clearly given, but this may be due to the fact that the evidence, which they discussed, is not very clearly recorded. At any rate, as it appears to their Lordships, they fell into no error of principle in their criticisms of the judgment of Kajiji, J., or in the process by which they arrived at their own conclusions. In dissenting from the method, which the learned Judge seems to have followed, they were certainly right. Factors such as he omitted to notice may be of great importance or of little, or even may be truly negligible, according to the circumstances of the particular case, but it cannot be right to ignore them altogether, as having no place at all in a rigid system of calculation. They were guided by their own view, as they were entitled to be, of the weight of the various pieces of evidence, nearly all of indirect bearing on the problem in hand—and in many cases only imperfectly developed. They thought, as they were entitled to think, that the grounds, on which the supposed rise in general market values was rested

(5) 9 M. I. A. 66 at p. 87; 1 W. R. P. C. 30; 1 Suth. P. C. J. 460; 1 Sar. P. C. J. 826; 19 E. R. 666.

(6) 21 I. A. 163; 21 C. 997; 6 Sar. P. C. J. 460; Rafique & Jackson's P. C. No. 135; 10 Ind. Dec. (N. S.) 1298 (P. C.).

were so unsubstantial in themselves and so distantly related to the circumstances of the site in question, as not to amount to any evidence on which to rest the judicial conclusion that something should be allowed for a rising market.

After carefully examining the evidence and the way in which the High Court appears to have dealt with it in arriving at the conclusion now under appeal, their Lordships are unable to find that there has been any error in principle or in law in the method of arriving at it. They will accordingly humbly advise His Majesty that this appeal should be dismissed with costs.

z. k.

Appeal dismissed.

Solicitors for the Appellant:—Messrs. T. L. Wilson & Co.

Solicitor for the Respondent:—The Solicitor, India Office.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 151-B OF 1923.

April 23, 1924.

Present:—Mr. Hallifax, A. J. C.

MAHADEO—APPLICANT

versus

SHIORAM—NON-APPLICANT.

Transfer of Property Act (IV of 1882), s. 106—Registration Act (XVI of 1908), ss. 17 (d), 49—Lease, agricultural—Oral lease, validity of—Document containing admission of oral lease—Registration, whether necessary.

Section 106 of the Transfer of Property Act excludes agricultural leases from the operation of its own provisions and allows such leases or agreements to lease to be made without a written instrument. [p. 51, col. 2.]

The Registration Act only comes into operation when a written document has been executed either because the transaction cannot legally be carried out without one or because the parties choose to have one though it is not compulsory. [ibid.]

In proof of an oral lease granted by the defendant to the plaintiffs the latter produced a document executed by the defendant which ran as follows:—

"Of the annual rent for the two years 1918-19 and 1919-20 for the field of which I had given you a lease for five years, you have to-day paid me Rs. 65 as the rent for the current year, and you have already paid me the rent for last year and taken a receipt for it, leaving the rent for the next three years which I will take from you in each of those three years with a rent note":

Held, that the document contained nothing more than a mention of an oral agreement made previously and did not require registration, but could be used as

evidence of an admission he had casually mentioned of a private letter. [p. 52,

Civil revision of a Cause Court, Khar July 1923, in Small 244 of 1923

Mr. G. R. Deo, for

the defendant, just as if the agreement in the course of the

decree of the Small Cause Court, dated the 18th July 1923, in Small Cause Court Suit No. 244 of 1923

Applicant.

JUDGMENT.

plaintiffs, who applied for revision of the Small Cause Court were as follows:

of the agricultural year 18-19 the defendant agreed by word

a lease of his land for Rs. 65 in each of the following five years, taking a separate kabuliyat from them each year. He kept

his promise for four years but refused to allow the plaintiffs to cultivate the field in

the fifth year 1922-23 and gave it to another person. They, therefore, claimed

damages for breach of the contract, assessing them at the amount of profit they would have made if the contract had not

been broken, which they said was Rs. 160. The defendant denied the alleged oral

agreement to lease and pleaded that it could only be made by a registered instrument.

The lower Court arrived at the following conclusions. Under ss. 17 (d) and 49 of the Registration Act the plaintiffs are not

allowed to prove the terms of the agreement to lease for five years by oral evidence, at least in a suit for damages for breach of

the contract though they probably would be allowed to prove it in that way in a

suit for specific performance of it. (The reasoning behind the last sentence is obscure, but the matter is outside the case).

If oral evidence can be accepted then that given proves that the contract was made. The plaintiffs suffered loss to the extent of

Rs. 85.

The learned Judge has forgotten s. 106 of the Transfer of Property Act which excludes agricultural leases from the operation of its own provisions and so allows

such leases or agreements to lease to be made without a written instrument. The Registration Act only comes into operation

when a written document has been executed, either because the transaction cannot legally be carried out without one or because the parties choose to have one though it is not compulsory. The only question, in this case is, therefore, whether the document produced by the plaintiff as part of the proof of the lease (Ex. P-1) is a writ-

allegations of the defendant, just as if the agreement in the course of the

decree of the Small Cause Court, dated the 18th July 1923, in Small Cause Court Suit No. 244 of 1923

Applicant.

allegations of the defendant, just as if the agreement in the course of the

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decree of the Small Cause Court, dated the 18th July 1923, in Small Cause Court Suit No. 244 of 1923

Applicant.

allegations of the defendant, just as if the agreement in the course of the

ten instrument requiring registration or not.

The document called itself a receipt given by the defendant to the plaintiffs. It is dated the 11th of November 1919 and its contents may be summarised as follows: "Of the annual rent for the two years 1918-19 and 1919-20 for the land of which I had given you a lease for five years, you have to-day paid me Rs. 85 as the rent for the current year, and you have already paid me the rent for last year and taken a receipt for it, leaving the balance for the next three years which I will take from you in each of those three years with a rent note."

This is no more than a mention of an oral agreement made about eighteen months before; the document clearly does not require registration but can be used as evidence of an admission by the defendant, just as if he had casually mentioned the agreement in the course of a private letter. There is other evidence in support of the finding of the lower Court that the oral agreement was made, though it was hardly necessary. Further the finding that the extent of the damage caused to the plaintiffs was equivalent to Rs. 85 has been accepted by both parties, the plaintiffs expressly and the defendant by his failure to appear in this Court to oppose the application for revision.

For all these reasons the decree of the lower Court dismissing the suit will be set aside and in its place a decree will issue ordering the defendant to pay to the plaintiffs the sum of Rs. 85 and all the costs incurred by them in both Courts. In this Court the Pleader's fee to be shown in the schedule of costs will be fifteen rupees.

Z. K.

Revision allowed.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

June 18, 1925.

Present:—Lord Sumner, Sir John Edge and Mr. Ameer Ali.

BURN AND COMPANY, LIMITED—
DEFENDANTS—APPELLANTS

versus

HIS HIGHNESS Thakur Sahib Sree
LUKHDIRJI OF MORVI STATE—
PLAINTIFF—RESPONDENT.

Vendor and purchaser—Contract for sale of goods—Time, whether of essence of contract—Breach by buyer—Supply of goods by seller—Subse-

quent breach by seller—Buyer, whether entitled to damages.

Plaintiff, a ruling Prince, entered into a contract with the defendant Company whereby the latter agreed to supply a certain number of goods wagons to be used for the purposes of the plaintiff's Railway on condition that one-third of the price was to be paid along with the order, another third at the time when the under-frames of the wagons should be wheeled and the balance on delivery. The wagons were required for a metre gauge Railway and delivery was to be made within six months from the date of the order. One-third of the price of the wagons was paid along with the order but there was considerable delay in the construction of the wagons due to war conditions and when the defendant Company called upon the plaintiff to pay the second instalment of the price of the wagons on the under-frames being wheeled, the plaintiff made default and failed to make the payment in accordance with the terms of the contract. The defendant Company thereafter completed the construction of the wagons and delivered a certain number of wagons to the plaintiff, and refused to deliver the remaining wagons until the whole of the price was paid by the plaintiff. As the plaintiff in spite of the repeated demands of the defendant failed to pay the balance of the price the defendant Company disposed of the remaining wagons elsewhere. Thereupon the plaintiff sent the defendant Company a cheque for the second instalment of the price of the wagons and called upon the Company to deliver the remaining wagons and receive the balance of the price. On the failure of the Company to comply with this demand plaintiff filed a suit against the Company to recover damages for non-delivery of the remaining wagons:

Held, (1) that having regard to the times when the three instalments of the contract price were according to the contract to become payable, and to the fact that the manufacture of the wagons involved considerable expenditure by the defendant Company in providing materials for their construction, and in the payment of men who would necessarily be employed in constructing them, and to the fact that it might be difficult to enforce in a British Court or in a Court of the State of which the plaintiff was the ruler payment by the plaintiff of the contract price, it must have been the intention of the parties when the contract was made that time should be of the essence of the contract as to the times when the three instalments of the contract price should be paid; [p. 57, col. 2.]

(2) that when plaintiff had, after he had notice that the under-frames of the wagons had been wheeled, made default in payment of the second instalment of the price, which, in fact, was a refusal by him to perform the contract in its entirety, the defendant Company was entitled to treat the contract as void and to rescind it; [*ibid*]

(3) that the defendant Company by delivering some of the wagons to the plaintiff treated the contract as a subsisting contract and that inasmuch as the contract price was not payable until all the wagons had been delivered, the defendant Company was not justified in refusing to deliver the remaining wagons till the whole of the price was paid; [*ibid*.]

(4) that, therefore, the defendant Company had committed a breach of the contract and were liable to the plaintiff in damages. [*ibid*.]

Appeal from an order of the Calcutta High Court (Sanderson, C. J., and Richardson, J.);

dated 27th June 1923, reported as 83 Ind. Cas. 260.

Mr. A. M. Dunne, K. C., and Sir Robert Aoke, for the Appellants.

Sir G. Lowndes, K. C., and Mr T. J. O'Connor, M. P., for the Respondent.

JUDGMENT.

Sir John Edge.—The suit in which this appeal has arisen was brought on the original civil jurisdiction side of the High Court at Calcutta on the 27th August, 1918, by His Highness the then Thakur Sahib of Morvi against Burn and Company, Limited, to recover damages for the alleged conversion of 42 Railway wagons, and for an alleged breach of contract to make and deliver the same wagons. The property in the wagons had never vested in His Highness of Morvi, who had never been, constructively or otherwise in possession of them. The claim for conversion has been dropped. The original plaintiff died and his son, who succeeded him as the Thakur Sahib of Morvi, was on the 19th July 1922, brought on the record as the plaintiff. The original plaintiff was, and his successor, the present plaintiff, is, the proprietor of the Morvi State Railway.

The contract was made between His Highness the then Thakur Sahib of Morvi through the Manager of the Morvi State Railway, his agent, and Burn and Company, Limited, of Howrah and Calcutta, in British India. The contract was for the manufacture of 50 Railway wagons by the defendant Company at the Company's works at Howrah and their delivery to the Morvi State Railway upon certain terms which will be later more fully mentioned. The contract was made by correspondence between the manager of the Morvi State Railway, who lived at Morvi, and the defendant Company at Calcutta. The suit has throughout been treated as a suit upon a contract to which the Indian Contract Act, 1872 (Act IX of 1872), applies.

The correspondence began on the 29th October 1914, by a letter to the defendant Company from the manager of the Morvi State Railway, asking the Company to quote rates for 25 covered wagons and 25 open wagons as per specifications and drawings which he enclosed. The specifications showed that the wagons were to be metre gauge Railway wagons. Between the 29th October, 1914, and the 23rd January, 1915, several letters passed between His Highness's agent and the defendant Company, the result of

which was the contract in suit. By the contract which was entered upon the defendant Company agreed to manufacture and to deliver to the Morvi State Railway, upon terms as mentioned, 25 covered wagons, 50 Railway wagons in all, at the price of Rs. 1,825 for each covered wagon and at the price of Rs. 1,375 for each open wagon, the wagon to be in accordance with certain specifications and drawings and the 50 wagons to be delivered in six months from the date of the receipt by the defendant Company of an order for the wagons. The terms of payment were that His Highness of Morvi should pay to the defendant Company one-third of the contract price on the order for the wagons being given, and one-third of the contract price when the under-frames of the wagons should be wheeled, and the remaining one-third when the wagons should be delivered. One-third of the total contract price amounted to Rs. 30,833. The contract contained no provision that the contract time for the delivery of the wagons should be extended in case the defendant Company should be delayed in completing the wagons owing to the war or any other cause beyond the Company's control.

On the 23rd January 1915, His Highness of Morvi, through his agent, sent to the defendant Company his final order for the 50 wagons and said "we have no more drawings to send than we have already sent. From the specifications and drawings sent, you will kindly prepare working drawings in detail and send them for our approval."

After the receipt by the defendant Company of the order of the 23rd January 1915, for the wagons, the defendant Company was much delayed in performing the contract by the difficulties, owing to the war, of obtaining some of the necessary parts of the wagons and the wagons were not ready for delivery at the time specified by the contract. His Highness of Morvi did not at any time exercise such right, if any, as he may have had under the Indian Contract Act, 1872, of determining the contract because the defendants had failed to deliver the wagons in accordance with it.

The agreement that the second instalment of the contract price should be paid by His Highness to the defendant Company when the under-frames of the wagons should be wheeled, of course meant that the second instalment should be promptly paid when

the defendants had Morvi, through the Company had fixed the under-frames of the 50 wagons. On the 25th October 1916, the defendants sent by post to the manager of the Morvi State Railway an account, dated 24th October 1916, for Rs. 30,833, for the second instalment, being one-third of the contract price due when the "under-frames are wheeled," and stated in the letter in which the account was enclosed, that it was submitted by them "for favour of payment at your convenience." That letter and the account which was enclosed were notice to His Highness's agent within the course of the post. They were received at Morvi, that the defendant Company had fixed the wheels to the under-frames of the 50 wagons. It was found by Mr. Justice Rankin, who tried the suit, and it has not been disputed, that at the date of that account, the 24th October, 1916, the under-frames had been wheeled. On the 19th November, 1916, the manager of the Morvi State Railway acknowledged the receipt of the Company's letter of the 25th October 1916 and enquired "when the wagons will be completed and despatched," but did not send any payment of the second instalment.

The position which His Highness, through his agent, then took up and maintained for months is illustrated by the following extract from the manager's letter of the 19th November 1916 :—

"It is now more than a year and a half and yet, as we understand from your letter you have come as far as the wheeling of under-frames and at the rate you have gone on there is no knowing when you will finish the work. When we placed the order, you certainly knew the condition of the market, because the war had then been on some months already. Till June even you talked of delay of a few weeks, but it is now several months which may perhaps run into years. In addition to loss of interest on the money locked up with you and trouble and inconvenience we had to pay hire to other Railways and even on payment of hire we could not get timely and sufficient supply and suffered in traffic. In consulting your convenience it was only fair and reasonable that you should have consulted ours. From your opening correspondence, we expected, beside solid and substantial work, that timely execution of this order might lead to future orders.

"We fear the payment of second instalment will remain locked up as the first and shall, therefore, be glad to know definitely when the wagons will be completed and despatched."

In reply to that letter of the 19th November, 1916, the defendant Company wrote to the manager of the Morvi State Railway on the 23rd November, 1916, as follows :—

"Your favour No. 4906 of 1916, dated 19th November 1916. We regret very much that you should write to us in this way as we can assure you we have done all possible to expedite and complete your work, the delay is entirely due to conditions brought about by the war.

"You ask when delivery will be made and we regret we cannot at present inform you, for instance the springs for your buffers although all ready in England cannot be despatched because the Munitions Board have so far not granted the necessary permit for them to be shipped. To help us will you kindly address the Railway Board stating that these springs are urgently wanted (i. e., 200 buffing springs) and should be supplied, send their reply to us and we can then enable our London Office to obtain shipping sanction.

"Your contract has been considered in every possible way and we trust that this trouble regarding one item alone, the buffing springs, will give you an example of the unprecedented and extraordinary conditions that have been in existence for the last 18 months and which grow more onerous and difficult every day."

The springs for the buffers referred to in that letter of the 23rd November, 1916, were apparently Ibbetson springs, which are patent springs and are made only in England. Their Lordships think it only fair to the parties to this suit that some of the difficulties of the situation should be illustrated by the passages which they have quoted.

On the 14th December, 1916, the 4th January, 1917, and the 25th January, 1917, the defendant Company wrote to the manager of the Morvi State Railway asking for payment of the second instalment and received no reply. On the 14th February, 1917, the defendant Company telegraphed to the manager of the Morvi State Railway: "Kindly wire when may expect settlement bill Rs. 30,833 account

wagons." That was the account for the second instalment. In reply the Company received from the manager by telegraph the following reply on the 19th February 1917: "No. 87. Your telegram of 14th, matter is referred to proprietor of this Railway." The proprietor was His Highness of Morvi. The reference to His Highness of Morvi did not result in the payment of the second instalment. In their Lordships' opinion His Highness of Morvi had then decided not to perform his contract to pay the second instalment until some future time, and the defendant Company was then entitled under the Indian Contract Act, 1872, to rescind the contract but the Company did not rescind the contract.

By the 20th February, 1917, the defendant Company had completed eight of the contract wagons and on that date forwarded them to the Morvi State Railway and thereby treated the contract as subsisting. On the 27th February 1917, the defendant Company wrote to the manager of the Morvi State Railway enclosing an account dated the 26th February, 1917, for Rs. 5,000 in respect of the eight wagons, and in their letter said " . . . we have wired you to-day as follows: kindly wire why bill Rs. 30,833 account wagons not paid . . . we shall be obliged if you will arrange to remit the amount as well as the amount of the enclosed bill No. 8156 W. for Rs. 5,000 with as little delay as possible . . . "His Highness of Morvi was not bound to accept in part performance of the contract eight wagons, but he did receive them. To the telegram of the 27th February, 1917, the manager of the Morvi State Railway replied by the telegram on the 28th February as follows: "No. 88. Your wire. Refer to this office wire 87 dated 18. Matter referred proprietor." The defendant Company received no other reply to their telegram of the 27th February or to their letter of that date.

On the 5th March, 1917, the defendant Company wrote to the manager of the Morvi State Railway with reference to their account for the second instalment and his telegrams of the 19th and 28th February, and said that the Company had "decided not to despatch any more wagons till your proprietor has paid the bill before mentioned and also that for Rs. 5,000 sent you with our letter of the 27th ultimo." On the 11th April, 1917, the defendant Company

wrote to the manager of the Morvi State Railway as follows

"DEAR SIR,

"As we have not received a cheque for the money due to us nor any reply to our letter dated the 5th March we find it necessary to address you again upon this matter and we desire to point out to you that by not paying our bills when they became due for payment you have broken the contract and we shall, therefore, take whatever action appears to us to be necessary for our own interests if we do not receive a satisfactory reply to the letter before the date specified below.

"The wagons could be delivered as soon as we could obtain trucks from the Railway to carry them, but we regret we cannot now permit another of your wagons to leave our works until you pay us in full for the whole order.

"Your action has put us to very considerable expense and very great inconvenience and at the present time your wagons are occupying much valuable space in our works. . . .

The date specified in that letter was the 20th April, 1917. The letter of the 11th April, 1917 was, their Lordships consider, a notice to His Highness of Morvi that the remaining 42 wagons were completely ready for delivery to him on payment of the balance of the contract price which would then be due. On the 21st April, 1917, the manager of the Morvi State Railway telegraphed to the defendant Company as follows: "Your letter though dated eleventh reached here yesterday. Matter referred to proprietor who now in Bombay." No other reply to the defendant Company's letter of the 11th April having been received, the defendant Company wrote to the manager of the Morvi State Railway on the 7th May, 1917, as follows:—

"Re WAGONS

"We desire to call your special attention to our letter, dated the 11th ultimo and to inform you that it is now imperative that we receive a satisfactory reply to this letter at once otherwise we shall have no option but to settle the matter without further reference to you. Kindly favour us with a reply by return."

To which the defendant Company re-

received the following
May, 1917:—

"Re Y NS.
"With reference to your special reminder No. O M 231/H., dated the 7th instant, I have to inform you that His Highness the Thakore, proprietor of this Railway, is not here at present as he has gone to Matheran, a hilly station for the hot weather, and so I have forwarded your letter to him and I will let you know on hearing from him."

No other reply to the defendant Company's letter of the 7th May having been received, the Solicitors of the defendant Company on the 4th July, 1917, wrote to the manager of the Morvi State Railway as follows:—

"Sir,
"Supply of Wagons from Messrs. Burn and Co., Ltd.

"Our clients, Messrs. Burn and Co., Ltd., have instructed us to address you with reference to the contract for the purchase by your Railway of 50 goods wagons from them. The terms of the contract were: Payment as to $\frac{1}{3}$ rd with the order, $\frac{1}{3}$ rd when the under-frame was wheeled and the balance on delivery. The first instalment was duly paid but the second instalment has not yet been paid, in spite of repeated demands, and in spite of the fact that our clients have actually delivered 8 wagons. In the existing circumstances of the trade, it is obvious that our clients cannot keep the undelivered balance of the wagons locked up indefinitely and, as you have failed to carry out your part of the contract, the only course now open to them is to dispose of the wagons elsewhere as best they can but before doing so they are prepared to give you the opportunity of purchasing these wagons outright by paying the total amount of the original contract price outstanding and we are accordingly instructed to give you notice, as we hereby do, that unless the full amount of the original contract price is paid to our clients or to us as their agents within 10 days from the date hereof the undelivered wagons will be disposed of by our clients as they may think fit.

"Yours faithfully,

"Orr, Dignam and Co."

On the 18th July, 1917, the defendant Company's Solicitors wrote to the manager of the Morvi State Railway as follows:—

"Sir,

"As neither our clients nor ourselves have received any reply to our letter to you of the 4th instant our clients have now taken steps to dispose of the undelivered wagons elsewhere and have made up an account the balance due to the Railway after deducting the costs of the wagons delivered from the deposit made to be Rs. 15,833. We enclose you herewith copy of this account together with our cheque for Rs. 15,833 and shall be obliged if you will let us have a formal receipt for this amount by return.

"Yours faithfully,

"Orr, Dignam and Co."

After the 18th July, 1917, the defendant Company sold the 42 wagons to the Mysore State Railway. On the 22nd September, 1917, Messrs. Sanderson and Co., the Solicitors of His Highness of Morvi, wrote to the defendant Company's Solicitors saying that they were instructed to ask for the delivery of the 42 wagons still undelivered, enclosing a cheque for Rs. 30,833, the amount of the second instalment and stating that their clients would pay the third instalment, immediately on the receipt and erection of the wagons in accordance with the terms of the contract. It may be assumed that the cheque was returned. The rest of the correspondence is not material.

As has been mentioned, the suit was tried by Mr. Justice Rankin. It was contended on behalf of the defendant Company that the payments of the instalments of the contract price at the times specified for them were of the essence of the contract. In support of that contention it was urged that the terms as to the payment of the first and second instalments showed that time was of the essence of the contract; that the performance by the Company of the contract involved the expenditure of very considerable sums of money and the occupation of the Company's workshops by the large number of bulky articles; that metre gauge Railways did not form a market where such wagons could be easily disposed of; that the wagons had to be made in accordance with special specifications; and that plaintiff was a person who could not be sued as of right. Mr. Justice Rankin observed in his judgment that the case depended entirely upon the correspondence, the correct appreciation of the general cir-

circumstances of the case, and of the rules of law to be applied, and he said:—

"On the whole and with some difficulty, I have come to the conclusion, looking at the circumstances and the letters, that in this case time was not of the essence of the contract."

The letters to which the learned Judge referred were letters of the 28th December, 1914, the 10th January, 1915, the 16th January, 1915, and the 23rd January, 1915, which in their Lordships' opinion do not support the conclusion at which he arrived.

Mr. Justice Rankin, having observed that the defendant Company had, on the 18th July, 1917, sent to the plaintiff's Solicitors the letter of that date enclosing a cheque for the balance due, on the footing that the contract was cancelled, held that the defendant Company had broken the contract, and gave His Highness of Morvi, the present plaintiff, a decree for damages, which, in their Lordships' opinion, were not excessive. The balance for which the cheque was sent was the balance due of the first instalment, which had been paid, after deducting the price of the 8 wagons.

From that decree the defendant Company appealed under the Letters Patent. The appeal was heard by Sir Lancelot Sander-son, C. J., and Mr. Justice Richardson. The Chief Justice in his judgment said:

"But for the conduct of the defendants, I should have thought that with regard to the payment of the second instalment time was of the essence of the contract. The defendants were under contract to build 50 wagons. In my judgment they were not bound to proceed with the work, after the wheels were attached to the under-frames, until the plaintiff paid the second instalment. They surely could not be expected to keep the wagons, partly built, standing in their works, for an indefinite time, or for so long as the plaintiff chose to keep them waiting for the second instalment. Having regard to the terms of the contract and the nature of the work to be done by the defendants, in my opinion, *prima facie*, time would be of the essence of the contract.

"The defendants, however, for some reason known to themselves, did not treat it as of the essence of the contract.

"They actually delivered 8 wagons in February, 1917, although the second instalment, which had been demanded in October,

1917 (1916), had not been paid, and although as far as could be seen there was no immediate prospect of the second instalment being paid."

The Chief Justice and Mr. Justice Richardson agreeing that the defendant Company broke the contract on the 18th July, 1917, the appeal was by their decree dismissed. From that decree this appeal has been brought.

Their Lordships, having regard to the times when the three instalments of the contract price were according to the contract to become payable, and to the fact that the manufacture of the 50 wagons would involve considerable expenditure by the defendant Company in providing materials for their construction, and in the payment of men who would necessarily be employed in constructing them, and to the fact that it might be difficult to enforce in a British Court or in a Court of the State of Morvi payment by His Highness of Morvi of the contract price, are of opinion that it must have been the intention of the parties when the contract was made that time should be of the essence of the contract as to the times when the three instalments of the contract price should be paid. When His Highness of Morvi had, after he had notice that the under-frames of the wagons had been wheeled, made default in payment of the second instalment of the contract, which was, in effect, a refusal by him to perform the contract in its entirety, the defendant Company was entitled to treat the contract as void and to rescind it, but the defendant Company did not rescind it; on the contrary, the defendant Company, by delivering 8 of the wagons in February, 1917, to the Morvi State Railway, treated the contract as a subsisting contract. The defendant Company was not on that delivery of the 8 wagons entitled to insist on a then payment for them. The contract price was not payable until the 50 wagons had been delivered.

In the view of the facts of this case which their Lordships take, and of the law which they consider is to be applied to those facts, they find that the defendant Company finally broke the contract in July, 1917. The 18th of that month may be taken as the date when defendant Company finally broke the contract.

Their Lordships are of opinion that this appeal should be dismissed with costs, and

they will humbly advise His Majesty accordingly.

Z. K.

Solicitors for
Waltons & Co.

Solicitors for
Watkins & Hunt

Appeal dismissed.

Appellants:—Messrs.

Respondent:—Messrs.

— —

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 186-B OF 1923.

July 18, 1924.

Present—Mr. Kinkhede, A. J. C.

SARJABAI—PLAINTIFF—APPLICANT

versus

YADEOSA—DEFENDANT—NON-APPLICANT.

Practice—Evidence not relevant to pleas—Party, whether can succeed.

A party cannot succeed upon evidence which is not relevant to his pleas. [p. 58, col. 2.]

Civil revision against a decree of the Small Cause Court, Mehkar, in Civil Suit No. 329 of 1923, dated the 8th August 1923.

Mr. G. R. Deo, for the Applicant.

Mr. P. C. Dutt, for the Non-Applicant.

ORDER.—On the basis of a bond, dated 14th December 1918, Ex. P-6, executed by Bhagwan and Deorao in favour of Gangaramsa Lad for Rs. 30, Gangaramsa instituted suit on 14th December 1921 against Deorao after the death of Bhagwan, alleging that the original was stolen away. Gangaramsa had also impleaded his own sons Yadeosa, Madhosa and Kesheosa as co defendants in the above Suit No. 1164 of 1921. The defence of Deorao was that the creditor's son Yadeosa made a demand for the debt and offered to return the bond as satisfied if he was paid 10 *pailis* of *jewar* of the Mehkar standard, that accordingly he delivered the *jewar* and got back the bond. This, defence, however, failed and the claim was decreed in that suit, against Deorao for Rs. 40-12-0 plus Rs. 10 as cost. Gangaramsa discharged the other defendants from that suit and got a decree against Deorao alone. Deorao afterwards on 7th March 1923 satisfied the decree by payment to Gangaramsa through his Pleader Ex. P-5. Before such payment was made Deorao filed present suit on 23rd February 1923 for the recovery of the value of the *jewar* Rs. 35 and for cost of Suit No. 1164 of 1921 decreed against him and for interest on both these sums,

total Rs. 55, against Yadeosa to whom he had alleged the *jewar* was delivered and from whom he had obtained back the bond as satisfied. In the present case the defendant Yadeosa made no detailed defence but denied the allegations in the plaint and thus denied the plaintiff's claim also. This point blank denial was rather peculiar. The plaintiff examined four witnesses including himself and Gangaramsa and proved that he had delivered four *pailis* of *jewar* to Yadeosa and in return for the same got the bond dated 14th December 1918 Ex. P-6. He also proved that inspite of this payment Gangaramsa got a decree and realised the same from him. The Small Cause Court Judge found all these points in favour of the present plaintiff but on the question as to whether plaintiff could claim the *jewar* and costs of the Suit No. 1164 of 1921 from Yadeosa, he held that the payment of the *jewar* was made inspite of notice to the plaintiff's father asking him not to give the money to any of his sons. The Small Cause Court Judge thought apparently that the payment was a voluntary payment and could not be recovered. The claim has been dismissed and the plaintiff has consequently come up in revision to this Court.

I think this petition of revision must succeed. There was no plea on behalf of the defendant that the payment to him was voluntary and could not, therefore, be recovered back from him. He had simply denied the allegations in the plaint which only meant that he had not received the *jewar* and was, therefore, not liable for the claim. He never set up any alternative case, that assuming the delivery was made to him it was not recoverable from him for certain reasons. The evidence of Gangaramsa that he had given notice to Deorao's father asking him not to give the money to any of his sons was, therefore, outside the scope of his pleadings and, therefore, inadmissible. A party cannot succeed upon evidence which is not relevant to his pleas. The apparent injustice which the plaintiff has suffered by being required to pay the same debt to two persons has, it appears, not attracted the attention of the Judge. It is impossible under these circumstances to uphold his decision. The plaintiff is, in my opinion, clearly entitled to recover back the value of the *jewar* delivered by him to the defendant. As regards his claim for interest I do not think he can succeed in holding the defendant liable for the same, because I do

not find that he served any written notice of demand on defendant intimating that he would charge interest. As regards his claim for Rs. 10 which he paid as costs of the former suit to Gangaramsa, I do not see any reason why he should not be held entitled to claim the same. If Yadeosa had given credit to the plaintiff and admitted the fact of the delivery, to his father, the previous litigation would in all probabilities have been saved and the costs avoided. The defendant is, therefore, liable for making good that amount also. The plaintiff's claim for Rs. 45 plus proportionate costs will have to be decreed and the rest of the claim dismissed. Since the filing of this petition of revision Deorao died and his widow has been substituted in his place. As she has not yet obtained the succession certificate for this debt due to her husband from the defendant, I cannot at once pass a decree in her favour and as the obtaining of the certificate may involve some delay, I think it more expedient to remand the case to the lower Court for passing a decree as soon as the succession certificate will be produced before it by the original plaintiff's widow. Costs of this application will be paid by the non-applicant who will bear his own.

K. S. D.

Case remanded.

CALCUTTA HIGH COURT.ORIGINAL CIVIL SUITS NOS. 1100 OF
1924 AND 621 OF 1925.

April 23, 1925.

Present :—Mr. Justice Page.

WALTER MITCHELL—PLAINTIFF

versus

A. K. TENNENT—DEPENDENT.

Evidence Act (I of 1872), s. 92, proviso (3), scope of—
Negotiable Instruments Act (XXVI of 1881), s. 6—Post-
dated cheque, whether can be sued upon as cheque—
Stamp, necessary—Oral agreement that cheque is not to
be presented till after the happening of a certain con-
tingency, whether can be proved—Contract Act (IX of
1872), ss. 23, 30—Obligation connected with betting—
Public policy.

Neither in India nor in England has the Legislature gone so far as to enact in express terms that betting transactions are illegal, but both in India and in England the Legislature regards it as undesirable in the public interest that any assistance should be afforded by Courts of Law to enforce obligations which

have been created in co-
ing transactions. [p. 60

A post-dated cheque payable otherwise than the meaning of s. 6 of and may be sued upon [p. 61, col. 2.]

A post-dated cheque although it bears a stamp in respect of a cheque payable in respect of [p. 61, col. 1.]

Oral evidence to contradict or vary or alter the terms of a negotiable instrument, the execution of which and the consideration for which are admitted, cannot be adduced having regard to the provisions of s. 92 of the Evidence Act. [p. 61, col. 2.]

The provisions of proviso (3) to s. 92 of the Evidence Act are inapplicable in a case in which an obligation under the written contract has been attached. If the effect of the alleged contemporaneous oral agreement is merely to suspend the performance of the obligation contained in the written contract, evidence of such oral agreement cannot be admitted. On the other hand, it is permissible to adduce evidence of a contemporaneous oral agreement under which the parties to the written contract agree that until the happening of a certain event no obligation whatever under the written agreement should attach, or, in other words that until the condition precedent has been fulfilled, the written agreement should be and remain inoperative and of no effect. [*ibid.*]

Defendant gave a post-dated cheque to the plaintiff on the understanding that the cheque was not to be presented for payment until and unless a certain dispute between the parties had been decided in a certain manner. Plaintiff brought a suit to recover the amount of the cheque from the defendant without taking steps to have the dispute decided :

Held, (1) that the effect of the agreement between the parties was not to contradict or to vary the terms of the cheque but to create a condition precedent to the attachment of any obligation under the cheque which would remain inoperative until after the adjudication of the dispute had taken place ; [p. 63, col. 2.]

(2) that the agreement, therefore, fell within the purview of proviso (3) to s. 92 of the Evidence Act and could be proved ; [*ibid.*]

(3) that consequently the plaintiff's suit must be dismissed as premature. [*ibid.*]

Case-law referred to.

Messrs. Pugh and Ameer Ali, for the Plaintiff.

Messrs. Langford James and Surita, for the Defendant.

JUDGMENT.—By consent the evidence which has been adduced before me is to be treated as evidence in both suits subject to the extent to which the evidence or any part thereof may be relevant to particular issues in either of the two suits.

The matters in controversy arise out of a dispute relating to an alleged order given by Tennent to Mitchell to back a horse called "Better Hope" at the Barrackpore Races on the 2nd April 1923. I take Colonel Tennent's suit first,

action with betting or wagering. [p. 61.]
which is not expressed to be demand is a cheque within Negotiable Instruments Act after the due date. [p. 61, col. 2.]

admissible in evidence representing duty payable not the *ad valorem* duty Bill of Exchange. [p. 61, col. 2.]

The claim in this sum of Rs. 9,000 is to recover the balance of a sum which it is all the balance of a sum which it is all was received by Mitchell as the pro of a bet made by Mitchell on behalf of agent, the residue Rs. 11,000 having paid on the 4th April, 1923 by Mitchell to Tennent. There is an alternative claim to recover Rs. 20,000 under an alleged agreement set out in the plaint.

Now, in my opinion, the first claim in this suit is wholly misconceived. Neither in this country nor in England has the Legislature gone so far as to enact in express terms that betting transactions are illegal, but it is clear that both in India and in England the Legislature regards it as undesirable in the public interest that any assistance should be afforded by Courts of Law to enforce obligations which have been created in connection with betting or wagering transactions. In India it has expressly been enacted that "agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made" (Contract Act, s. 30). Similar provisions obtain in England, but up till 1892 it was not deemed necessary on grounds of public policy in England to include within the ambit of the legislation relating to betting and wagering transactions in which a principal had instructed an agent to back a horse for him. Accordingly, it was held by a majority of the Court of Appeal in 1881, confirming the decision of Mr. Justice Hawkins, that where a principal had instructed an agent to make a bet for the principal, and the bet had been lost, although the agent who had in fact made the bet was not liable to a suit to recover the sum which he had staked, nevertheless, if the agent paid the bet which he had lost, he was entitled to recover from his principal the sum which he had paid on his behalf. Brett, M. R., however, in a dissenting judgment, observed that "the plaintiff's business, although it may not be illegal, is directly objected to by the law, and the contracts made by him in his business cannot be enforced: it is a business of which the law ought not to take notice, and, therefore, the inconvenience and the loss, which the plaintiff may suffer in his objectionable business, form no ground for an action for revoking

an authority which the principal ought not to have given": *Read v. Anderson* (1). Similarly in *Bridger v. Savage* (2), the Court of Appeal decided that where a principal had instructed an agent to make a bet for him, and the agent had done so and had received the proceeds of the bet, the principal was entitled to recover from the agent the sum which he had received on the principal's behalf. Now, in 1892 an Act was passed by which the Legislature enacted that in the circumstances that I have set out the agent would not be entitled to recover from the principal the moneys which he had paid to the bookmaker in respect of the bet which was lost. The Legislature must, I think, have been moved to pass the Gaming Act of 1892 because it was regarded that public opinion had become more enlightened, and that the exigencies of public policy demanded that further restrictions should be placed upon the efficacy of wagering transactions. Now, although legislation has not been passed to overrule the converse proposition of law laid down in *Bridgers v. Savage* (2), the principle which underlies the legislation of 1892 must apply, in my opinion, as well to the one set of circumstances as to the other. If it is regarded as contrary to the public interest that the agent who has effected a bet, and has paid money to the bookmaker on behalf of his principal, should be entitled to re-imbursement from the principal. I fail to see why it is not equally against public policy to permit the principal where his agent has received the proceeds of a successful bet to recover from the agent the sum which he has received. If and when it becomes necessary to determine that question, it must not be taken that I should hold without further argument that in this country a principal is entitled to recover the proceeds of a bet which has been received on his behalf by his agent. It seems to me that to permit him to do so would be to act in opposition to the dictates of public policy relating to betting transactions. It is unnecessary however, finally to determine that question in this case, because no evidence has been adduced to prove that Mitchell backed "Better Hope" on behalf of Tennent, or otherwise, or at all, or that he received the pro-

(1) (1884) 13 Q. B. D. 779 at p. 782; 53 L. J. Q. B. 532; 51 L. T. 55; 32 W. R. 950; 49 J. P. 4.

(2) (1885) 15 Q. B. D. 363; 54 L. J. Q. B. 464; 53 L. T. 129; 33 W. R. 891; 49 J. P. 725.

ceeds of the bet see also *Cohen v. Kittell* (3), *Cheshire and Co. v. Vaughan Bros. and Co.* (4) and *Maskell v. Hill* (5).

With respect to the alternative claim, if the plaintiff proves the agreement which he has alleged, his cause of action (if any) has not yet arisen. For these reasons, in my opinion, the suit by Tennent against Mitchell is misconceived, and must be dismissed with costs.

As regards the suit brought by Mitchell against Tennent different matters arise for consideration. The suit is brought to recover the amount due under four cheques drawn by Tennent in favour of Mitchell amounting in the aggregate to Rs. 11,000. The first cheque bears date 1st October 1921. It is drawn in favour of Mitchell by Tennent for Rs. 2,500; there are two similar cheques, dated 1st November, and 1st December, and a fourth cheque dated 1st January, for Rs. 3,500. The execution of these cheques is admitted, and the payment of Rs. 11,000 as the consideration for executing the same is also admitted. In the alternative, Mitchell claims the like sum as being money lent and re-payable upon demand, such demand having been made before the suit was filed.

Now, the first defence which is raised is that the cheques in suit are not cheques at all because, although they purport to have been executed on the 1st October, 1st November, 1st December 1923, and 1st January 1924, respectively, in truth and in fact all of them were drawn by Tennent and delivered to Mitchell on the 4th April 1923. In my opinion, there is no substance in this contention. A cheque is defined in the Negotiable Instruments Act (XXVI of 1881, s. 6) as "a Bill of Exchange drawn on a specified banker and not expressed to be payable otherwise than on demand." In India a post-dated cheque is admissible in evidence although it bears a stamp representing duty payable in respect of a cheque, and not the *ad valorem* duty payable in respect of a Bill of Exchange: *Ramen Chetty v. Mahomed Ghose* (6), *Motilal Shival v. Jagmohandas Vundravandas* (7),

The cheques in suit are "not expressed to be payable otherwise than on demand" and, in my opinion, such post-dated cheques are cheques, after the due dates of which cheques: *Royal Bank of Scotland v. Tottenham* (8).

Now, since these cheques are negotiable instruments, the execution of which and the consideration for which are admitted, it is not permissible, pursuant to the provisions of s. 92 of the Indian Evidence Act, to adduce oral evidence to contradict or vary or alter the terms thereof. But under s. 92, proviso (3), it is provided that "the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved." Now, the true construction, in my opinion, to be placed upon that proviso is that the provisions thereof are inapplicable in a case in which any obligation under the written contract has attached and that if the effect of the alleged contemporaneous oral agreement is merely to suspend the performance of the obligations contained in the written contract, evidence of such oral agreement cannot be admitted. On the other hand, it is permissible to adduce evidence of a contemporaneous oral agreement under which the parties to the written contract agreed that until the happening of a certain event no obligation whatever under the written agreement should attach, or, in other words, that until the condition precedent has been fulfilled, the written agreement should be and remain inoperative and of no effect: *Jugtanund Misser v. Nerghan Singh* (9), *Cohen v. Bank of Bengal* (10), *Ramjibun Serougy v. Oghore Nath Chatterjee* (11) and *Vishun Ramchandra Joshi v. Ganesh Krishna Sathe* (12).

Now, the question of fact which I have to determine in this suit is whether Tennent has proved to my satisfaction a separate agreement which amounts to a condition precedent within the meaning of proviso (3) of s. 92 of the Evidence Act. The material facts are as follows: A dispute arose on

(3) (1889) 22 Q.B.D. 680; 58 L. J. Q. B. 241; 60 L. T. 932; 37 W. R. 400; 53 J. P. 469.

(4) (1920) 3 K. B. 240; 89 L. J. K. B. 1168; 123 L. T. 487; 84 J. P. 233; 25 Com. Cas. 242.

(5) (1921) 3 K. B. 157; 90 L. J. K. B. 1332; 125 L. T. 827; 65 S. J. 714; 37 T. L. R. 841.

(6) 16 C. 432; 8 Ind. Dec. (N. S.) 285.

(7) 6 Bom. L. R. 699.

(8) (1894) 2 Q. B. 715; 64 L. J. Q. B. 99; 9 R. 569; 71 L. T. 168; 43 W. R. 22.

(9) 6 C. 433; 7 C. L. R. 347; 3 Ind. Dec. (N. S.) 282.

(10) 2 A. 598; 5 Ind. Jur. 151; 1 Ind. Dec. (N. S.) 957.

(11) 25 C. 401; 2 C. W. N. 188; 13 Ind. Dec. (N. S.) 266.

(12) 63 Ind. Cas. 673; 45 B. 1155; 23 Bom. L. R. 488.

the 2nd April 1923 during the course of the racing at Barrackpore to whether Tennent had instructed Mitchell to back a horse which ran in one of the races, viz., "Better Hope", Rs. 5,000 each way, that is, for a win and for a place. Tennent consistently has maintained that such an order was given to Mitchell. On the other hand, Mitchell has protested with equal vigour that no such order was given to him. "Better Hope" won the race. I do not propose to determine that issue in this suit for the following reasons: after the race was over Tennent and Mitchell discussed the disputed order, but could arrive at no satisfactory conclusion as to what should be done for the purpose of settling the matter. On the morning of the 4th April, however, Mitchell and Tennent went together to the Royal Calcutta Turf Club, and saw Captain Howard, the Secretary. Captain Howard refused officially to interfere in the matter, but stated that each of the parties had better put up a case which he would lay before the Stewards of the Turf Club. At that time both Mitchell and Tennent had expressed their willingness to have the question as to whether this order had been given, and the indebtedness (if any) of Mitchell thereunder, adjudicated upon by some impartial person or persons. After leaving the Turf Club the parties repaired to Spence's Hotel, and either at Spence's Hotel, as Tennent alleges, or at Tennent's place of business, as Mitchell asserts, an agreement was finally arrived at between the parties. Mitchell stated that the final arrangement which was reached at Tennent's place of business was to the following effect; there was a balance of Rs. 1,500 in respect of racing commissions executed by him for Tennent, which was due and owing by Tennent. On the other hand there was Tennent's claim for Rs. 25,000 in respect of the alleged order to Mitchell to back "Better Hope". Mitchell stated that at that time he thought that Tennent was a man of substance and in a good position, and that he could assist Mitchell by supporting Mitchell's application to obtain a license as a bookmaker from the Turf Club, and that some four or five weeks previously he had promised to grant a loan to Tennent to help him to tide over his immediate financial difficulties if Tennent failed to make money by backing horses at the Barrackpore Meeting. He further stated that finally it was arranged between the parties that if Tennent gave up his

disputed claim to Rs. 25,000 Mitchell would forego the debt of Rs. 1,500 which admittedly Tennent owed to him. He further stated that as Tennent was agreeable that this course should be taken the parties agreed that Mitchell should lend Tennent Rs. 11,000 upon the security and in accordance with the terms of the four cheques in suit. I am unable to accept Mitchell's story as regards this alleged arrangement. It seems to me that such a story is entirely inconsistent with two admitted facts: (1) that on that very day Tennent wrote a letter addressed to the SS. "Naldera" at Bombay to Mitchell, who in fact travelled by that vessel to Australia, the terms of which are inconsistent with the arrangement which Mitchell alleges had been arrived at; (2) on the 11th May 1923 Mitchell in Sidney received from the Turf Club a letter enclosing Tennent's application for the adjudication of the dispute with reference to this alleged order, and calling upon Mitchell to state what he had to say in respect thereof. To that letter Mitchell sent no reply. If the matter had finally been settled in the sense which Mitchell stated in the witness-box, to my mind the natural and reasonable course for Mitchell to take would have been to have written to the Stewards of the Turf Club informing them that there was nothing to adjudicate upon inasmuch as the matter had been amicably and finally settled in the sense which he stated in the witness-box. Nowhere in any document at any time has Mitchell set out the terms of this alleged agreement, and, in my opinion, no such agreement was ever arrived at. On the other hand, Tennent gave his version of the agreement which was arrived at on the 4th April at Spence's Hotel, and in considering which of the two stories ought to be accepted, it must be borne in mind that until the written statement was filed in Mitchell's suit Tennent had not put into writing the terms of the agreement to which he deposed in the witness-box, and further that both in the letter to Mitchell to which I have referred, and in his application to the Turf Club, Tennent had referred to a loan from Mitchell. According to Tennent after the interview which admittedly the parties had with Captain Howard in the morning of the 4th April Tennent was fortified in the view he held that any reasonable Tribunal would find in his favour if an enquiry were to

be held in respect of the disputed order. On the other hand, there is no doubt that Mitchell was extremely dissatisfied with the result of the interview with Captain Howard. Tennent stated that at Spence's Hotel both he and Mitchell maintained that his own story was the correct one. What was to happen? How was the dispute to be settled? Now, racing men are accustomed, and rightly accustomed, to have their debts of honour settled promptly; *ex concessis* Mitchell was leaving India that very day, and it was obviously in harmony with the environment in which they as racing men spend so much of their time that the matter should forthwith be settled. It was important for Tennent, because it was most undesirable, as he was so closely connected with racing circles, that a dispute of this nature should remain outstanding. He was also anxious that the matter should immediately be settled, because the whole of the liability in respect of this bet had not been undertaken by himself, and he had to meet his obligations to his friends. It was also extremely desirable in the interest of Mitchell that the matter should immediately be adjusted, for Mitchell had been a bookmaker, and was anxious to be reinstated, and to obtain a license to "stand up" at the races in Calcutta and Barrackpore. He was also extremely anxious to obtain the good offices of Tennent in order to enable him to obtain a license to carry on business as a bookmaker. Now, in these circumstances, it was only natural that some arrangement should have been arrived at. Tennent's version of the arrangement which was arrived at was to this effect. Mitchell stated that he must leave Calcutta that every afternoon, and that he was going to Australia, but that he would be back in Calcutta in September. Mitchell urged that under the circumstances the matter could not be adjudicated upon until he came back, and suggested that the best way to get over the immediate difficulty was that he should let Tennent have Rs. 11,000 (which was about half of the sum that Tennent claimed), and that when he came back in September the dispute could immediately be submitted to the arbitrament of some one or more impartial persons; and that if it was decided that no order had been given, and that Mitchell was not liable to pay Rs. 20,000 or any sum to Tennent, after the adjudication

had taken place. Tennent should re-pay the Rs. 11,000 which Mitchell had handed to him. On the other hand, if the adjudication resulted in a manner favourable to Tennent, an order was that Mitchell was bound to pay Tennent, then it was suggested that Rs. 11,000 should be retained by Tennent, and that Mitchell should pay to Tennent any further sum which might have been awarded to him. Tennent agreed to this arrangement, and suggested that if the money was given to him he should give a receipt for it. Mitchell, on the other hand, stated that he would not be content with a receipt, but would like to have something tangible as security, such as cheques; Tennent after some demur agreed, and the first cheque was dated 1st October and the other cheques on subsequent dates because Mitchell had assured Tennent that he would return in September and the matter would be decided between them before the 1st October.

Now, in my opinion, that is the substance of the agreement which was concluded between the parties, and the effect of that agreement was not to contradict or to vary the terms of the four cheques, but to create a condition precedent to the attachment of any obligation under the four cheques which would remain inoperative until after the adjudication had taken place. In my opinion, such an agreement comes within the terms of proviso (3) of s. 92 of the Indian Evidence Act. Now, what is the effect of finding, as I do, that an agreement was effected between the parties in the sense that I have just indicated? It is this, that at the date when Mitchell filed his suit the condition precedent to any obligation under the agreement attaching had not been fulfilled. The same result would follow if the claim were to be founded upon the consideration for the bills, or, in other words, if the suit was for the re-payment of money lent. In either case, on the date when he filed the suit Mitchell had no present cause of action. It follows, therefore, that Mitchell's suit is premature and must be dismissed with costs. The parties having agreed that the Court should allocate the liability to pay costs as it deems fit, the costs must be allocated in this manner: Mitchell must pay two-thirds and Tennent one-third thereof, having regard to the fact that Mitchell has lost on what I think is the main issue in this case, viz., as to who

ther there was an agreement within proviso (3) of s. 92 of the Indian Evidence Act.

Z. K.

Suit dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 995 of 1918.

February 11, 1925.

Present:—Mr. Rupchand Bilaram, A. J. C.

FIRM OF CHOTUMAL-BULCHAND—

PLAINTIFFS

versus

FIRM OF LILARAM-LAKHMICHAND—

DEFENDANTS.

Civil Procedure Code (Act V of 1908), O. XXVI, rr. 2, 7, 8—Evidence recorded on commission—Party other than one at whose instance evidence taken, whether can exhibit it.

Where the evidence of a witness is taken on commission at the instance of a party who refuses to exhibit it, it is competent for any other party to do so, if it so likes.

Kusum Kumari Roy v. Satya Ranjan Das, 30 C. 993; 7 C. W. N. 784 and *Hemanta Kumari v. Banku Behari Sikdar*, 9 C. W. N. 794, distinguished.

Mr. G. A. Kikla, for the Plaintiffs.

Mr. Kodumal Lekhraj, for the Defendants.

ORDER.—In this suit the defendants applied for examination on commission of the witness Radhakishen son of Seth Gerimal. He has been examined on commission, but the defendants are not prepared to have his evidence exhibited. The plaintiffs, on the other hand, have asked permission to do so. Mr. Kodumal on behalf of the defendants objects to this evidence going in on a two-fold ground. Firstly, he says that as the commission had issued at his instance, he alone has the right to have it exhibited, and secondly, that two other Suits Nos. 1285 of 1920 and 535 of 1922 which are connected with this suit to a certain extent, are suits to which this witness is a party. There is an order of this Court that the evidence in the present suit is to be treated as evidence in those suits. As he is a party to those suits, it would be virtually admitting his evidence in those suits without his appearing in Court and being examined in the presence of the Court so as to enable the Court to form an opinion as to how far he is speaking the truth. Mr. Kodumal also contends that this witness is a hostile witness, that he has

avoided answering certain questions, has failed to produce his account-books and that he has purposely kept away from Karachi in order to avoid his being examined in Court.

With regard to the first objection, I do not think it can prevail. It is open to the plaintiffs to say that as the defendants had applied for examining this witness on commission, they refrained from doing so, and that if the defendants had not so applied, they would themselves in their turn have asked for a commission. Under O. XXVI, r. 2, C. P. C., a commission may be issued for the examination of a witness by the Court either *suo moto* or on being moved by any party. Under O. XXVI, r. 7, C. P. C., when the commission evidence is certified to the Court, it forms part of the record of the suit. Rule 8 contains no limitation requiring such evidence to be read as evidence only at the instance of the party who originally applied for the issue of commission. All that r. 8 contemplates is that it shall not be read without the consent of the party against whom it is offered. It may, therefore, be read at the instance of any party to the suit. Mr. Kodumal has drawn my attention to the cases of *Kusum Kumari Roy v. Satya Ranjan Das* (1) and *Hemanta Kumari v. Banku Behari Sikdar* (2) to show that according to the practice of the High Court of Calcutta on the Original Side, the party who has applied for commission to issue, can alone tender it in evidence. But whatever the practice of the Calcutta High Court on the Original Side may be, it is not warranted by the provisions of O. XXVI, r. 8, C. P. C., by which this Court is governed. There is also a note in Mulla's Commentaries on r. 8 to the effect that, a practice quite contrary to that of the High Court of Calcutta on its Original Side, prevails in the *moffusil*. On this ground I am not prepared to exclude the evidence of Radhakishendas from being exhibited in this case at the instance of the plaintiffs. It will, however, be open to the defendant to show that Radhakishen is a hostile witness that he is interested in the plaintiffs, and that in view of the vague nature of his evidence, or on account of his having withheld certain books no weight should be attached to it.

With regard to the other objection as to his evidence being treated as evidence in Suits Nos. 1285 of 1920 and 535 of 1922, I do

(1) 30 C. 999; 7 C. W. N. 784;

(2) 9 C. W. N. 794.

not propose to pass any orders now. I think subject to what the other side may say in those suits, it would be open to Mr. Kodumal to urge that so far as those suits are concerned, Radhakishen being one of the parties, should go into the witness-box and that unless he does so, the evidence taken on commission and exhibited in this case should not be treated as evidence in those cases. I, therefore, allow the evidence of Radhakishen to be exhibited at present in this case only.

Z. K.

Order accordingly.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 94 OF 1922.

May 29, 1925.

Present:—Mr. Justice Das and

Mr. Justice Adami.

KANHAIYA LAL SAHU—PLAINTIFF

—APPELLANT

versus

Musammatt SUGA KUER—DEFENDANT

—RESPONDENT.

Hindu Law—Mithila School—Adoption, kritima form of—Karta putra, rights of—Natural born son, whether excludes karta putra from inheritance.

Under the *karta putra* form of adoption the adopted son does not lose his status in his natural family, although he acquires a status as a son of his adoptive father. No ceremonies or sacrifices are necessary to the validity of this particular form of adoption. All that is necessary is the consent of the adoptee which involves the adoptee being an adult. Although such an adoptee does not lose his rights of inheritance in his natural family and takes the inheritance of his adoptive father, he does not succeed to the property of his adoptive father's father or other collateral relations nor of the wife of his adoptive father or her relations. In the case of such an adoption there is no contract that the adopted son would in all events succeed to the property of his adoptive father. [p. 69, col. 1; p. 70, col. 2.]

Under the *Mithila School* of Hindu Law a natural born son is entitled to exclude every other kind of son, including a *karta putra*, from sharing with him in the estate of his father. [p. 71, col. 1.]

Appeal from a decision of the District Judge, Darbhanga, dated the 3rd January 1922.

Messrs. K. P. Jayaswal, S. M. Gupta and Md. Hasan Jan, for the Appellant.

Messrs. S. M. Mullick and L. K. Jha, for the Respondent.

JUDGMENT.

Das, J.—Although I differ from the learned District Judge in regard to both

the questions decided by him, I think that the decree pronounced by him is right and that it ought to be affirmed.

The plaintiff claims to have been adopted by Khub Lal as his *karta putra* on the 26th January 1915. Khub Lal died on the 28th December 1915 and a posthumous son Hanuman Prashad was born to him who, however, died shortly afterwards. The plaintiff contends that notwithstanding the birth of a posthumous son, he is entitled to succeed to the estate of Khub Lal to the exclusion of the defendant, who is the widow of Khub Lal and who is in possession of the estate, not as the heiress of Khub Lal, but as the heiress of her deceased son Hanuman Prashad. Two questions were raised in the litigation; first, the question of fact, namely, whether the plaintiff was adopted by Khub Lal as his *karta putra*; and, secondly the question of law, namely, whether, assuming that he was so adopted, he is entitled to succeed to the properties in the events which have happened. The learned District Judge held that the adoption was not proved and decided the question of fact in favour of the defendant. In regard to the other question raised before him, he thought that the plaintiff would have been entitled to 1/4th share in the estate of Khub Lal had he succeeded in proving his adoption. In my opinion, the plaintiff has established the *factum* of his adoption, but he is not entitled to succeed to the estate of Khub Lal having regard to the fact that a son was born to Khub Lal subsequent to the plaintiff's adoption.

I will first deal with the question of fact. Khub Lal had three daughters, Tapeswar Kuer, Dhano Kuer and Muneswar Kuer of whom Dhano Kuer and Muneswar Kuer were alive at the date of the alleged adoption. The plaintiff is the son of Tapeswar Kuer who died many years ago. Khub Lal had also a son who died in his infancy. It is the common case that Kanhaiya Lal the plaintiff was brought up as a son by Khub Lal and was the object of his love and affection. He certainly looked upon him as his son and referred to him as his son to all his friends. The plaintiff lost both his father and mother in his infancy, and, as I have said, was brought up by Khub Lal and was married at his expense. The learned District Judge accepts the case of the plaintiff as inherently probable. He also thinks that "the story told has been

told in a consistent way and there is not much contradiction in the same". He says that he "might have been disposed to accept their evidence" but for certain circumstances of the case to which he refers. I will presently refer to these circumstances myself; it is sufficient for me to point out at the present moment that in the view of the learned District Judge the story told by the plaintiff is inherently probable and is supported by evidence which is consistent.

Now what is the story? The story is that the plaintiff was married in *Baisakh* 1318 at the expense of Khub Lal and that his *gowna* was fixed to take place on *Fagoon Badi* 2nd, 1322. In connection with that ceremony many relatives came but the ceremony had to be postponed on account of a death in the family of his father-in-law. Khub Lal took that opportunity to adopt the plaintiff as his *karta putra* on the 25th *Magh* 1322 corresponding with the 26th January 1915. The evidence of the plaintiff on this point is as follows: "As Khub Lal did not get any male issue, who lived for any time, he made me *karta putra* on 25th *Magh*, 1322. Khub Lal was then about 70 years of age and he was suffering much from asthma. It was at Madhubani in the *zanani* portion of the house that Khub Lal made me *karta putra*. Khub Lal told me, I make you my *karta putra* from to-day. You will be *malik* of my estate from this time and you will have to perform the *sradhs* of myself and my wife. I said I agreed to all these. I was made *karta putra* with the consent of the defendant." This story is supported by the evidence of two very important members of the family—Dhano Kuer daughter of Khub Lal and Ugam Kuer a daughter of Khudu Lal who was a brother of Khub Lal. I do not propose to discuss in detail the evidence of these two ladies; it is sufficient to say that they entirely support the case of the plaintiff and there is no apparent reason why they should be disbelieved. The learned District Judge, however, disbelieves them on a ground which may be stated in his own words:—"It is said that plaintiff's *gowna* was settled to take place on the 2nd *Fagoon* (*Fasli*) of 1322 and in view of the same Dhano and Ugam (two aunts witnesses for the plaintiff) were brought to Madhubani. A reference to the almanac shows that 2nd *Fagoon* 1322 fell in the solar month of *Magh* and Tuesday. Neither the

day nor the month is auspicious for *gowna*. The *nachatra* of the day is also not one for *gowna*. No *brahmin* or *hajam* appears to have been sent to fix the date. Again plaintiff's marriage took place in *Baisakh* 1318 and *gowna* cannot take place in even years of marriage. All these show that the story about *gowna* is not probably true. As a matter of fact, the *gowna* did not take place at that time. It is said that the date had to be postponed owing to the death of some agnate of the father-in-law. But none of the witnesses could say who that agnate was. Plaintiff's father-in-law did not give evidence though he was present in Court. I am not, therefore, prepared to hold that plaintiff's *gowna* was at first settled to take place at that time." Now there is no evidence in the record that 2nd *Fagoon* (*Fasli*) 1322 was an inauspicious day and this case was certainly not put either to the plaintiff or to any of his witnesses. In regard to the other matter to which the learned District Judge refers it did not seem to be very material in the case as to who was the particular person related to the plaintiff's father-in-law who died and owing to whose death the ceremony of *gowna* had to be postponed. The point is much too trivial to be referred to in the judgment. In my opinion the learned District Judge has not given good reasons for disbelieving the evidence of these two ladies. Then there is the evidence of various independent persons unconnected with the parties who live in the locality and who must be presumed to know as to what actually happened.

The plaintiff's case has received strong corroboration from the terms of a document which was approved of by Khub Lal but which was in fact not executed by him. This document is Ex. I printed at page 18, Part III. It is a draft of a Will by Khub Lal in which he refers to the plaintiff as his *karta putra*. The plaintiff's case in regard to this document is as follows:—Khub Lal was anxious before his death to make a Will in favour of the plaintiff and had a draft of a Will drawn up. He sent the draft to Babu Mohendra Narain a Senior Pleader of Madhubani. Babu Mohendra Narain and another Vakil Rai Sahib Susil Kumar Roy were then sent for by Khub Lal in connection with the Will which he proposed to execute. Mohendra Narain took a leading part in the conversation that

ensued at the interview and read out the draft Ex. I to Khub Lal. Khub Lal thereupon asked Mohendra Narain "to draw a Will on the lines of the draft Ex. I". Mohendra Narain thereupon drafted a Will which contained all the terms of Ex. I with certain additions. He made over the draft to Khub Lal and came back. It appears, however, that after his death a Will alleged to have been the last Will of Khub Lal was registered which is not the same as Ex. I and which certainly does not refer to the plaintiff as his *karta putra*. This Will is Ex. A printed at page 20, Part III. The validity of the Will, however, has not yet been established for the respondent has not yet applied for Probate of that Will.

The plaintiff relies upon the reference to him as the *karta putra* of Khub Lal in Ex. I. He has called Babu Mohendra Narain as a witness on his behalf and Babu Mohendra Narain proves:

First, that the draft of Ex. I is in the handwriting of Biseswar Lal who was in the service of Khub Lal;

Secondly, that the draft was shown to him about 15 or 20 days before the death of Khub Lal and that he made one or two corrections in it;

Thirdly, Rai Sahib Susil Kumar Roy and he were called by Khub Lal in connection with the draft;

Fourthly, he read the draft to Khub Lal and that Khub Lal did not object to the reference to the plaintiff as his *karta putra*;

Fifthly, "that Khub Lal asked him to draw a Will on the lines of this draft Ex. I," and

Sixthly, he drafted a Will on those lines and made it over to Khub Lal.

Babu Mohendra Narain admits in his evidence that he did not know that the plaintiff was the *karta putra* of Khub Lal and that Khub Lal did not tell him that the plaintiff was his *karta putra*. The learned District Judge thinks that it is a very strange thing that the Pleader had not the curiosity to ask Khub Lal whether the plaintiff was in fact the *karta putra*. He also thinks that the subsequent conduct of the Pleader is somewhat inexplicable. This view of the learned District Judge is based on the fact that after the death of Khub Lal there were several cases in which Hanuman Prasad the posthumous son of Khub Lal was substituted in the place of Khub Lal. The learned District Judge thinks

that if the Pleader knew that the plaintiff was the *karta putra* of Khub Lal it was his clear duty to substitute him in the record of those pending proceedings in the place of Khub Lal. But it is just possible that the Pleader may have taken the view that the plaintiff had no right to assert since there was a natural-born son of Khub Lal in existence. In my opinion no good ground has been shown for disbelieving Babu Mohendra Narain who has given his evidence in a very straightforward manner. But before I finally dispose of this matter, it is necessary to consider the evidence of Rai Sahib Susil Kumar Roy who is examined on behalf of the defendant. His evidence on this point is as follows:—"I remember that Babu Mohendra Narain and I made a draft of a Will for him, that is for Khub Lal. "So far as I remember no previous draft was shown to me or to any one else in my presence. It is not a fact that any previous draft was read out in my presence before he made the draft. To the best of my memory Kanhaiya was not described as a *karta putra* in the draft we prepared." In cross-examination he admits that it was Mohendra Babu who dictated the draft and that Biseswar Lal wrote it. He also admits that before Mohendra Babu began to dictate he and Mohendra Babu had some talk with Khub Lal. He says that Mohendra Babu made no notes before dictating and that so far as he recollected Mohendra Babu dictated *ex-tempore* without the help of any paper. The following question was then put to him:

Q. "If Mohendra Babu said on oath that he was given a paper beforehand and he began to dictate with its help, are you prepared to say that this is not true?"

His answer was as follows:—

"It is very difficult to answer this question as I am giving evidence about 5 or 6 years after; as regards the contents of the draft I am positive as to 2 or 3 things. As to other things I say by guess. I am positive about 2 or 3 things as those struck me most at that time. One of these is about making the son expected the *malik* of whole of the property, the other is that Kanhaiya was given only a sum of money and no property, and the third is his anxiety about providing for his widow."

I will deal with these "2 or 3 things" at once. It is sufficient for me at this stage to point out that the purely negative evidence of Rai Sahib Susil Kumar Roy cannot

be preferred to the positive evidence of Babu Mohendra Narain. It is clear on the evidence of Rai Sahib Susil Kumar Roy that Mohendra Narain took a leading part at the interview. Mohendra Narain gave his evidence by reference to Ex. I. He had Ex. I in his hand while he was giving his evidence and he pointed out the corrections which he made in that document. All that Rai Sahib Susil Kumar Roy says is that it is very difficult for him to answer the direct question put to him in cross-examination as he was giving his evidence five or six years after the incident. I must not be understood as casting the slightest reflection upon the honour and integrity of Rai Sahib Susil Kumar Roy; but, in my opinion, the evidence of Rai Sahib Susil Kumar Roy is without value as he is speaking only from memory and his evidence is of a purely negative character. In regard to the "2 or 3 things" of which he spoke and which apparently helped him to remember that Mohendra Narain did not dictate from any draft, it is sufficient to say that two of these "things" are true both of Ex. I and Ex. A. For instance, he says that one of the things he remembers is about "making the son expected the *malik* of whole of the property." At the date of the alleged Will Khub Lal knew that his wife was expecting to present him with a child and Ex. I provides that "if by the grace of God a son is born, then the said son shall be the *malik* of the estate along with the said *karta putra*." Exhibit A provides that the natural born son should be the proprietor of the entire estate. No doubt Ex. A gives the natural born son the whole of the estate, whereas Ex. I gives him that estate "along with the said *karta putra*; but it is obvious that the provision as to "the son expected" being the *malik* of the property could not help him to remember that there was no draft in the hand of Babu Mohendra Narain when he was dictating the Will to Bisseswar. The other matter to which the Rai Sahib speaks is "his anxiety about providing for his widow." but the same anxiety is also shown in Ex. I. The third "thing" to which the Rai Sahib speaks is that Kanhaiya Lal was given only a sum of money and no property. Now this is true neither of Ex. I nor of Ex. A. In Ex. A Kanhaiya Lal has a vested estate in remainder expectant on the death of the widow. In my opinion there is no reason to prefer the evidence of the Rai Sahib to that of Babu Mohendra Narain. I hold

that it has been proved that Ex. I was brought to Mohendra Narayan by Bisseswar who was a servant of Khub Lal and that Mohendra Narain read this draft to Khub Lal without any protest from Khub Lal. It is obvious that Bisseswar could not have prepared the draft without instructions from Khub Lal and even if those instructions have not been proved in this case, it is sufficient for me to say that Khub Lal accepted the description of the plaintiff as his *karta putra* when the draft was subsequently read out to him. I may further point out that Bisseswar has not been examined to contradict the story told on behalf of the plaintiff.

There is one very important matter which I must not omit to consider in this connection. The defendant produced the account-books of Khub Lal with some of the pages torn. The criticism is that these are the critical pages in which the expenses in connection with the adoption must have been entered. The learned Judge concedes that "this is a circumstance against the defendant." But he declines to draw the only inference possible in the circumstances because, "according to the defendant there were no entries relating to the adoption," and "on the plaintiff's side no witness said that any expenses relating to the adoption were entered in the book". Now one thing is certain; the evidence of the defendant should not have been accepted in the absence of an explanation as to why these critical pages in the account-book were torn. In regard to the other point made by the learned Judge, it is sufficient to say that it was quite impossible for the witnesses examined on behalf of the plaintiff to say definitely whether the expenses were entered in the account-book. Expenses were undoubtedly incurred if there was an adoption in fact, and those expenses, if incurred, that is to say, if there was an adoption, would undoubtedly have been entered in the account-book. In fact, the account book would have constituted the most valuable evidence on the question of adoption, if these pages were not torn from the account-book; and I am of opinion that the learned Judge should have drawn the inference that the defendant deliberately destroyed the most valuable evidence on the question of adoption.

I hold that the plaintiff has established that he was adopted by Khub Lal as his *karta putra*.

The next question is whether in the events which have happened the plaintiff is entitled to succeed to the estate of Khub Lal. The plaintiff's case is, first, that he has the right to succeed to the estate of Khub Lal by virtue of the contract at the time of the adoption; and, secondly, that in any event he is entitled to succeed to a share of that estate. The defendant's case is that the only contract between the parties was as to sonship and that he took no estate by virtue of that sonship although he might have succeeded to one had a son not been born to Khub Lal. It is, in my opinion, a very strong thing to say that a *karta putra* who retains his status in his natural family and loses no right in that family is in a better position than a *dattak putra* who undoubtedly loses his status in his natural family and who is liable to be defeated in his adoptive family by the birth of a natural born son. The modern textbooks refer to the adoption of a *karta putra* as an adoption in the *kritima* form; but it seems to me that this is not quite correct. I do not however, propose to enter upon this question as it is not material to this litigation. It may be that the system as to *karta putra* is an extension of the *kritima* form of adoption; but there is no doubt whatever that the system as we now know it is in *Mithila* is the invention of that very ingenious person, the *Mithila Brahmin* who is so anxious to preserve unsullied the purity of his genealogical table. The difficulty with which the *Mithila brahman* was faced was this: Where an adoption took place the name of the adoptee had to be removed from the genealogical table of his natural family and a question might be raised whether the genealogical table with the correction was an honest document. He, therefore, devised the system—the system of *karta putra*—under which a person on adoption did not lose his status in his natural family, though he acquired a status as the son of his adoptive father. No ceremonies or sacrifices are necessary to the validity of this particular form of adoption. All that is necessary is the consent of the adoptee which involves the adoptee being an adult. As I have said, he does not lose the rights of inheritance in his natural family, and takes the inheritance of his adoptive father, but not of his father's father or other collateral relations nor of the wife of his adoptive father or her relations. The following

passage in Colebrooke's Digest (Book V, Ch. IV), s. 10, cited in Sarkar's Adoption, 2nd Edition, page 417) is of interest as stating the position in this particular form of adoption:—"Sons are thus adopted in *Mithila*; the practice of adopting sons given by their parents was there abolished by Sridatta and Pratihasta, although the latter had been himself adopted in that manner. Their motive was, lest, a child already registered in one family, being again registered in another, a confusion of families and names should thence ensue. A son adopted, in the form so briefly noticed in the present section, does not lose his claim to his own family, nor assume the surname of his adoptive father; he merely performs observances, and takes the inheritance." The reason for this particular form of adoption in *Mithila* is also explained by Macnaghten as follows:—(Macnaghten's Hindu Law, Vol. I, 95-100): "But according to the doctrine of *Vachaspati*, whose authority is recognised in *Mithila* a woman cannot, even with the previously obtained sanction of her husband, adopt a son after his death, in the *dattak* form and to this prohibitory rule may be traced the origin of the practice of adopting in the *kritima* form, which is there prevalent. This form requires no ceremony to complete it, and is instantaneously perfected by the offer of the adopting, and the consent of the adopted party. It is natural for every man to expect an heir, so long as he has life and health and hence it is usual for persons, when attacked by illness, and not before, to give authority to their wives to adopt. But in *Mithila* where this authority would be unavailable, the adoption is performed by the husband himself; and recourse is naturally had to that form of adoption which is most easy of performance, and, therefore, less likely to be frustrated by the impending dissolution of the party desirous of adopting." The rights of the adopted son would seem to depend on the contract between him and his adoptive father, and the question is what is that contract?

Mr. Jayaswal strongly contends before us that it is part of the contract that the adoptee should succeed to the estate left by his adoptive father. I have investigated this matter with some care and I find it difficult to accept this proposition. As I have said, a *dattak* son who loses his status in his natural family has no absolute right to the

estate of his adoptive father. He is liable to be defeated by a gift *inter vivos* or by a devise made by his father in favour of another person. He is also liable to be defeated, if not absolutely, certainly to the extent of important shares in the estate by the birth of a natural born son subsequent to the adoption. What reason is there for suggesting that a *karta putra* is in a better position than a *dattak* son? It is not suggested that the contract in regard to this particular form of sonship involves a contract by the father to devise the estate to the adoptee. If that were established, it might be urged that the adoptee might claim specific performance of the agreement against the person in actual possession of the estate agreed to be devised to him. If that were the position of Mr. Jayaswal, the answer would be that the plaintiff was admittedly a minor at the date of the adoption, and whatever the position may be in Hindu Law, a person in a British Court cannot sue for specific performance of an agreement entered into at a time when he was a minor. But if it is not the case of the plaintiff that there was a contract to devise the estate to him, what else can there be in the argument? It surely cannot be suggested that any one can alter the rule of succession laid down by Hindu Law. To succeed in his argument Mr. Jayaswal must establish that it is the rule of Hindu Law that a *karta putra* must succeed to the estate of his adoptive father and that it is not open to his adoptive father to defeat his interest either by a gift *inter vivos* or by a Will to take effect upon his death. For this proposition there is no authority and I am unable to accept it.

Mr. Jayaswal relies upon a decision in *Kullean Singh v. Kirpa Singh* (1). In answer to a question put by the Court in that case the *Pundit* thus described the ceremony of adoption in this particular form: "Let the person (intending to adopt) first consult a *Brahmin*, and, having discovered a propitious moment, let him, in the presence of the *Brahmin*, and of some friends or relatives, place something in the hand of the person to be adopted, and say to him, be thou my adopted son, my goods and effects shall become thy property, the person adopted will reply, I agree to become thy son."

Mr. Jayaswal relies upon the fact that it is part of the contract that the ad-

optive father says: "my goods and effects shall become thy property" and so they will, unless the adoptive father makes a gift of the goods and effects or gives them away by his Will to take effect on his death. In my opinion the passage upon which Mr. Jayaswal relies does not establish that succession to the estate of the adoptive father is inherent in the status of a *karta putra*.

But apart from any other view it seems to me that this is not a very correct way of describing the ceremony. We have two later cases: *Sutputtee v. Indranund Jha* (2) and *Ooman Dut v. Kunhia Singh* (3). In both these cases the ceremony is thus described:—"The prescribed form for adopting a *kritima* son is as follows: In an auspicious hour let him bathe, and also cause the person whom he wishes to adopt to be bathed; let him present something at his pleasure, and say, 'Be you my son,' and let the son answer 'I am become your son.' Then let him, according to custom, give a suit of clothes to the son. These are the legal conditions of adoption," and then it is said in the case of *Sutputtee v. Indranund Jha* (2) that "the adopted son will inherit the property of his adoptive father, even although the latter leave a widow." This is accepted by Mayne as the ceremony in the *kritima* form of adoption. He says as follows:—"At an auspicious time, the adopter of a son having bathed, addressing the person to be adopted, who has also bathed, and to whom he has given some acceptable chattel, says. 'Be my son.' He replies: 'I am become thy son.' The giving of some chattel to him arises merely from custom. It is not necessary to the adoption. The consent of both parties is the only requisite; and a set form of speech is not essential"—(see s. 206). It seems to me, therefore, that it cannot be urged that the plaintiff takes the estate of Khub Lal by virtue of his original contract with him.

The next question is whether he is entitled to any share in the estate of Khub Lal. This question admits that the natural born son was the proper person to succeed to the estate of Khub Lal; but the question still remains whether the adopted son is to be altogether excluded. Now on this question different *Smriti* writers have laid down different rules; but we are con-

(2) 2 Sel. Rep. 222 at p. 224; 6 Ind. Dec. (o. s.) 527.

(3) 3 Sel. Rep. 192 at pp. 197, 198; 6 Ind. Dec. (o. s.) 820.

(1) 1 Sel. Rep. 11; 6 Ind. Dec. (o. s.) 8

cerned with the rule in the *mithila* School. After quoting the various *Smriti* writers, Bachaspati Misra, who is of paramount authority in *mithila* says as follows: "Manu and other legislators have said that, notwithstanding other kinds of sons, the legitimate son alone receives the whole estate of his father, but they have also declared that the other sons are sharers of the estate. To remove this contradiction it must be understood that, if the legitimate son be virtuous, he shall receive the whole estate without giving a share to the others; but if he be void of good qualities, and others possess them they are entitled to have their respective shares, as has been stated above." In my opinion this is conclusive of the rights of the parties in this litigation. It was contended on behalf of the appellant by Mr. Jayaswal that in order to entitle a legitimate son, by which I understand a natural born son, to succeed, he must show that he is virtuous; but the question does not arise because the natural born son in this case died soon after his birth and it cannot be suggested that he was not virtuous. If this particular form of adoption be the same as *kritima* form of adoption, then this passage in *Vivada Chintamani* (Tagore's Edition, page 287) is conclusive of the rights of the parties. If, on the other hand, this particular form of adoption is not the same as *kritima* form of adoption, as I am inclined to think, the rule laid down by Bachaspati Misra must still apply since he has made it clear that where a natural born son is in existence, he is entitled to exclude every other kind of son from sharing with him in the estate of his father.

In my opinion the suit was rightly dismissed by the learned District Judge and I must dismiss this appeal with costs.

Adami, J.—I agree.

Z. K.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS.

676 AND 753 OF 1923.

March 18, 1925.

Present:—Mr. Justice Chakravarti.
BEJOY CHAND MAHATAB—PLAINTIFF
—APPELLANT
versus

BENI MADHAB CHAUDHURY

AND OTHERS—DEPENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 153—Suit for assessment of rent and recovery of rent, whether suit for rent—Appeal, whether lies.

An appeal should not be held to be barred under the provisions of s. 153 of the Bengal Tenancy Act unless it comes within the express limitation provided in the section. [p. 72, col. 1.]

In a suit for assessment of rent the question of the right to vary the rent is involved. [p. 72, col. 2.]

A suit in which a prayer for assessment of a rent is added to a prayer for recovery of rent is not a suit for rent within the contemplation of s. 153 of the Bengal Tenancy Act, and the section does not, therefore, bar an appeal in such a suit. [*ibid.*]

Appeals against a decree of the Subordinate Judge, Bankura, dated the 2nd November 1922, affirming that of the Munsif, Bishnupur, dated the 31st May 1922.

Dr. Dwarkanath Mitter (with him Babu Saratkumar Mitra), for the Appellant.

Babu Rupendra Kumar Mitter, for the Respondents.

JUDGMENT.

S. A. No. 676 OF 1923.

This is an appeal by the plaintiff and arises out of a suit brought by him for assessment of fair and equitable rent for the lands in suit on the ground stated in s. 30, cl. (b) of the Bengal Tenancy Act, and after assessment of fair and equitable rent for a decree for rent payable for the years 1324 to 1327 B. S. The defence of the defendants was that no relationship of landlord and tenant existed between the parties, and secondly, that the rent ought not to be varied or enhanced.

The Court of first instance raised three issues—first, whether there was any relationship of landlord and tenant between the parties; secondly, what was the *jama*, and whether the rent was liable to be enhanced and if so, what should be the enhanced rate. The third issue was a general issue as to the relief to which the plaintiff was entitled. The Trial Court, upon the evidence, decided the first issue against the plaintiff, and held that no relationship of landlord and tenant was established by the plaintiff. In that view the Court of first instance refrained from deciding the other issues in the case.

There was an appeal by the plaintiff to the Subordinate Judge, which was dismissed on the ground that the learned Munsif who decided the case was vested by the Government with special powers as contemplated by s. 153, cl. (b), and the claim in the suit being under Rs. 50 no appeal lay to him, as there was no question as indicated in s. 153 which would bring the case within the exceptions.

In this appeal, on behalf of the plaintiff, the learned Advocate for the plaintiff-appellant contended that an appeal to the Subordinate Judge was competent, because s. 153 contemplates only cases for rent. The section runs as follows: "An appeal shall not lie from any decree or order passed, whether in the first instance or on appeal, in any suit instituted by a landlord for the recovery of rent where" It is unnecessary to quote the other part of the section for the purpose of the point raised. It was contended that this was not a suit for rent *simpliciter*, but it was a suit where assessment of fair and equitable rent was prayed for and then recovery of rent so assessed was prayed; and that if it was not a suit for rent as contemplated by s. 153, but was a suit which in addition to being a suit for rent, was also a suit for assessment of rent, s. 153, cl. (b) would be no bar. I have had the plaint read out to me and I find that the plaint clearly states in para. 6 the ground on which the assessment of rent is prayed and then there is a prayer for recovery of rent. The question, therefore, is limited to this—Was it a suit for rent as contemplated in s. 153 or was it a suit for assessment of rent and also for rent? It was contended by the learned Vakil for the respondents that, although there was a prayer for assessment of rent, it was a suit for rent, because the plaintiff wanted to recover rent after assessment of fair and equitable rent.

I think an appeal should not be held to be barred unless it comes within the express limitation provided by the Statute. I do not see any reason why the section should be held to apply to the present case, because there may be suits for rent where no assessment of rent is claimed. If the section is limited to the latter class of cases, it seems to me the words of the section "unless in either case the decree or order has decided a question relating to title to land or to some interest in land as between parties having conflicting claims thereto, or a question of

right to enhance or vary the rent of a tenant or a question of the amount annually payable by a tenant" would be appropriately applicable to a suit for rent where the questions as contemplated, are in the words quoted. It may be observed that in a suit for assessment of rent, the question of right to vary the rent is involved in the suit itself. In the case of *Dhanukdhari Lal v. Bibvram Ahir* (1), Mr. Justice Stephen sitting with Mr. Justice Chatterjee held that a suit where a prayer for assessment of rent was added to the prayer for recovery of rent was not a suit for rent within the contemplation of s. 153. The learned Judges say in the course of their judgment that "the suit is, therefore, for assessment of rent independently of the prayer for recovery of rent from defendant No. 1." I think that reasoning is quite applicable to the present case. Here also there was a prayer for assessment of rent, although ultimately there was the prayer for recovery of rent after assessment of rent. In this view it seems to me that the appeal was competent and ought to have been tried by the learned Subordinate Judge on the merits. If the learned Subordinate Judge finds that the defendants are tenants under the plaintiff, it would then be his duty to discuss the other questions which arise in the case.

In this view I think the case ought to go back so that the learned Subordinate Judge may decide the appeal on the merits.

The plaintiff is entitled to the costs of this appeal.

S. A. No. 753 of 1923.

My judgment in Appeal No. 676 of 1923 governs this appeal also.

There are two applications connected with these two appeals. They are not pressed and no orders are necessary on them.

Z. K.

Cases remanded.

(1) 4 Ind. Cas. 745; 10 C. L. J. 629.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No. 83 OF 1923.

July 17, 1925.

Present:—Sir Grimwood Mears, Kt., Chief Justice, and Mr. Justice Mukerji.

KEDAR NATH—AUCTION-PURCHASER—

APPELLANT

versus

Musammatt BISMILLAH BEGAM AND

ANOTHER—OBJECTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII,

rr. 3, 11—Appeal—Death of appellant—Respondent, whether can make application for substitution.

Rule 3 of O. XXII of the C. P. C. read with r. 11 of the Order does not confine the right to make an application to bring on the record the legal representatives of a deceased plaintiff or appellant to such legal representatives alone. Where a defendant or a respondent is interested in bringing on the record the legal representatives of a deceased plaintiff or deceased appellant it is open to him to do so by making an application for that purpose.

Execution first appeal from a decree of the Subordinate Judge, Agra, dated the 9th October 1922.

Mr. M. L. Sandal, for the Appellant.

Messrs. Mahmud-ullah and N. P. Asthana, for the Respondents.

JUDGMENT.—This appeal is very easily disposed of. In execution of decree No. 166 of 1921 passed by a Subordinate Judge of Agra certain properties were sold and were purchased by one Kedar Nath. At the instance of one of the judgment-debtors the sale was set aside and Kedar Nath filed the present appeal. During the pendency of the appeal, on the 14th of November 1923 Musammat Bibbo, who was one of the judgment-debtors made an application to this Court stating that she had purchased the property from Kedar Nath and praying that she might be made an appellant along with Kedar Nath. The application came before one of us and was opposed by Kedar Nath's Counsel. Kedar Nath, through his Counsel, denied the validity of the alleged title of the applicant and stated that he would have no objection if the applicant were made a respondent. It appears from the affidavit filed on behalf of Musammat Bibbo that Kedar Nath had declined to register the sale-deed which, it was alleged, was executed by him in favour of Musammat Bibbo, and the deed was compulsorily registered. Musammat Bibbo did not demand in this Court that the question of title should be decided by remanding an issue to the Court below. She was content to be made a respondent. Her fears were that Kedar Nath would not prosecute the appeal whole-heartedly, and the order allowing Musammat Bibbo to be impleaded as a respondent mentioned that if Kedar Nath did not properly prosecute it, it would be open to Musammat Bibbo to support the appeal. Kedar Nath, however, died pending the appeal and no legal representative of his was brought on the record and the appeal must be regarded as having abated.

On behalf of Musammat Bibbo, Mr. S. P. Sinha contended that she was entitled to prosecute the appeal. It was pointed out to him that his client's position as a transferee was neither admitted nor had been established on any trial of an issue between herself and Kedar Nath. Mr. Sinha argued that it was still open to the Court to send back an issue for the trial of the question of the validity of the transfer. The question could be tried only in the presence of the legal representatives of Kedar Nath. But no such legal representatives are on the record, and it is, therefore, impossible for any such issue to be tried as between the estate of Kedar Nath and Musammat Bibbo. Mr. Sinha then argued that if Kedar Nath's legal representatives did not choose to bring themselves on the record his client was not to blame. We are not quite sure that such was the case. Order XXII, r. 3 read with r. 11 of the C. P. C. does not confine the right to make an application to bring on the record the legal representatives of a deceased plaintiff or appellant to them alone. Where the defendant or a respondent is interested in bringing a deceased plaintiff or appellant's legal representatives on the record it would be open to him to do so.

As already stated, neither Kedar Nath nor his legal representatives are before the Court and the question of validity of the alleged transfer of the property in favour of Musammat Bibbo cannot now be determined. Without a determination of Musammat Bibbo's title she cannot be allowed to prosecute an appeal which has abated.

The result is that we declare the appeal as having abated. In the circumstances of the case we make no order for costs in favour of Musammat Bibbo. The respondent Musammat Bismillah Begam will get her costs of the appeal from the estate of the deceased Kedar Nath.

Z. K.

Appeal abated.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 488
OF 1922.

May 14, 1925.

Present:—Justice Sir B. K. Mullick, Kt.,
and Mr. Justice Ross.

TULSHI PRASAD RAM—APPELLANT

versus

**MR. J. A. W. WILSON, CHAIRMAN,
DUMRAON MUNICIPALITY—**

RESPONDENT.

Bengal Municipal Act (III of 1884), ss. 6 (3), 85-A—Adjacent plots held by same person as owner, whether constitute one holding—Separate assessments, legality of.

Where two adjacent plots of land bounded by one set of boundaries are held by the same person as owner, they must be deemed to be held by him under one title and constitute one holding within the meaning of s. 6 (3) of the Bengal Municipal Act; it makes no difference that one plot was acquired by survivorship and the other by purchase. In such a case the owner of the plots is liable only to one assessment in respect of the plots under s. 85A of the Act and not to separate assessments in respect of each plot.

Appeal from a decision of the Subordinate Judge, Second Court, Arrah, dated the 13th February 1922, affirming that of the Munsif, First Court, Buxar, dated the 15th February 1921.

Messrs. K. P. Jayaswal, S. M. Gupta and Janak Kishore, for the Appellant.

Messrs. Ray Guru Saran Prasad and Anand Prasad, for the Respondent.

JUDGMENT.

Mullick, J.—The appellant holds four plots of land in the Dumraon Municipality. Plot No. 7 is his ancestral property and plot No. 8 was purchased in the name of his son; again plot No. 49 is his ancestral property and plot No. 50 has been acquired by purchase. The Dumraon Municipality have assessed the appellant with personal tax on the footing that he is the occupier of four holdings. He contends that plots Nos. 7 and 8 form one holding and plots Nos. 49 and 50 one holding and that he is liable to assessment only in respect of two holdings. He has been assessed Rs. 84 on each of the plots Nos. 7 and 8 and Rs. 28 on each of the plots Nos. 49 and 50. He claims that he is liable to pay Rs. 84 on plots Nos. 7 and 8 and Rs. 28 on plots Nos. 49 and 50.

The question is whether plots Nos. 7 and 8 constitute one holding within the meaning of s. 6 (3) of the Bengal Municipal Act. It is clear that the plots being adjacent are bounded by one set of boundaries. The only question is whether they are held under one title. The appellant's interest

is ownership. It makes no difference, that he has acquired it in respect of one plot by survivorship and the other by purchase. There is no reason why we should read the word "title" in s. 6 as "title deed". The provision that the land shall be held under one title or under one agreement means that where the assessee has no title but holds under an agreement without any interest in the land, then all plots covered within the same set of boundaries and by the same agreement will form one holding; the proviso in the Explanation to s. 6 (3) is not relevant to the discussion now before us.

In my opinion plots Nos. 7 and 8 form one holding and the appellant is liable only to one assessment in respect of it under s. 85-A of the Act. The same observation applies to plots Nos. 49 and 50.

The result is that the appeal succeeds and is decreed with costs in all Courts in proportion to a claim of Rs. 122.

Ross, J.—I agree.

Z. K.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 464-B OF 1922.

July 18, 1924.

Present:—Mr. Kotval, A. J. C.

Haji SHEIKH MUHAMMAD—DEFENDANT
No. 3—APPELLANT

versus

RAMCHANDRA—PLAINTIFF AND

DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

Hindu Law—Alienation—Sale of minor's property by mother—Legal necessity—Plea, whether open to vendee—Transferee of reversioner, position of.

The mere fact that the sale-deed of a minor's property has been executed by the mother of the minor as guardian does not preclude the vendee from urging or getting the benefit of the plea of legal necessity. [p. 75, col. 2]

The transferee of a reversioner is in no worse position than the reversioner himself and can raise the plea of legal necessity. [p. 76, col. 1.]

Second appeal against a decree of the District Judge, Amraoti, dated the 27th July 1922, in Civil Appeal No. 39 of 1922.

Messrs. Yusuf Sharif, V. Bose and P. N. Rudra, for the Appellant.

Mr. D. T. Mangalmoorti, for Plaintiff No. 1 and Defendants Nos. 1 and 2, Respondents.

JUDGMENT.—The facts material to this appeal may be stated as follows. The

plaintiff Ramchandra sued for foreclosure of a mortgage executed in his favour by defendant No. 1, Laxmi, widow of one Hambirji in the year 1906. He joined Janu alias Balaram as defendant No. 2 on the ground that he claimed to be Laxmi's adopted son and one Haji Sheikh Muhammad as defendant No. 3 on the ground that Laxmi and Janu had executed a sale-deed of the mortgaged property in his favour. He stated that the mortgage was executed for legal necessity and defendants Nos. 2 and 3 are entitled to redeem it. Laxmi admitted the plaintiff's claim. She denied that Janu was her adopted son and that she had sold the property to defendant No. 3 Haji Sheikh Muhammad. Janu stated that he was the adopted son of Hambirji. He admitted execution and consideration of the mortgage deed but pleaded that it had been satisfied by a lease of the mortgaged property. He admitted that Laxmi and he had sold the property to Haji Sheikh Muhammad. At a later stage he pleaded by permission of the Court that there was no legal necessity for the mortgage. Haji Sheikh Muhammad raised the same pleas as Janu. In reply the plaintiff denied that the mortgage was satisfied.

The Trial Court found that the mortgage was not satisfied. The issue regarding legal necessity was as follows:—

"7. Whether the debt in suit was incurred for legal necessity as alleged? Is the defence of legal necessity open to defendants Nos. 2 and 3?"

The Court found that the consideration of the mortgage was not taken for legal necessity. Upon this finding it dismissed the suit against Janu. As regards Haji Sheikh Muhammad it held that though the plea of legal necessity was open to him as he took the sale from Janu he could derive no benefit from the plea as he held the sale-deed also from Laxmi. It passed a decree for redemption against Laxmi and Haji Sheikh Muhammad. The District Judge in appeal by Haji Sheikh Muhammad agreed with the Trial Court's findings that the mortgage was not satisfied and that legal necessity was not proved. He also accepted the view that Haji Sheikh Muhammad could not derive any benefit from the plea of legal necessity on the ground stated by the Trial Court and dismissed the appeal. Both the lower Courts proceeded on the assumption that Janu is the adopted son of Hambirji.

No attempt has been made to support the reason of the lower Courts for holding that Haji Sheikh Muhammad cannot derive any benefit from the plea of legal necessity. The lower Courts seem to assume that the real vendor is Laxmi and Janu is only a nominal vendor. It is not unusual for purchasers to join in the sale their vendor's mothers also by way of precaution. When the vendor is a son by adoption prudence dictates the joinder of the adoptive mother. There is no reason why the sale-deed in the present case should be assumed to have been taken primarily from the mother and the adopted son's name should be deemed to have been entered therein as a mere formality. The fact that Haji Sheikh Muhammad took the sale from the mother also does not preclude him from urging or getting the benefit of the plea of legal necessity. He can rely alternatively on the titles derived from both. In order, however, to be able to raise the plea he must show that he derives his title from a person who is able to raise that plea. He has, therefore, to show that Janu was the adopted son of Hambirji. The necessity of proving this is dispensed with by the plaintiff conceding the adoption for the purposes of this suit as appears from paragraph 19 of the Trial Court's and paragraph 7 of the lower Appellate Court's judgments. It is to be noted that although the decision of the Trial Court in dismissing the claim against Janu proceeded on the assumption that he was the adopted son of Hambirji the plaintiff did not challenge the assumption or the dismissal.

The suit must, therefore, fail against defendant No. 3 for the same reasons as against defendant No. 2. But it is contended that though Janu whose rights are similar to those of a reversioner could plead absence of legal necessity that plea was not open to his transferee: *Sitaram Kavoji Bhosle v. Khandu Mairala* (1), *Jhari Koeri v. Bijai Singh* (2), and *Kesho Prasad Singh v. Chandrika Prasad Singh* (3) are cited in support of this contention. The question whether the transferee of a reversioner can or cannot raise the plea of necessity did not arise and is not decided in these cases. The dictum in *Kesho Prasad Singh v. Chandrika Prasad Singh* (3) that a sale or mortgage by

(1) 59 Ind. Cas. 480; 45 B. 105; 22 Bom. L. R. 1155.

(2) 74 Ind. Cas. 865; 45 A. 613; 21 A. L. J. 563; (1924) A. I. R. (A.) 109.

(3) 68 Ind. Cas. 394; 2 Pat. 217; 3 P. L. T. 797; 1923) A. I. R. (Pat.) 122.

a Hindu widow which purports to pass or hypothecate the absolute title against every one except the reversioners and that unless the reversioners elect to treat it as a nullity it subsists as against every one else does not mean that the transfer though invalid as against the reversioners is valid as against their transferees or that though the reversioners may treat it as a nullity their transferees cannot. There is no reason why the transferee of a reversioner should be placed in any worse position than the reversioner. If the reversioner's right to avoid the previous alienation by the widow is not exercisable by his transferee the transfer value of the inheritance will be diminished and the reversioner will to that extent suffer. The question, however, does not arise in this suit as the adopted son is a party and the mortgage has been at his instance declared not binding on him. Counsel on both sides have argued the case as if there was no plea on the part of Janu regarding the absence of legal necessity. There was some excuse for this in the fact that the petition for permission to make the plea is placed in file C (2) instead in file A with the pleadings in the case but a more careful inspection of the record would have disclosed that the plea was on the record. The appeal succeeds. The decree of the Trial Court which was confirmed in appeal is modified, the suit being dismissed with costs throughout against defendant No. 3 Haji Sheikh Muhammad also.

G. R. D.

Appeal allowed.

K. S. D.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 384 OF 1923.

April 24, 1924.

Present :— Mr. Kinkhede, A. J. C.

GOKUL AND ANOTHER—DEFENDANTS

—APPELLANTS

versus

SHYAMLALSINGH—PLAINTIFF—

RESPONDENT.

C. P. Tenancy Act (I of 1920), s. 37—Sir land—Person cultivating, status of—Lease of sir and khudkasht land—Landlord not taking part in cultivation—Lessee, ejectment of.

The status of a person cultivating the proprietor's sir land under s. 37 of the C. P. Tenancy Act is that of a sub-tenant and is not that of an ordinary

or occupancy tenant. In spite of the fact that sir land was let out to a person along with other land under one set of conditions so as to constitute one holding the land is liable to be separated from the remainder of the holding and the landlord is entitled to a declaration that the person in possession of the sir land is liable to be ejected on partition by Revenue Officers. [p. 78, col. 1.]

If the *malguzar* has supplied no capital for or has not taken any part in the cultivation of the *khudkasht* land but has let it out on condition that he should be given half the produce, the contract is not that of a *batai* and the person cultivating becomes the occupancy tenant thereof. [ibid.]

Appeal against a decree of the District Judge, Hoshangabad, dated the 16th July 1923, in Civil Appeal No. 47 of 1923.

Mr. M. R. Dixit, for the Appellants.

Sir B. K. Bose, Messrs. V. Bose and P. N. Rudra, for the Respondent.

JUDGMENT.—This is a second appeal by the defendants against whom a decree for possession of certain lands has been passed. It is held that they are not the tenants under plaintiff-respondent who is the 16-annas *malguzar* of Sohagpur. He owned *khudkasht* land bearing Nos. 537/1 and 537/2 area 6-20 and sir land bearing No. 538 area 2 30 acres in the said *mouza* and it is this land which is in dispute in this litigation.

The plaintiff admits that Umed the father of defendant No. 1 and husband of defendant No. 2 was his *bataidar* in respect of this entire land with effect from 18th October, 1920 for a period of one year, and held the said land on certain conditions as to its cultivation in partnership. It is alleged that as a part of this contract of partnership the plaintiff supplied seed grain to Umed and that after Umed's death the defendants worked in his place and divided the seed grain and gave to the plaintiff his share of grain and straw. Plaintiff sets up an express agreement that Umed was not to put forth any claim to the fields as a tenant thereof after the expiry of the one year's term. Under the contract defendants had bound themselves to vacate possession but they did not. Hence plaintiff served them with a notice dated 2nd September, 1921 to quit the land, but they have been holding possession of the land forcibly. Hence this suit for ejectment.

The defence set up is one of tenancy. The defendants denied that plaintiff supplied any seed grain or took any part in the cultivation of the land as a part of the alleged contract of partnership. The First Court's finding is that plaintiff failed to

prove that he supplied the seed grain or took any part in the actual cultivation of the land; that on the contrary, it was proved that he took half the produce as rent in each of the years 1920-21 and 1921-22; that under the ruling reported as *Khoshal Chowdhury v. Nanhu* (1) the defendant No. 1 thus became a tenant of the fields in suit, and was not a mere *bataidar* liable to ejectment. In this view the plaintiff's claim was dismissed. The plaintiff, therefore, appealed to the District Judge, Hoshangabad, and obtained a decree for possession against the defendants on the ground that they could not become tenants of the land. The correctness and legality of the findings on which this decree is based is challenged before me in second appeal by the defendants.

It is urged in the first instance that the agreement dated 18th October 1920 has been misconstrued and the rulings misapplied to this case, while upsetting the decree of the First Court. The Appellate Court has, however, maintained the findings of the First Court to the effect that the plaintiff provided no capital for the cultivation.

The sole point for consideration is, whether the defendant No. 1's father Umed was created a tenant of the land or was a mere partner in cultivation with the landlord. In 1889 this Court held in *Kisan Sukal v. Jaiwant Rao Misar* (2) that cultivation of land in partnership with a landlord for several years does not constitute the partner an *ipso facto* tenant within the meaning of the C. P. Tenancy Act. There each party supplied seed and labour and both cultivated the land together. In 1892 the same question came up for decision before this Court under slightly different circumstances, and it was held that where the landlord himself takes part in the cultivation, the person associated with him therein and who get a share of the produce as his remuneration is not *ipso facto* a tenant. On the other hand, where a landlord does not take part in the cultivation, but merely lets certain land to a person on condition that the latter should deliver to the former a proportionate share of the produce, the person to whom the land is let is a tenant: see *Khoshal v. Nanhu* (1) Stevens, J. C., who decided this case [*Khoshal v. Nanhu* (1)], pointed out in 1895 in the case of *Deopuri v. Arjun* (3) that to

constitute a contract of cultivating partnership as distinguished from a contract of tenancy it was not essential that the person who provided the land should actually take part in tilling it, but that it was sufficient if he furnished a portion of the working capital as part of the transaction by which he provides the land and not as a loan. The plaintiff *malguzar's* claim which was dismissed in the Courts below was accordingly decreed on the necessary facts being found in his favour.

Ismay, J. C., in 1900 held in *Ganoo v. Mukund Krishna Brahman* (4) a case coming from Chanda District under the old Tenancy Act of 1883, that the sharing of gross returns does not of itself create a partnership, and that consequently the defendant in that case who had held the *malguzar's* land under a *kabuliyat* which provided that he shall cultivate the land for the year 1306 F. i. e., one year only, and shall give half the produce to the plaintiff was held to be the tenant of the land. It was pointed out that there was no agreement for the sharing of losses which is an essential element in a contract of partnership. The learned Judicial Commissioner pointed out that the mere fact that the rent is variable and not fixed does not affect the nature of the contract. The plaintiff's claim which was decreed by the Courts below was accordingly dismissed.

Under the Tenancy Act of 1898 a provision was made in s. 62 (2) for doing away with this distinction between a contract of partnership by giving jurisdiction to the Revenue Officer to declare even the partner in cultivation of lands other than *sir* land belonging to a proprietor to be an ordinary tenant of the same not universally all over the province but in certain districts in which the Local Government may by notification declare that section to be in force. The position of a partner in cultivation was thus raised to that of a tenant by the Statute; but the operation was confined only to these tracts where the Local Government deemed it necessary to declare the said section to be in force. The conferral of jurisdiction in this matter on the Revenue Officer accounts for the absence of reported decisions of this Court under s. 62 (2) of the C. P. Tenancy Act, 1898. We have, however, a case, reported at page 13 of the Volume of Central Provinces Revenue Rulings, decided by Sir? Crump as Officiating

(1) 6 C. P. L. R. 117.

(2) 3 C. P. L. R. 180

(3) 10 C. P. L. R. 29

(4) 14 C. P. L. R. 12.

Financial Commissioner in 1912: *Chandan v. Megha* from Chhindwara District. It was held in it that the ordinary presumption is that a man who cultivates the land of the *malguzar* whether on *batai* or on payment of rent is a tenant, and it is for the *malguzar* to prove the terms of the agreement of the partnership on which he relies to disprove the tenancy. The landlord having failed to prove the same the cultivator's right to the land as a tenant thereof was upheld.

The new C. P. Tenancy Act of 1920 has also introduced a change. The status of a person cultivating the proprietor's *sir* land under s. 37 of the new Act is that of a sub-tenant. It is no longer that of an ordinary or occupancy tenant. The contract which has given rise to the tenant-right here was made after the new Tenancy Act of 1920 came into force. Consequently, in spite of the fact that the *sir* land and other land was given to Umed under one lease or one set of conditions so as to constitute one holding, the status of the defendant so far as the *sir* land is concerned, is that of a sub-tenant. In view of the provisions of s. 94 of the said Act the *sir* land is liable to be separated from the remainder of the holding and all that I can award to the plaintiff is a decree declaring that defendants are liable, on partition, to be ejected therefrom, by the landlord, even though it has to be conceded that they had acquired a position higher than that of a mere partner in cultivation, but not that of an occupancy tenant thereof.

The case is, however, different so far as the *khudkasht* lands are concerned. In view of the clear wording of the contract embodied in the document in question, the status of defendant No. 1 is that of an occupancy tenant, and as such he is not liable to be ejected therefrom by the landlord except under s. 25 of the said Act, and the plaintiff's claim must, therefore, stand dismissed in regard thereto.

It is argued on behalf of the plaintiff-respondent that if the defendants are to be allowed to retain possession of the land, the stipulation in the contract to the effect that if the tenant desires to set up a tenant right in the land he shall pay a fine of Rs. 1,000 should be given effect to, and that a decree directing them to pay that sum to plaintiff as a condition precedent to their retaining the land may be passed in the case. I do not think I should give effect to this

contention in this suit. All that is necessary under law to create a tenancy, is an agreement to let land and an agreement which will ordinarily create a liability for rent. Both these elements are present here. How far the above stipulation for payment of a fine of Rs. 1,000 is legally enforceable, is not, therefore, necessary for me to consider. As the landlord could not under the new Tenancy Act legally grant an occupancy tenancy so far as the *sir* land was concerned, and the defendants could not but be mere sub-tenants thereof under the Statute, I do not think it would be equitable to compel them to pay the whole of Rs. 1,000 to the plaintiff as a condition precedent to their retaining only the *khudkasht* lands in lieu thereof. From the tenor of the document, I do not regard the stipulation either as a condition precedent, operating as an impediment to, or as consideration for the acquisition of the tenant right; I consider it as only imposing upon the tenant an obligation to pay to the landlord reasonable compensation not exceeding Rs. 1,000 for the land he might lose in the event of his tenant refusing to vacate possession at the end of the term, and claiming to hold the same as a tenant under him. Such conditions are conditions subsequent and not conditions precedent to the acquisition of the tenancy, and must form the subject of a separate suit where the equities if any existing in favour of both the parties might be adjusted with due regard to all the circumstances of the case.

The respondent cannot, therefore, ask that effect should be given to the stipulation side by side or as a condition precedent to the appellants being permitted to retain the *khudkasht* land in suit in tenant right. The appeal, therefore, succeeds so far as the *khudkasht* fields are concerned. The plaintiff's claim is dismissed in regard to the same.

As the *sir* land is liable under s. 94 of the C. P. Tenancy Act of 1920, to be separated from the rest of the holding through the Revenue Officer, and as no partition has yet been effected, I cannot pass a decree for actual possession of that land as against the defendants. I, therefore, simply declare that the *sir* is liable to be so partitioned, and leave it open to the plaintiff to work out his own right to immediate possession of the *sir* land by recourse to the appropriate remedy of a parti-

tion through the Revenue Officer as against the defendants.

The decree of the lower Appellate Court is set aside and in lieu thereof a decree in the above terms will be passed. The *sir* land presumably forms a $\frac{1}{4}$ th share of the lands in suit. As the plaintiff's claim for possession of the *khudkasht* lands which forms a substantial portion, fails, and only a declaratory decree as regards the *sir* is given to him, I direct that plaintiff shall realize $\frac{1}{4}$ th of his own costs throughout from the defendants and pay to the latter a $\frac{3}{4}$ th share of their costs. The rest of the costs in all the Courts will be borne by the party incurring them.

G. R. D.

Decree set aside.

K. S. D.

PATNA HIGH COURT.

CIVIL REVISION No. 527 OF 1924.

March 23, 1925.

Present:—Mr. Justice Kulwant Sahay.

Musammatt RAM KUMARI—PETITIONER

versus

DEONANDAN SINGH—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 115, 151, O. XLVII, r. 1—Decree for possession conditional on payment of money into Court within certain period—Payment beyond period prescribed—Extension of time—Power of Court—Review—Revision.

A suit to recover possession of certain lands was decreed on condition that the plaintiff should deposit in Court for payment to the defendant a certain sum of money within three months from the date of the judgment. The plaintiff deposited the amount mentioned in the decree into Court three days after the expiry of the period fixed and applied for extension of the period which was granted, the Court holding that as there was no order to the effect that the suit was to be dismissed in case the deposit was not made within three months from the date of the judgment, it was open to it to extend the time. On revision:

Held, (1) that the Court had for the reason given by it jurisdiction to extend the time; [p. 80, col. 1.]

(2) that in any event the Court had jurisdiction to extend the time upon an application for review of its judgment and that there was no reason why its order should be disturbed because it had been made upon an application for extension of time and not upon an application for review. [ibid.]

Rameshwar Mahton v. Dwarka Prasad, 84 Ind. Cas. 320; 3 Pat. 778; (1925) A. I. R. (Pat.) 36; 6 P. L. T. 309, followed

Revision from an order of the District Judge, Darbhanga, dated the 22nd September 1924.

Messrs. B. N. Mitter and G. N. Mukherji, for the Petitioner.

Mr. S. N. Ray, for the Opposite Party.

JUDGMENT.—This is an application in revision on behalf of the defendant in the suit against an order passed by the District Judge of Darbhanga, dated the 22nd September 1924, whereby he extended the time for depositing a certain sum of money ordered to be deposited under the decree passed in appeal. The circumstances under which the order came to be passed are shortly as follows:—

The plaintiff brought a suit in the Court of the Subordinate Judge to recover possession of certain lands on a declaration of his title on the basis of a deed of sale executed by one Damodar Raut. The defendant was the widow of Damodar Raut and her defence was that the *kabala* set up by the plaintiff was not executed by her husband and that there was no passing of consideration under it.

The learned Subordinate Judge held that the *kabala* had been executed by Damodar Raut, but that the plaintiff had failed to prove the passing of consideration; and he accordingly dismissed the suit. On appeal the learned Judge decreed the suit on condition of the plaintiff depositing in Court for payment to the defendant a sum of Rs. 400 within three months from the date of the judgment. The judgment was passed by the District Judge on the 27th March 1924, but the decree was prepared and signed by him on the 2nd April 1924. The plaintiff deposited the amount required under the decree on the 30th June 1924, that is, three days beyond the three months directed by the decree. He filed an application subsequently saying that he was misled by the fact that the decree had been signed on the 2nd of April, and that he was under the impression that the money was to be deposited within three months from the 2nd of April. The learned District Judge has accepted the deposit and has directed the plaintiff to deposit interest for the three days from the 27th of June to the 30th of June. Against this order the defendant comes in revision to this Court, and it is contended on her behalf that the learned Judge had no jurisdiction to extend the time upon the application made by the plaintiff.

Now, the decree did not direct that the suit would stand dismissed on failure of

the plaintiff to deposit the amount within three months. The decree runs thus:—

"It is ordered that the appeal be and the same is hereby allowed, the decree of the Court below is set aside and the plaintiff's suit is decreed in this way that the title of the plaintiff as purchaser on the strength of the *kabala* Ex. I is declared and that the plaintiff is declared to recover possession of the properties in suit subject to his paying the sum of Rs. 400 with interest running thereon from 29th June 1921 the date of the *kabala* at the rate of one rupee per cent. per month within 3 months from to-day and it is also declared that defendant as widow of Damodar holds a lien by way of charge on the properties sold until such time that she is paid off the above dues. The plaintiff-appellant will get half the costs throughout and the defendant will bear her own costs."

The learned District Judge who passed the decree is the Judge who has extended the time by his order of the 22nd September, 1924 and he is the best person to construe his own decree. He has construed that decree to mean that there was no order passed by him to the effect that the suit was to be dismissed in case the deposit was not made within three months from the date of the order. That he had jurisdiction to extend the time in any event on an application for review of his judgment is not denied. What is contended is that the time could not be extended upon the application of the plaintiff without an application for review. That may be so, but, if the learned Judge had jurisdiction to extend the time upon an application for review, there is no reason why his order should be disturbed because he made the order upon an application for extension and not upon an application for review. In *Rameshwar Mahton v. Dwarka Prasad* (1) it was held by a Division Bench of this Court that although a Court has no inherent jurisdiction under s. 151, C. P. C., to do that which is prohibited by the Code, but where a suit was dismissed on a preliminary ground and the plaintiff applied under s. 151 to the Court to set aside the decree under its inherent powers, and the Court granted the prayer, and an application in revision was made to the High Court to set aside the order, it was held that inasmuch as a prayer for review under

O. XLVII, r. 1, if made, could have been granted by the Court, the mere fact that the plaintiff, instead of applying, as he should have done, under O. XLVII, r. 1, had applied under s. 151, was no ground for interference in revision. The principle laid down is applicable to the present case.

The application must, therefore, be dismissed with costs.

Z. K.

Application dismissed.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 147 OF 1924.

July 15, 1925.

Present:—Sir Grimwood Mears, Kt., Chief Justice, and Mr. Justice Mukerji.

AHMAD HUSAIN AND OTHERS—
DEFENDANTS—APPELLANTS

versus

MUHAMMAD QASIM KHAN AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Mortgage—Redemption—Integrity of mortgage broken up, effect of—Co-mortgagor, whether can redeem more than his own share—Redemption suit—Parties, necessary.

Where the integrity of a mortgage has been broken up, a mortgagor is not entitled to claim redemption of more than his own share of the mortgaged property, the reason being that the integrity of a mortgage is necessary for the benefit of the mortgagee alone, and where that has been broken and a redemption has to be allowed, there is no equity in favour of one of the mortgagors to possess the remaining property where it is more than his own legitimate share. [p. 81, col. 2.]

In all redemption cases, which are properly framed, not only the redeeming co-sharers should be made parties but also the mortgagors who have not so far joined in the suit for redemption. The necessity of impleading co-mortgagors is this that the share and the right to redeem of the plaintiff cannot be determined behind the back of the non-redeeming mortgagors. [p. 82, col. 1.]

Letters Patent Appeal from a judgment of Mr. Justice Kanhaiya Lal, dated the 4th August 1924.

Mr. Mushtaq Ahmad, for the Appellants.
M. M. A. Aziz, for the Respondents.

JUDGMENT.—This appeal is against the judgment of a learned Judge of this Court and raises two points.

It appears that the learned Judge decided a question of fact, *viz.*, whether all the representatives of the original mortgagees, together, had acquired an interest in a part of the mortgaged property or whether some of the representatives of the

(1) 84 Ind. Cas. 320; 3 Pat. 778; (1925) A. I. R. (Pat.) 36; 6 P. L. T. 309.

original mortgagees had acquired that interest. It has been pointed out to us that this question never arose in this Court and the argument of the appellants seems to be right.

In cl. (g), para. 2 of the plaint, the plaintiffs stated that the original share mortgaged was a 5 *biswa* one, that a portion of it, viz., 1 *biswa* had already been redeemed, that 2 *biswas* had been purchased by the mortgagees themselves, that 2 *biswas* remained under mortgage, that out of these 2 *biswas* an $11/12$ share had also been redeemed and that they wanted the redemption of the remaining $31/12$ share out of the 2 *biswas*. The defendants in their written statement did not contest this statement of facts. Indeed, in para. 1 of their additional statements they accepted this statement of facts and raised the plea in law that the integrity of the mortgage having been broken the plaintiffs were not entitled to ask for redemption of more than their legitimate share. It will be noticed, therefore, that on the pleadings no question of fact, as to whether all the representatives of the mortgagees had purchased or not a share of the mortgaged property arose. When an appeal was taken to the lower Appellate Court that Court remanded three issues of fact. One of these was:—

"Have the mortgagees or their representatives acquired the ownership of any part of the mortgaged property."

The answer to this was given by the learned Munsif in the following language:—

"I have to hold that the defendants have no doubt acquired ownership of a small part of the mortgaged property."

Not only did the plaintiffs not object to this finding which was really in accordance with their statement of facts in the plaint, but their Pleader relied on this finding and argued before the learned Judge that the integrity of the mortgage had been broken. In view of these circumstances it is difficult for us to understand how the new question of fact was for the first time raised in the second appeal.

Mr. Aziz, the learned Counsel for the respondents, has argued that what the plaintiffs really meant by their statement in the plaint was not that all the representatives of the mortgagees had together acquired a share in the mortgaged property but what was meant was this that, indi-

vidually, the several representatives had purchased certain shares and the result was that the total amount of shares purchased amounted to 2 *biswas*. This is really a pleading which cannot be fairly deduced from the statement of facts made in cl. (g), para. 2 of the plaint. Evidently this argument was raised before the learned Judge of this Court for the first time and the learned Judge determined the question of fact because it had never been determined by the Court below. As we understand the pleadings and the proceedings, the pleading brought up before this Court was an entirely new pleading and in our opinion it should not have been allowed to be urged in second appeal.

The learned Judge of this Court has held that where the integrity of a mortgage is broken a mortgagor is not entitled to recover by way of redemption more than his share in the property. Mr. Aziz has contested this proposition of law and has cited, as an authority, the cause of *Shiam Saran v. Banarsi Das* (1). In this case the question was never raised very specifically and no authorities were cited. Indeed, the opinion delivered in this judgment is contrary to the opinion expressed in this Court in *Kallan Khan v. Mardan Khan* (2), *Munshi v. Daulat* (3) and *Zaib-un-nissa v. Prabhu Narain Singh* (4). We are clearly of opinion that the learned Judge from whose judgment this appeal is, was perfectly right in holding that where the integrity of a mortgage is broken a mortgagor is not entitled to claim redemption of more than his own share. Briefly, the reason is this, that the integrity of a mortgage is necessary for the benefit of a mortgagee alone and where that has been broken and a redemption has to be allowed, there is no equity in favour of one of the mortgagors to possess the remaining property, although the same is more than his own legitimate share. If a redemption of a large share be allowed, the redeeming mortgagor will be in possession of his own share as the owner and will hold the remaining share as mortgagee, having been subrogated to the position of the original mortgagee. The co-mortgagor, who has so far not redeemed

(1) 65 Ind. Cas. 863; 20 A. L. J. 258; 4 U. P. L. R. (A.) 102; (1922) A. I. R. (A.) 192.

(2) 28 A. 155; A. W. N. (1905) 225.

(3) 29 A. 262; A. W. N. (1907) 49; 4 A. L. J. 74.

(4) 40 Ind. Cas. 315; 15 A. L. J. 625; 39 A. 618.

his share, will have to ask for redemption on payment and it is immaterial to him whether he goes to a co-mortgagor who has redeemed or to the original mortgagee. In the circumstances, there is no reason why a co-mortgagor should have more than his own share.

It has been next contended on behalf of the respondents that the fact that the remaining mortgagors are parties as defendants to the suit was a justification for decreeing the redemption of the entire property in favour of the plaintiffs. This proposition of law clearly goes counter to the case of *Kallan Khan v. Mardan Khan* (2) and *Zaib-un-nissa v. Prabhu Narain Singh* (4). In all redemption cases, which are properly framed not only the redeeming co-sharers should be made parties but also the mortgagors who have not so far joined in the suit for redemption. The necessity of impleading co-mortgagors is this that the share and the right to redeem of the plaintiff cannot be determined behind the back of the non-redeeming mortgagors. It follows, therefore, that if the argument for the respondents be sound, in every case of a properly framed redemption suit, the plaintiff would be entitled to redeem not only his own share but of the shares of his co-mortgagors whom he has made defendants. This cannot be right.

The result is that the appeal succeeds. We allow the appeal, set aside the decree of this Court and remand the suit through the lower Appellate Court to the Court of first instance for determination of the share of the plaintiffs in the 2 biswa share in question and the proportionate amount of the mortgage-money that they must pay. The plaintiffs will not be allowed to redeem more than their legitimate shares. The appellants will have their costs of the present appeal, but the remaining costs will abide the result.

Z. K.

*Appeal allowed.***PATNA HIGH COURT.**

CIVIL REVISION No. 547 OF 1924.

March 23, 1925.

Present :—Mr. Justice Adami.

MR. RAJKISHORE LAL NAND-
KEOLYAR AND OTHERS—PETITIONERS
versus

Musammam ALAM ARA BEGUM *alias*
MOGHUL SAHEBA AND ANOTHER—
OPPOSITE PARTY.

Limitation Act (IX of 1908), s. 22—Defendant made co-plaintiff, effect of—Limitation, whether affected—Transfer of parties—Valuation of suit exceeding limits of jurisdiction of Court—Procedure—Order directing presentation of plaint to proper Court.

Sub-section (1) of s. 22 of the Limitation Act has no application to a case where a party who was originally impleaded by the plaintiff as a defendant to the suit is transferred in that suit as a co-plaintiff. [p. 83, col. 1.]

Where one of the defendants to a suit applies to be made a co-plaintiff, his application cannot be rejected on the ground that if it is granted the valuation of the suit will exceed the limits of the jurisdiction of the Court. If after adding the defendant as a co-plaintiff the valuation of the suit does exceed the limits of the jurisdiction of the Court, it is open to the Court to return the plaint to the plaintiffs to be presented in the proper Court. [*ibid.*]

Appeal from an order of the Munsif, First Court, Gaya, dated the 17th November 1924.

Mr. Anand Prasad, for the Petitioners.

JUDGMENT.—This application is directed against an order of the Munsif, First Court, Gaya, rejecting the application by the petitioners to be made co-plaintiffs in a suit brought by the opposite party No. 1. The opposite party No. 1 sued to recover a sum of money from the defendants Nos. 1 to 26 on account of certain expenses incurred by her in erecting and maintaining a *bandh*. It appears that the co-sharer *maliks* of village Lao and of several other villages have to erect *bandhs* for the purposes of irrigation in those villages. The *malik* of village Lao supervises the erection of these *bandhs* and the other *maliks* contribute towards the expenses incurred. The suit related to the expenses incurred by the opposite party No. 1 in the years 1329 and 1331. She joined as defendants to the suit defendants Nos. 27 to 35, who are co-sharer *maliks* of Mouza Lao. The present applicants petitioned the lower Court to be changed from co-defendants in the suit to co-plaintiffs.

The learned Munsif rejected the application on two grounds, firstly, that if these defendants were made co-plaintiffs, the rule of limitation would come in and the plaint-

iffs' suit would be barred with regard to the claim for 1329. The second ground was that the addition of these petitioners as co-plaintiffs would raise the value of the suit, beyond the jurisdiction of the Court. Now, with regard to the question of limitation, it is clear from the provisions of sub-s. (2) of s. 22 of the Limitation Act that the provisions of sub-s. (1) of the section will not apply where a defendant, who was made such by the plaintiff at the time of the institution of the suit, is transferred in that suit as a co-plaintiff. Sub-section (2) clearly says that "nothing in sub-s. (1) shall apply to a case...where a plaintiff is made a defendant or a defendant is made a plaintiff." All that the petitioners have asked in this case is that they being defendants should be made plaintiffs in the suit. Accordingly the Law of Limitation will not bar any portion of the claim.

With regard to the other objection raised by the Munsif if the suit after the addition of these petitioners as co-plaintiffs exceeds the valuation which is within the jurisdiction of the Munsif, it will be open to him to return the plaint, after the petitioners have been so added, to the plaintiffs to be presented in the proper Court.

The order of the Munsif must be set aside and it is directed that the status of the present petitioners be changed from the category of defendants to that of plaintiffs in the suit.

Z. K.

*Order set aside.***ALLAHABAD HIGH COURT.**EXECUTION SECOND APPEAL No. 1844 OF 1924.
July 15, 1925.Present:—Mr. Justice Sulaiman and
Mr. Justice Daniels.

DIP PRAKASH AND OTHERS—

OBJECTORS - APPELLANTS

versus

Bohra DWARKA PRASAD AND ANOTHER
—DECREE-HOLDERS—RESPONDENTS.*Execution of decree—Res judicata—Implied decision,
whether binding on parties in subsequent stages—Civil
Procedure Code (Act V of 1908), s. 11.*

Section 11 of the O. P. C. does not in terms apply to execution proceedings but an order in execution may be as binding between the parties and those claiming under them as an interlocutory order in a suit is binding upon the parties in every proceeding

in that suit, or as a final judgment in a suit is binding upon them in carrying the judgment into execution. Where, therefore, a point has once been expressly decided in the execution department, the decision binds the parties in all subsequent stages of the proceeding. Where a point has not been directly decided but is such as must be deemed to have been necessarily decided before the order for execution was passed, the decision has a similar binding force. [p. 85, cols. 1 & 2.]

Plaintiff obtained a decree for an injunction restraining the defendants from erecting any building on the land in dispute. Plaintiff subsequently put in an application for execution of the decree complaining that the defendants had constructed a pavement on the land in dispute and asking for its removal. The defendants objected that the parties had compromised their dispute after the decree had been passed and that the pavement had been constructed in pursuance of that compromise. There was no objection taken that the construction complained of was not in defiance of the injunction. The Execution Court after taking evidence held that no compromise had been proved and dismissed the objection and directed that the pavement should be removed. After this order was carried out the defendants filed a set of objections complaining that the pavement was not a structure of the nature the construction of which had been prohibited by the decree and that the plaintiff having wrongfully obtained the removal of the pavement should be directed either to restore the pavement or to pay damages to the defendants:

Held, that the defendants having failed to take the objection in answer to the application for execution that the pavement was not a structure the construction of which was prohibited by the decree, were estopped from raising the objection at a subsequent stage inasmuch as the order of the Execution Court directing execution must be taken to have necessarily decided that the construction of the pavement was in defiance of the decree. [p. 86, col. 1.]

Execution second appeal from a decree of the Third Additional Subordinate Judge, Aligarh, dated the 25th September 1924.

Sir Dr. Tej Bahadur Sapru and Dr. K. N. Katju, for the Appellants.

Dr. S. N. Sen and Mr. Panna Lal, for the Respondents.

JUDGMENT.

Sulaiman, J.—This is an appeal by the judgment-debtors arising out of an execution matter. The plaintiffs decree-holders obtained a decree from the Appellate Court on the 15th of December 1920 ordering the defendants to remove the walls and sheds which they had constructed on the disputed land, and for an injunction 'not to erect any building on the land.' The claim of the plaintiffs for other reliefs like joint possession was dismissed. On the 30th of April 1923 the decree-holders put in an application for execution of the said decree complaining that the defendants in spite of the aforesaid injunction had constructed a pucca pavement and several walls and had put a tin shed on the latter,

In this application they expressly asked to execute the decree by demolition of the walls, the tin shed and the newly constructed pavement. Upon this, notice was issued to the judgment-debtors fixing the 30th of July 1923. On this last mentioned date the judgment-debtors appeared and put in a written objection that the decree was not executable on the ground that the parties had compromised their dispute and the constructions had been made in pursuance of that compromise. In the objection there was no suggestion that any of the constructions complained of were not in defiance of the injunction. On the 18th of August 1923 the Execution Court after hearing the evidence of the parties held that no compromise had been proved and accordingly dismissed the objection. No further objections were filed by the judgment-debtors, and on the 27th of August 1923 the Court ordered that inasmuch as the judgment-debtors' objections had been dismissed process should be issued to the *Amin* to carry out the order of execution and report. Before, however, the order could be fully carried out, an order staying further proceedings was passed on the 29th of August 1923 because a declaratory suit was instituted by the sons of the judgment-debtors. This last mentioned suit was dismissed on the 17th of December 1923. On the 18th of December 1923 on receipt of a report that the civil suit had been dismissed, the Court ordered that the previous order dated the 27th of August 1923 should be carried out and the papers be sent to the *Amin* for compliance. In obedience to this order the *Amin* got the walls, the tin shed and the pavement removed from the land.

After this the judgment-debtors filed a set of objections complaining that the decree-holders had fraudulently and without any right got the pavement removed causing a loss of Rs. 5,100 to them. They, therefore, prayed that the decree-holders might be ordered to get the pavement which they had got demolished re-built or to pay Rs. 5,100 on account of the cost of its construction to the objectors. The decree-holders replied that the construction of the pavement was contrary to the terms of the decree and further that the objectors had no right to raise this objection which was barred by the principle of *res judicata* and estoppel. They also disputed the amount of the alleged loss.

no bar of *res judicata*. It further held that the pavement was not a building within the meaning of the decree and that, therefore, the decree-holders had no right to get it removed. It accordingly ordered that the decree-holders should re-build the pavement within four months otherwise they would be liable to pay Rs. 3,490 5-4 to the objectors. On appeal the learned Additional Subordinate Judge agreed with the First Court that the objection was neither barred by *res judicata* nor by estoppel. He, however, held that the brick pavement of the floor was a building within the meaning of the term used in the decree. He accordingly allowed the appeal and dismissed the objection.

On appeal by the judgment-debtors to this Court it has been strongly urged before us that the pavement which is practically level with the ground, is not a building the construction of which was prohibited by the injunction. If the pavement stands by itself and is not covered by any other construction we would be inclined to accept the contention of the learned Advocate for the appellants that its construction was not intended to be prohibited. The object of the injunction was to keep the courtyard free from obstruction so that the utility of the shops abutting it should not be diminished. This object is in no way defeated by making the floor of the courtyard *pucca*. On the other hand if this pavement is a part of the entire construction and is surrounded by walls of which a tin roof has been put on, then it must be taken along with the entire construction of which it would obviously form a part. The decree-holders then would be entitled to get removed the entire construction as it stands. It is, however, unnecessary to go any more into the facts because I am of opinion that this appeal should fail on legal grounds.

When notice was issued to the judgment-debtors to show cause why execution should not proceed and the judgment-debtors appeared before the Court they had full notice of the decree-holders' prayer for the removal of the disputed pavement. They had ample opportunity to object and urge that the construction of the pavement was not in contravention of the injunction. This objection they failed to raise. The objection which they did raise was disallowed and on the 27th of August 1923 execution was ordered. Subsequently the

The Execution Court held that there was

proceedings were stayed because of another pending suit, but when that suit was dismissed execution was ordered afresh. Process was issued to the *Amin* with specific instructions to demolish the pavement along with the other constructions complained of. The *Amin* went to the spot and carried out the order. All this time the objectors were sleeping. It was their duty to raise the objection, before it was too late, that the pavement should not be removed. The order directing execution by removal of the pavement was based on the assumption that the pavement was a building within the meaning of that term as used in the decree. Had the Execution Court been invited to consider and had it concluded that the pavement was not a building it would never have ordered its removal. It must, therefore, be assumed that the question that this pavement was liable to be removed in execution of the decree was by necessary implication decided by the Court against the judgment-debtors. They are, therefore, not entitled to come to Court and ask for damages for the loss which they have suffered on account of such execution.

It is true that s. 11 of the O. P. C., or any of its explanations, cannot in terms apply to an execution proceedings because the question arises in the same suit and not in a second suit. But 'as observed by their Lordships of the Privy Council in the case of *Ram Kirpal v. Rup Kuari* (1) an order in execution may be "as binding between the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit, or as a final judgment in a suit is binding upon them in carrying the judgment into execution. The binding force of such a judgment depends not upon s. 13, Act X of 1877, but upon general principles of law. If it were not binding, there would be no end to litigation." See also the Privy Council case of *Mungel Pershad Dicht v. Grija Kant Lahiri* (2).

Where, therefore, a point has once been expressly decided in the execution department there can be no doubt whatsoever that that decision binds the parties in all subsequent proceedings. In cases where a point has not been directly decided but is

such as must be deemed to have been necessarily decided before an order of execution was passed, the decision has also been held to have a similar binding force. For instance, objections that the application is not in accordance with the law, or that it is barred by time or that the decree is not capable of execution or that the Court has no jurisdiction to entertain the application or that the person applying for execution has not the right to do so, are objections, which if not raised before the execution is ordered, have been held in several cases to have been decided adversely to the objectors by the execution order. Reference may be made to the recent case of *Raja of Ramnad v. Velusami Tevar* (3) decided by their Lordships of the Privy Council. At page 48* Lord Moulton observed: "It was not only competent to the present respondents to bring the plea forward on that occasion, but it was incumbent on them to do so if they proposed to rely on it," though in that case such a plea was in fact brought forward and decided upon. See also the case of *Dwarka Das v. Muhammad Ashfaqullah* (4) and the cases cited therein.

On the other hand, in cases where the decretal amount is in dispute it has been held that a mere order directing execution does not imply a decision that the amount entered in the application for execution is necessarily correct, and it has been held that there is nothing to prevent the Court at a subsequent stage from correcting the amount which the decree-holder is entitled to recover. In the case of *Kalian Singh v. Jagan Prasad* (5) which was affirmed by a judgment in Letters Patent Appeal reported as *Kalian Singh v. Jagan Prasad* (6) it was held that if a judgment-debtor does not take exception to the amount erroneously set forth in an application for the execution of the decree as being the sum due, he is not prevented from doing so on a subsequent application for the execution of the same decree. Similarly in the case of *Sheo Mangal v. Hulsa* (7) the vendee

(3) 59 Ind. Cas. 880; 48 I. A. 45; 19 A. L. J. 168 40 M. L. J. 197; 13 L. W. 290; (1921) M. W. N. 51; 33; O. L. J. 218; 25 O. W. N. 581; 23 Bom. L. R. 701; 29 M. L. T. 345 (P. C.).

(1) 8 Ind. Cas. 722; 47 A. 83; 22 A. L. J. 928; L. R. 5 A. 744 Civ.; (1925) A. I. R. (A.) 117.

(5) 27 Ind. Cas. 950; 13 A. L. J. 162.

(6) 30 Ind. Cas. 523; 37 A. 589; 13; A. L. J. 828.

(7) 65 Ind. Cas. 377; 19 A. L. J. 954; 44 A. 159; (1922) A. I. R. (A.) 413.

(1) 6 A. 269; 11 I. A. 37; 4 Sar. P. C. J. 189; 3 Ind. Dec. (N. S.) 718 (P. C.).

(2) 8 O. 51; 8 I. A. 123; 11 O. L. R. 113; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32 (P. C.).

decree-holder who was at least entitled to execute his decree for costs, had included a sum of Rs. 380-15-0 in his application. An order issuing process was made but before the order could be executed the vendee gave up his claim for Rs. 380-15-0 and applied to be allowed to retain the property. It was held that the order issuing process passed in favour of the decree-holders did not preclude them from saying that they were not entitled to recover the sum of Rs. 380-15-0 by way of execution but that they were entitled to the property itself. It was pointed out that there was some amount recoverable by execution, namely, the amount of costs and, therefore, the Execution Court had jurisdiction to order execution. The mere fact that a larger amount was included in the application of the decree-holders did not necessarily imply that the Court had decided that the whole of that amount was due and recoverable only by execution.

The learned Advocate for the appellants has contended before us that the present case is analogous to cases where property is delivered to a decree-holder in excess of the decree in which contingency the Execution Court always allows restitution. Had the decree-holders in the present case merely asked for execution of their decree by demolition of constructions made in contravention of it, without specifying what constructions they particularly wanted to be demolished, it might have been open to the judgment-debtors to come to the Court if constructions which had not been forbidden were also removed. But where the decree-holders expressly applied to get the disputed pavement removed and the judgment-debtors had full notice that they had so applied and failed to raise any objections and the Court then ordered execution to issue and through its officer, the *Amin*, got its order carried into effect, it must be deemed by necessary implication that the question of the pavement having been constructed in defiance of the injunction was decided adversely to the objectors, for without deciding this matter execution could not possibly have been ordered.

I am, therefore, of opinion that the objectors are prevented from now asking the Court to re-consider the question and, holding that the buildings ought not to have been demolished, to award them

damages. I would, therefore, dismiss the appeal.

Daniels, J.—I concur both in the order dismissing the appeal and in the reasons given by my learned brother for doing so. The rulings on the subject of *res judicata* as applied to execution proceedings are not altogether consistent, and it is, in my opinion, unnecessary to express any opinion as to the decisions in *Kalyan Singh v. Jagan Prasad* (6) or *Sheo Mungal v. Hulsa* (7). In the present case the judgment-debtors were clearly bound, if they alleged that the construction of the so-called pavement was not inconsistent with the decree, to take this objection when the judgment-debtors asked for its demolition. It would be contrary to all principles of justice to allow them deliberately to stand aside while the pavement was demolished by order of the Court, and then, after the work was completed, to come forward and claim, as they now do, that it should be restored and they should be awarded damages.

By the Court.—The appeal is dismissed with costs including fees on the higher scale.

Z. K.

Appeal dismissed.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 1452 OF 1920.

April 10, 1923.

Present:—Mr. Justice Page.

HARI CHANDANA JOGA DEVA—
PLAINTIFF

versus

HINDUSTAN CO-OPERATIVE
INSURANCE SOCIETY, LTD.—
DEFENDANT.

Construction of document—Insurance policy—Insured taking shares in Company—Premia, balance of, to be recovered from dividends—Liability of Company—Company—Articles of Association, whether can be altered—Share-holder entering into special contract with Company, position of.

Under a policy of an insurance the defendant Company guaranteed to the insured that if the latter paid to the Company a certain sum each year for a certain number of years the Company would pay to the insured the sum of Rs. 20,000 and would also pay at the end of the period fixed (called the endowment period) such additional sums by way of profits as according to the Society's Regulations may accrue and become payable in respect of the policy, after paying up in full all calls due and payable in respect of certain bond shares

which the insured had agreed to take. One of the conditions of the policy was that in case the insured should outlive the endowment period all dividends to become payable on the shares shall be subject during the period to a lien in favour of the Society for payment of the premium payable on the policy, the total premium in each case being equal to the face value of the policy. The plaintiff continued to pay the stipulated sum each year to the Company and at the end of the endowment period sued the Company to recover the amount of Rs. 20,000 as a debt due by the Company under the policy:

Held, (1) that the true construction of the policy was that the Company had agreed at the end of the endowment period to pay the principal sum insured and that it undertook also to pay at the same time an additional sum in respect of dividends accrued on the shares after retaining thereout all calls due and payable in respect thereof and that it had agreed to pay an additional sum in respect of dividends accrued after the period had expired during which it was at liberty to allocate the dividends towards the balance of the premium; [p. 89, col. 1.]

(2) that the risk of the dividends not being sufficient to cover the balance of the premia was taken by the Company; [*ibid.*]

(3) that the plaintiff having paid the whole sum which the Company required him to pay during the endowment period under the policy, he was entitled to recover from the Company the sum of Rs. 20,000 being the principal sum insured. [*ibid.*]

A share-holder in a Company must be taken to know that one of the incidents of membership of a Company is that the Company may, by adopting the proper method, *bona fide* alter its articles in a way which may prejudicially affect his interests, and, provided that the alteration in the articles is not inconsistent with the objects set out in the Memorandum of Association, and is *bona fide* made in the interests of the Company a share-holder in ordinary circumstances would be bound by such an alteration. The rights of a share-holder in respect of his shares, except so far as they may be protected by the Memorandum of Association, are by Statute made liable to be altered by special resolution. But the case of a contract between an outsider and the Company is entirely different and even a share-holder must be regarded as an outsider in so far as he contracts with the Company otherwise than in respect of his shares. In such a case the Company cannot by altering its articles justify a breach of contract. [p. 89, col. 2; p. 90, col. 2.]

Messrs. Langford James, S. M. Bose and A. K. Chaudhury, for the Plaintiff.

Messrs. H. D. Bose and S. K. Chakravarty, for the Defendant.

JUDGMENT.—This is an action brought to recover a sum of Rs. 20,000 as being the principal sum due under a policy of insurance. The policy is for Rs. 20,000, and the annual premium is Rs. 1,550. It is an Endowment Policy for 10 years; the Rs. 1,550 has been regularly and duly paid, and the 10 years have elapsed.

The defendant Company in the first place urges that I ought to read together the proposal for the policy and the policy itself, because it is provided in the policy that the proposal together with the state-

ments made in connection therewith to the Medical Officer is to be deemed to be the basis of the contract. The defendant Company further contends that if the proposal and the policy are read together the contract is not a contract merely for insurance, or indeed primarily for insurance, but is a contract in the first place to take shares in the Company, the annual sum of Rs. 1,000 being treated as in each year a call in respect of the shares, and, secondly, that it is a contract whereby if the policy-holder pays the annual sum agreed upon by the parties as and for excess premia (a term which I will explain later) at the end of 10 years, he shall receive Rs. 20,000 less any sum which may be due on calls which have been made and are unpaid and less any further sum which may be due on an actuarial basis as the balance of the premia in respect of the insurance over and above the excess premia which have been paid, which balance in the events that have happened the Company has been unable to recover out of dividends declared by the Company.

In order to solve this problem it is necessary to look at the terms of the policy itself. By s. 1 it is specifically provided as follows:—

1. "The Society, hereby guarantees to the insured that if the insured pays to the Society at their office in Calcutta on the 7th day of April 1910 and in each succeeding year up to and including the year 1919 the sum of Rs. 1,550 or in lieu of any such annual payment the full number of instalments thereof as may be agreed upon (of which agreement the receipt granted by the Society shall be full and sufficient evidence) then the Society will on the 7th April 1920 (the period intervening between the last mentioned date and the endowment period) pay to the insured the sum of Rs. 20,000 at the Head Office of the Society in Calcutta or at the insured's permanent residence whichever may be preferred and will also pay at the end of the endowment period such additional sums by way of profits as according to the Society's regulations may accrue and become payable in respect of this policy, after paying up in full all calls due and payable in respect of the Bond shares hereinafter mentioned.

Clause 3.—This policy is issued on the express condition and stipulation that in case the insured should outlive the endow-

ment period all dividends to accrue become payable on the shares numbered(described in the certificate thereof as bond shares) shall be subject during the period ending to a lien in favour of the Society for payment of the premium payable on this policy to the total premium in each case being equal to the face value of the policy.

Condition 7 of the policy provides:—

Profits apportioned by the Society will in the first instance be applied to the payment of remaining calls on the Bond shares relating to this policy up to and including the 20th call or the last call made as the case may be and any surplus remaining thereafter at the end of the within mentioned period of lien may at the option of the insured be either (1) paid up in cash, or (2) applied in such other manner as he may direct.

Looking at the proposal I find that it is in this form:—

Dear sir,

I am desirous of taking so many Bond shares in the capital of the above-named Society and shall forward Rs..... being the first instalment of the first five per cent. call payable on application with a fee of Re. 1 for share certificate, etc., and I undertake to hold as many of these shares as may be allotted to me, subject to the provisions of the Memorandum and Articles of Association of the Society and the special conditions of such Bond shares combined with insurance benefits.

In case I fail to pay the first instalment aforesaid within a month from date of notice of acceptance of this proposal, I shall be liable to pay the incidental costs incurred by the Society in connection therewith.

Then there are set out certain details. Endorsed on the back of the proposal form are certain conditions:—

1. Amount of insurance is always equal to nominal value of the shares (hereinafter called Bond shares) against which it is granted.

2. Ordinary endowment period 25 years.

N. B.—The endowment period may be varied on terms and conditions ascertainable on application.

3. Dividends on Bond shares payable are subject to a lien for payment of the premiums on the insurance granted against these shares which shall not exceed the face value of the policy in case of survival of the endowment period; but in case of previous

death the period of lien to be extended to not more than five additional years.

N. B.—A single payment of Rs 40 per share will be accepted in full discharge of 10 calls on Bond shares.

8. Bond shares may be redeemed (i.e., dividends thereon freed from above conditions) as under:—

(a) At any time before payment of claim thereunder if the insurance is lapsed or surrendered for cash or paid up value or, other security is offered and accepted for due payment of unpaid premiums at investment insurance rates provided that such cash or paid up value has become due by reason of the dividends previously accrued.

(b) After payment of claim under the policy of the remaining premium is secured as aforesaid of the present value thereof paid up in cash.

Pursuant to that proposal the plaintiff became share-holder in the Company, and a share certificate was produced showing that he was a registered holder of 200 Bond shares of Rs. 100 each numbered consecutively 56,616 to 56,815. The certificate was dated 28th April 1910. On paying each year Rs. 1,000 plus Rs 550 the plaintiff received certain receipts. This is the form of one of them:—

"Received the sum of Rs. 1,550 being the first yearly instalment of the first call of 200 Bond shares supplied by him..... 1910"

Later, it was slightly altered, and the form of receipt was:

"Policy No. C5056, face value Rs. 20,000, the name, Rs. 1,000, premium Rs. 550. Total Rs. 1,550, 6th May 1918."

The plaintiff knew that the Rs. 1,550 which he was paying was as to Rs. 1,000, a call on the shares, and as to Rs. 550 excess premium on the policy. Now, the term "excess premium" meant that while the Company in the case of policies for 25 years demanded no sum as payment for premium, in respect of policies payable in 10 years the Company demanded an annual premium of Rs. 550, and by clause 3 of the Policy it was provided that the difference between the excess premium of Rs. 550 and the actuarial value of the full premium, (that is the full premium for Rs. 20,000 ascertained on an actuarial basis) was to be received by the Company out of the dividends which the Company would pay up till the year 1935. Now, reading

the policy as based upon the proposal, in my opinion, the true construction of the policy is that the Company agreed at the end of the endowment period to pay the principal sum insured. They undertook also to pay at the same time an additional sum in respect of dividends accrued (if any) on the shares after retaining thereout all calls due and payable in respect thereof. Under clause 3 they agreed to pay an additional sum in respect of dividends accrued after the period had expired during which the Company was at liberty to allocate the dividends towards the balance of the premium. In my opinion, under the Combined Investment Scheme the risk of the dividends not being sufficient to cover the balance of the premia was taken by the Company. It was contended by Counsel on behalf of the Company that under the policy the Company was entitled to deduct from the principal sum when it became due any sum which was still outstanding in respect of the balance of the premia which at that time had not been in fact recovered out of the profits of the Company. In my opinion, that is not in accordance with the terms of the contract. As it is admitted, therefore, that the plaintiff has paid the whole sum which the Company required him to pay during the endowment period under the policy, in my opinion, he is entitled to recover from the Company as a debt from the Company Rs. 20,000, being the principal sum insured. From that sum the Company, no doubt, might deduct any calls which in fact were due, but no calls are due, and, in my opinion, the Company is bound to pay the Rs. 20,000 without deduction notwithstanding that the balance of the premia has not been recovered out of the dividends of the Company. The Company has paid no dividend since 1912. On the assumption, however, that the Company is bound to pay as a debt to the plaintiff a sum of Rs. 20,000, Mr. Bose, on behalf of the defendant, has ingeniously argued that the Company is not bound to pay the Rs. 20,000 out of its General Fund, but that the debt of Rs. 20,000 is to be treated merely as a claim which is to be liquidated, in so far as funds are available, out of a certain fund created under Art. 97 of the Articles of Association of the 16th of August 1915. There is evidence before me that this particular fund called the "Combined Policy Holders Account" is insolvent, and, although

the Company has other funds at its disposal out of this particular account the Company would not be able to provide sufficient monies to liquidate the debt due to the plaintiff from the Company. Now, as I am satisfied that the plaintiff has an undoubted right to recover Rs. 20,000 from the Company, the question as to whether the Company can pay or how it will pay, is a matter which will have to be considered when the time comes for the plaintiff to put his decree into execution. I think, however, that it is advisable in this case, as the matter has been urged by Counsel on behalf of the defendant Company, that I should express my view on the question as to how far the plaintiff is bound by the alteration in Art. 97 of the Articles of Association. Now, it is perfectly true that the plaintiff, being a share-holder in the Company, must be taken to know that one of the incidents of membership of a Company is that the Company may by adopting the proper method, *bona fide* alter its articles in a way which may prejudicially affect his interest, and, provided that the alteration in the article is not inconsistent with the objects set out in the Memorandum of Association, and is *bona fide* made in the interest of the Company, the plaintiff as a share holder in ordinary circumstances would be bound by such an alteration: *Allen v. Gold Reefs of West Africa* (1).

Sir Nathaniel Lindley, Master of the Rolls lays down the rule as follows:—

"The power thus conferred on Companies to alter the regulations contained in their articles is limited only by the provisions contained in the Statute and the conditions contained in the Company's Memorandum of Association. Wide, however, as the language of s. 50 is, the power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also *bona fide* for the benefit of the Company as a whole, and it must not be exceeded. These conditions are always implied, and are seldom, if ever, expressed. But if they are complied with I can discover no ground for judicially putting any other restrictions on the power conferred by the section than those contained in it.

(1) (1900) 1 Ch. 656; 69 L. J. Ch. 266; 82 L. T. 210 48 W. R. 452; 7 Mans. 417; 16 T. L. R. 213.

How shares shall be transferred, and whether the Company shall have any lien on them, are clearly matters of regulation properly prescribed by a Company's Articles of Association. This is shown by Table A in the Schedule to the Company's Act, 1852, cls 8, 9, 10. Speaking, therefore, generally, and without reference to any particular case, the section clearly authorises a Limited Company, formed with articles which confer no lien on fully paid up shares, and which allow them to be transferred without any fetter, to alter those articles by special resolution, and to impose a lien and restrictions on the registry of transfers of those shares by members indebted to the Company."

"But then comes the question whether this can be done so as to impose a lien or restriction in respect of a debt contracted before and existing at the time when the articles are altered. Again, speaking generally, I am of opinion that the articles can be so altered, and that if they are altered *bona fide* for the benefit of the Company, they will be valid and binding as altered on the existing holders of paid-up shares, whether such holders are indebted or not indebted to the Company when the alteration is made. But, as will be seen presently, it does not by any means follow that the altered article may not be inapplicable to some particular fully paid-up share holder. He may have special rights against a Company, which do not invalidate the resolution to alter the articles, but which may exempt him from the operations of the articles as altered."

Further on, the Master of the Rolls adds:—"But, although the regulations contained in a Company's Articles of Association are revocable by special resolution, a special contract may be made with the Company in the terms of or embodying one or more of the articles, and the question will then arise whether an alteration of the articles so embodied is consistent or inconsistent with the real bargain between the parties. A Company cannot break its contracts by altering its articles, but, when dealing with contracts referring to revocable articles, and especially with contracts between a member of the Company and the Company respecting his shares, care must be taken not to assume that the contract involves as one of its terms an article which is not to be altered."

The principle enunciated by the Master

of the Rolls in *Allen v. Gold Reefs of West Africa* (1) was considered by the Court of Appeal in the case of *Baily v. British Equitable Assurance Company* (2). In that case the question arose as to whether a Company had power by altering its Articles of Association to distribute to the shareholders, not the whole of the profits, but the whole of the profits less a reserve fund which was deducted, and the Court of Appeal held that the effect of such an alteration of the articles was to cause the Company to commit a breach of its contract with the policy holder. That case went to the House of Lords where it was reversed, but on the ground that in that particular case the share-holder must be taken to have anticipated that it was possible that the articles would be altered so as to authorize a distribution of the profits less an amount set aside for reserve, and the House of Lords did not affect to disapprove the principles laid down by the Court of Appeal. Lord Justice Cozens Hardy in the Court of Appeal stated the principle as follows:—

"It is said, that, apart from the Statute, the deed of settlement itself contained a power to alter the by-law of which power the plaintiff had notice. We cannot assent to this argument. As between the members of a Company and the Company, no doubt, this proposition is to some extent true. The rights of a share-holder in respect of his shares, except so far as they may be protected by the Memorandum of Association, are by Statute made liable to be altered by special resolution: see *Allen v. Gold Reefs of West Africa* (1).

"But the case of a contract between an outsider and the Company is entirely different, and even a share-holder must be regarded as an outsider in so far as he contracts with the Company otherwise than in respect of his shares. It would be dangerous to hold that in a contract of loan or a contract of service or a contract of insurance validly entered into by a Company there is any greater power of variation of the rights and liabilities of the parties than would exist if, instead of the Company, the contracting party had been an individual. A Company cannot by altering its articles justify a breach of contract."

And Lord Lindley, in the House of Lords,

(2) (1904) 1 Ch. 374; 11 Mans. 169; 73 L. J. Ch. 240; 20 T. L. R. 242; 90 L. T. 335; 52 W. R. 549.

while coming to the conclusion that the particular alteration in the article did not involve a breach of the Company's contract with the plaintiff, concludes his speech by saying :—

"Of course, the powers of altering by-laws, like other powers, must be exercised *bona fide*, and having regard to the purposes for which they are created, and to the rights of persons affected by them. A by-law to the effect that no creditor or policy-holder should be paid what was due to him would, in my opinion, be clearly void as an illegal excess of power. But in this case it is conceded that the alteration contemplated, and sought to be restrained, is fair, honest and business-like, and will in the opinion of the Directors and share-holders of the Company, be beneficial as well to the policy-holders as to the share-holders. The sole question is whether such an alteration infringes the rights of the policy-holders. In my opinion it clearly does not."

Mr. Justice Sargant in the *British Murac Syndicate, Ltd. v. Alperton Rubber Co., Ltd.* (3) held that the alteration of the article in that case was not an alteration which was applicable to the contract between the Company and the plaintiff. In that case by one of the articles it was provided that a certain Syndicate should have the right to nominate two Directors, and the Company, in the belief that certain nominees of the Syndicate were undesirable as Directors, altered the articles so as to authorise the Company to refuse to accept the Syndicate's nominees. Mr. Justice Sargant at page 193,* passed these observations :—

"The principal authority on the subject is *Allen v. Gold Reefs of West Africa* (1), where the Court clearly recognized that a Company cannot alter its articles so as to commit a breach of contract, and further that even the articles themselves might show that there was such a contract as that it would be unfair on the part of the Company to alter them. Here I have not to consider the latter point because there are present here both the provision in the articles and the express obligation in the agreement under which the plaintiff Syndicate is to have this express right." Later on he adds that "if the Court sees that a

contract involves as one of its terms that an article is not to be altered, then the Company is not at liberty to alter that article so as to break that contract. In my judgment on the facts of this case the contract between the plaintiff Syndicate and the defendant Company clearly involved as one of its terms that Art. 88 was not to be altered, i. e., that the plaintiff Syndicate so long as it held the stipulated number of shares was to have a perpetual right of nominating two Directors of the Company." [See also *Sidebottom v. Kershaw, Leese & Co.* (4) and *Dafen Tinplate Co. v. Lanelly Steel Co.* (5).]

Applying the principles thus laid down to the facts of this case I have to consider whether the alteration of the article in August 1915, (if it is applicable at all, having regard to the further alteration of the articles in May 1922), involves such a breach of the contract which the Company made with the plaintiff as that it would be inequitable that the article as altered should be held to apply to that contract. In my opinion, the effect of the contention of the defendant Company is that, notwithstanding that the plaintiff has a valid claim against them for a liquidated sum of Rs. 20,000 the Company is entitled to deduct from such sum the balance of premia not recovered out of the dividends paid, and in addition is entitled to make a call in respect of any balance of the monies due on the shares which is outstanding; while the effect of the alteration of the article is that the plaintiff's claim which the Company has ample means at their disposal to liquidate, is not to be paid by the Company out of their general assets, but is to be treated as a claim against a fund which is insolvent. It is not necessary for me to hold in these proceedings that the articles as altered are invalid; it may be that the right of the Company to alter its articles is unimpaired, but, in my opinion, the effect of the alteration of the articles is that it involves a fundamental breach of the contract which the Company had previously entered into with the plaintiff, and in respect of that contract the article is inapplicable. I come, therefore, to the conclusion that, in respect of that contract the article is inapplicable, and that, although the plaintiff

(3) (1915) 2 Ch. 186; 84 L. J. Ch. 665; 113 L. T. 373; 59 S. J. 494; 31 T. L. R. 391.

*Page of (1915) 2 Ch. -[Ed.]

(4) (1920) 1 Ch. 154; 89 L. J. Ch. 113; 122 L. T. 325; 64 S. J. 114; 36 T. L. R. 55.

(5) (1920) 2 Ch. 124; 89 L. J. Ch. 346; 128 L. T. 225; 64 S. J. 446; 36 T. L. R. 428.

iff is a share-holder in the Company in respect of this debt of Rs. 20,000 the Directors would not be acting *ultra vires* in paying the sum of Rs. 20,000 out of the general assets of the Company which the Directors are at liberty to allocate for the purpose of liquidating this and other business claims.

Mr. Bose, on behalf of the defendant further contended that it was *ultra vires* for the Directors to pay this sum, as in effect it would be paying back the capital of the Company, but, in my opinion, all that the Directors would be doing would be paying an ordinary business debt, and not in any sense re-paying capital monies of the Company.

Under these circumstances there will be judgment for the plaintiff for the sum claimed with costs on scale No. 2. Interest on sum decreed at 6 per cent.

Z. K.

Appeal allowed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 85 OF 1923.
November 13, 1924.

Present:—Justice Sir Charles Gordon Spencer, Kt., and Mr. Justice Srinivasa Iyengar.

Dewan Bahadur GOVINDAS
CHATURBHUJAS—PLAINTIFF—
APPELLANT

versus

N. RAMADOSS—DEFENDANT—RESPONDENT.

Presidency Towns Insolvency Act (III of 1909), ss. 23, 30 (2)—Insolvency—Composition agreed to by majority of creditors—Annulment of adjudication—Secured creditor not party to composition, whether bound—Right of suit, whether barred.

Under the Presidency Towns Insolvency Act, a composition in the course of the insolvency proceedings agreed to by the prescribed statutory majority of creditors is binding on all creditors of the insolvent whether they were parties to the composition or not, but such composition takes effect and operates to discharge the insolvent from his liability in respect of a debt only if the compensation agreed to is paid or else a scheme is outstanding under which the creditor is required to proceed and obtain relief. [p. 96, col. 1.]

Where a scheme of composition has been approved the insolvent debtor is bound to pay to all his creditors, including secured creditors, whose debts are provable in insolvency, the amount of the balance of their debts according to the composition and the right to enforce such payment can be enforced in the ordinary Courts. [p. 93, col. 2.]

Clause (2) of s. 30 of the Presidency Towns Insolvency Act is merely enabling in its nature and provides only for a summary remedy and does not exclude the jurisdiction of the ordinary Courts. It is applicable only to cases where there is something in

the provisions of the composition or scheme which is capable of being enforced in the Bankruptcy Court. [p. 97, col. 1.]

A composition was agreed to by the statutory majority of the creditors of an insolvent and the adjudication was annulled. One of the secured creditors got no notice of the adjudication and had not yet proved his debt when it was annulled. There was no provision in the scheme of composition capable of enforcement under cl. (2) of s. 30 of the Presidency Towns Insolvency Act. In a suit by the secured creditor to recover the balance of what was due to him after deducting the value of his security since realised :

Held, (1) that s. 30, cl. (2) of the Act did not operate as a bar to the maintainability of the suit ; [ibid.]

Edwards v. Hancher, (1876) 1 C. P. D. 111; 33 L. T. 575; *Edwards v. Coombe*, (1872) 7 C. P. 519; 41 L. J. C. P. 202; 27 L. T. 315; 21 W. R. 107, *In re Bestwick, Ex parte Hodgkinson*, (1876) 2 Ch. 485; 45 L. J. Bk. 148; 31 L. T. 784; 24 W. R. 938 and *In re Hardy, Hardy v. Farmer*, (1896) 1 Ch. 904; 65 L. J. Ch. 461; 74 L. T. 403; 44 W. R. 503; 3 Manson 150, relied on.

Flint v. Barnard, (1889) 22 Q. B. D. 90; 58 L. J. Q. B. 53; 37 W. R. 185 and *Seaton v. Deerpur*, (1895) 1 Q. B. 853; 64 L. J. Q. B. 430; 14 R. 523; 72 L. T. 453; 43 W. R. 436; 59 J. P. 357; 2 Manson 355, distinguished.

(2) that the plaintiff was, however, bound by the terms of the composition and could only recover that proportion of the balance of his debt which had been paid to the other creditors. [p. 97, col. 2.]

Per Spencer, J.—In India the position of an insolvent whose adjudication has been annulled is not the same as that of a discharged insolvent. [p. 93, col. 1.]

Per Srinivasa Iyengar, J.—A composition in the course of the insolvency agreed to by the prescribed statutory majority of the creditors is binding on all creditors of the insolvent whether they were parties to the composition or not. [p. 95, col. 1.]

In the absence of express statutory provision excluding the jurisdiction of the ordinary Tribunals no right of action can be deemed to have been taken away. [p. 97, col. 1.]

Appeal from the judgment of Mr. Justice Coutts-Trotter, dated the 14th August 1923, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, in O. S. No. 720 of 1922.

Mr C. V. Anantakrishna Iyer, for the Appellant.

Mr A. Ramachandra Iyer, for the Respondent.

JUDGMENT.

Spencer, J.—Appellant, Dewan Bahadur Govindas Chaturbhujdas, plaintiff in the Trial Court, was the secured creditor of respondent N. Ramdoss first defendant in the Trial Court, who pledged with him, through his agent the second defendant, certain jewels as security for a loan of Rs. 12,000. Respondent was adjudicated insolvent on 20th September 1921. The appellant got no notice from the Official Assignee and before he attempted to prove for the balance of what was due to him, the adjudication was annulled on the 20th

February, 1922. Appellant brought this suit to recover the balance due to him after deducting the value of his security which he has since realised.

The learned Judge held that he was not entitled to anything and dismissed the suit against this defendant. He acted upon first impressions, as there is no decided case in this country as to the rights of a secured creditor to recover the balance of any debt which he has failed to prove in insolvency, when the adjudication has been annulled owing to the debtor having compounded with his other creditors. The learned Judge quoted the case of *Flint v. Barnard* (1) as being an authority for the principle that the effect of a composition between a debtor and his creditors is the same as the effect of a discharge, viz., that it releases a debtor from all debts provable in bankruptcy. If I rightly understand that decision, it only decided what are debts provable in bankruptcy and included among them liabilities which mature into debts due after acceptance of composition.

In this country the position of an insolvent whose adjudication has been annulled is not the same as that of a discharged insolvent. The Presidency Towns Insolvency Act gives the effect of an order of discharge in s. 45. An order of discharge releases an insolvent from all debts provable in insolvency except certain debts of a special nature, such as debts owing to the Crown. An adjudication may be annulled either under s. 21 when it is found by the Court that a debtor ought not to have been adjudged insolvent, or where it is proved that all his debts have been paid in full, or it may be annulled under s. 30 when a proposal of composition has been accepted by a majority of his creditors. The effect of annulment appears in s. 23; which states that the property of the debtor shall vest in such person as the Court may appoint, or, in default of such an appointment shall revert to the debtor, to the extent of his interest therein. In Bombay, there are rules for the vesting of the property in a person appointed by the Court. Here, as there are no such rules and no such appointment has been made, the property must necessarily revert to the debtor.

In the present case there was no regular

scheme of composition laid before the Court but the insolvent filed an affidavit in the Court affirming that all the creditors had agreed to accept eight annas in the rupee and had been paid at that rate. As there is no provision for composition which can be enforced under s. 30, cl. (2), no property of the insolvent is in the hands of the Official Assignee, and no proceedings are now pending in the matter of the insolvency of N. Rama Doss, it would be futile for us to refer the creditor to the Court of Insolvency for his remedy. He has brought this suit for the whole of the balance that is due to him, but being one of the creditors whose names were entered in the Schedule (Ex. J), a majority of whom agreed to accept eight annas in the rupee, he is bound by the result of the composition approved by the Court, for s. 30, cl. (1) says that upon an order being made annulling the adjudication, the composition or scheme shall be binding on all the creditors so far as it relates to any debt due to them from the insolvent and provable in insolvency. The appellant's claim for the unsecured balance was provable in insolvency though not actually proved, as the adjudication was annulled before he got notice and came in to prove for the balance. In *Edwards v. Coombe* (2), the rights of general action of a creditor whose name does not appear in the statement of composition were held not to be taken away by s. 126 of the Bankruptcy Act of 1869 which provided as follows:—"The provisions of a composition accepted by an extraordinary resolution in pursuance of this section shall be binding on all the creditors whose names and addresses, and the amount of debts due to whom are shown in the statement of the debtor, produced to the meetings at which the resolution was passed, but shall not affect or prejudice the rights of any other creditors." Under the same Act in *In re Bestwick, Ex parte Hodgkinson* (3), creditors who failed to prove their debt in composition proceedings were allowed to come in after realizing their security and claim the balance at the rate at which composition was accepted. In the Bankruptcy Act of 1883 this provision was not repeated, but s. 18, cl. (8) of that Act provided: "A composition or scheme

(2) (1872) 7 C. P. 519; 41 L. J. C. P. 202; 27 L. T. 315; 21 W. R. 107.

(3) (1876) 2 Ch. 185; 45 L. J. Bk. 148; 34 L. T. 784; 24 W. R. 938.

(1) (1889) 22 Q. B. D. 90; 58 L. J. Q. B. 53; 37 W. R. 185.

accepted and proved in pursuance of this section shall be binding on all the creditors so far as it relates to any debts due to them from the debtor and provable in bankruptcy."

Assuming that a creditor might enforce the original agreement or resolution by a summary application to the Court of Bankruptcy, it is clear from these decisions that the jurisdiction of Courts of Common Law has not been ousted thereby. In the last quoted of these decisions, it is stated that a creditor may wait till he realises his security, but in any case the debt will not be discharged until the amount of composition is paid. It was held by the Court of Chancery in *In re Hardy, Hardy v. Farmer* (4), that secured creditors who had not assented to a scheme of composition could bring an action after the death of an adjudicated bankrupt against his estate for the balance of their debt that remained after valuing their security and that although the Court of Bankruptcy had jurisdiction over such a claim notwithstanding the bankrupt's death, the secured creditor's right of action was not barred. In India too it is provided that under s. 17 of the Presidency Towns Insolvency Act a secured creditor's right of suit is not barred by the making of an order of adjudication.

I think that the plaintiff was clearly entitled to a decree against first defendant for a moiety of the balance that may be found to be due, after deducting from the amount claimed in the plaint the amount realised by sale of the security, and interest thereon at the contract rate of Rs. 1-3-0 up to the date of the decree (14th August 1923) of the Court of first instance.

The appeal is accordingly allowed, but without costs as in this Court the case has been placed upon a new footing and a decree will be given to the plaintiff (appellant) as I have stated.

The memorandum of objections is dismissed.

Srinivasa Iyengar, J.—I agree that the appeal should be allowed. But it must be observed that the point on which the appeal has been argued before us was not only not argued before the learned Judge at the Original Trial but does not seem to have been even hinted at. The plaintiff-ap-

pellant instituted the suit against two defendants. The first defendant is the only respondent here in appeal before us. The other defendant was the widow and legal representative of one Oggu Guruswami Chetty. This Guruswami Chetty pledged with the plaintiff two diamond *addigais* as security for a loan of Rs. 12,000, carrying interest at Rs. 1-3-0 per cent. per mensem, and as further security gave his own promissory note therefor to the plaintiff. It is now admitted that the two jewels which were so pledged by Guruswami belonged to the first defendant and that the pledge was made and the loan obtained by Guruswami only for and on behalf of the first defendant.

The learned Judge granted a decree against the second defendant limited to the assets of the said Guruswami in her hands, but dismissed the action—so far as the first defendant was concerned.

The ground on which the learned Judge held that the plaintiff was not entitled to a decree against the first defendant is as follows:—The first defendant had subsequent to the pledge been adjudicated an insolvent, but in the course of the insolvency proceedings the statutory majority of his creditors agreed to a composition of 8-annas in the rupee and thereupon the insolvent first defendant applied to the Court for the annulment of his insolvency on the representation that he had paid all his creditors the composition agreed to. The Court sanctioned the compromise and annulled the insolvency. The plaintiff who had not realised his security, had not proved his debt in insolvency or taken any steps to have it proved in any of the ways indicated by the rules relating to secured creditors before the insolvency was annulled by the Court. And under some practice for which there seems to be no warrant, no notice of the application for annulment was given to the plaintiff or any other secured creditor. Even when the suit was instituted, the plaintiff had not realised his securities, and one of the prayers in the plaint relates to the sale of the securities by or under the directions of the Court.

The learned Judge referring to the case of *Flint v. Barnard* (1) and the case of *Seaton v. Deerhurst* (5) held that the

(4) (1895) 1 Ch. 904; 65 L. J. Ch. 461; 74 L. T. 403; 41 W. R. 503; 3 Manson 150.

(5) (1895) 1 Q. B. 853; 64 L. J. Q. B. 430; 14 R. 523; 72 L. T. 453; 43 W. R. 436; 59 J. P. 357; 2 Manson 355.

annulment following on the composition had the same effect with regard to the insolvent as an order of discharge and that, therefore, the first defendant became released from liability to the plaintiff with regard to any balance that might be found due to the creditor after the realisation of the securities.

The first question, therefore, that arises in this appeal is whether the annulment of the insolvency in such circumstances has the operation in law of discharging the insolvent debtor entirely from liability and this will have to be determined apart altogether from any question whether by reason of the plaintiff not having proved the debt in insolvency he has become precluded or debarred from enforcing any remedies and whether the appropriate remedy open to such a creditor would be in the Bankruptcy Court or by separate action. The learned Vakil for the appellant did not seriously press the claim of the plaintiff for the payment of the whole amount of the deficiency in the debt after crediting the proceeds realised by the sale of the securities but contended only for the recovery of such deficiency at the rate agreed to under the composition, namely, at 8-annas in the rupee. As I understand *Flint v. Barnard* (1), it is only an authority for two propositions; firstly, that a composition in the course of the insolvency agreed to by the prescribed statutory majority of the creditors is binding on all creditors of the insolvent whether they were parties to the composition or not; and secondly, that a debt accrued subsequent to adjudication but before the composition is a debt provable in insolvency. The plaintiff in the action claimed not to be bound by the composition and not liable to proceed to recover his debt under the scheme framed and approved of by the Court for the payment of the creditors. Lord Esher, M. R., properly held that such a debt was a debt provable in insolvency and an agreement in composition bound all the creditors whose debts were debts provable in insolvency. No question, therefore, arose or was decided whether a creditor in those circumstances was or was not entitled to be paid even at the rate agreed to under the composition. It seems to me that it was assumed throughout in that case that the creditor had a right at least to be so paid.

In *Seaton v. Deerhurst* (5), the question

that arose was whether a judgment-creditor whose debt was rejected on its being attempted to be proved before the trustees in Bankruptcy was entitled, merely because he had not received any dividend, to proceed to have execution of his decree. The Court held that being a debt provable in bankruptcy and there being a scheme for the payment of all the creditors whose debts were provable in bankruptcy and the debt due to the judgment creditor being a debt so provable, the trustee in bankruptcy was entitled to reject it as not binding and that the mere fact that his claim was rejected would not give him a right to proceed in execution. The *ratio decidendi* in that case obviously was that a judgment creditor was not in a better position with regard to the liability to prove his claim before the trustee under a composition arrangement than any other ordinary creditor whose debt was similarly provable in insolvency. In that case there was clearly a trustee appointed under the composition arrangement and the creditors who had not been paid were relegated to their remedies against him. In the present case, however, there has been no arrangement whatever made for the payment of any creditors who might be found not to have been paid the composition agreed to, no amount or property was set apart for that purpose either in the hands of the Official Assignee or any other trustee and not even an undertaking was given by the insolvent debtor to make any payments under the composition. This case, therefore, is not one in which a claim was made by the plaintiff to any trustee in bankruptcy or composition and properly rejected by him. It is clear that no such claim could have been made, for indeed there is no person before whom such a claim could have been preferred. The case of *Seaton v. Deerhurst* (5) is, therefore, an authority only for the position that if there is a scheme sanctioned by the Court for the payment of a composition to all creditors the creditors have only the remedy given to them for getting what they can get under the scheme and not otherwise.

In *Edwards v. Hancher* (6), there was a composition agreed to of three shillings in the pound for which the insolvent debtor along with a surety gave a pro-

(6) (1876) 1 C. P. D. 111; 33 L. T. 575.

missory note to the creditor and a receipt was also granted by the creditor for purporting to be in discharge of the debt. On the note being dishonoured, it was held that the plaintiffs were remitted to their rights to sue on the original debt. Chief Justice Lord Coleridge held that the actual payment arrived at on the basis of the composition is the thing which the creditors resolved to accept and that, therefore, it is if and when and only if and when that amount is actually paid, there is satisfaction of the debt. The Court held that on failure of the payment, the plaintiffs were remitted to their original rights and were entitled to a decree in their action against the defendants. This case was referred to with approval and followed in *In re Bestwick, Ex parte Bestwick* (3) and it was there held that a secured creditor was in no way bound by a compounding debtor's estimate of the value of his security and that he was entitled to abstain from proving the claim or taking any part in composition proceedings and that when he has realised his security he may claim from the debtor payment of the composition on the balance of the debt, which may then remain unsatisfied.

On the authority of these two cases we arrive at the conclusion that though a composition sanctioned by the Court is binding on all the creditors of the insolvent including the creditors who were not parties to the composition the composition takes effect and operates to discharge the insolvent from his liability on the debt only if the compensation agreed to is paid or else a scheme is outstanding under which the creditors are required to proceed and obtain relief. In default of such payment and in the absence of such a scheme, it necessarily follows that the obligation is laid on the insolvent debtor to pay to all the creditors whose debts are provable in insolvency the amount of the balance of their debt according to the composition. It is inconceivable that in default of any such payment and in the absence of any such scheme of trust for payment the insolvent debtor should be entirely discharged from all liability merely on the Court approving of a composition and annulling the adjudication. But that was the contention put forward by Mr. A. Ramachandra Iyer the learned Vakil for the respondent if I understood his argument aright. It seems to me that it can scarcely be

the law. There are, however, two cases which were relied on and which I may here refer to. In the case of *Gilbey v. Jeffries* (7), no doubt, Brett, M. R., held that as the composition was binding on the creditor the debtor became discharged. But that was a case in which under the arrangement of composition all the property of the debtor had been transferred to a trustee and the remedy of the creditor obviously was against such a trustee. The case of *Couldery v. Bartrum* (8) was also relied on, but that was a case merely relating to valuation of securities and to the liability under the rules relating thereto of the holder of the security to refund any amount realised by him by the sale of the securities over and above the amount at which he had valued the securities. Thus if the creditor in circumstances has a remedy, the only question that remains is, what is his remedy? Whether it is by way of application to the Bankruptcy Court or by a separate action. In the English Bankruptcy Rules, there is a specific r. 215 which provides that no action to enforce payment shall lie but the remedy shall only be by application to the Bankruptcy Courts if default is made in payment under a composition scheme either by the debtor or the trustee. No such rule has been framed in this Court. The only provision of law relating to this matter is contained in cl. (2) of s. 30 of Act III of 1909. It is as follows:—"The provisions of the composition or scheme may be enforced by the Court on application by any person interested, and any disobedience of an order of the Court made on the application shall be deemed a contempt of Court." This is an exact reproduction of cl. (10) of s. 18 of the English Bankruptcy Act of the year 1883.

In the case of *In re Hardy, Hardy v. Farmer* (4), after the death of the bankrupt a secured creditor valuing his security under the rules applied in an administration action for the recovery of the balance due to him. A trustee had been appointed under the composition and objection was taken that no application would lie except to the Bankruptcy Court. Justice Chitty having regard to the terms of r. 211 of the Bankruptcy Rules of 1886 which had been passed by that

(7) (1833) 11 Q. B. D. 559; 52 L. J. Q. B. 601; 48 L. T. 699.

(8) (1882) 19 Ch. D. 394; 51 L. J. Ch. 265; 45 L. T. 689; 30 W. R. 141.

time, which rule was identical in terms with the present r. 215 already referred to, held that the proper remedy was by way of application in the Bankruptcy Court, and the learned Judge apparently adjourned the hearing of the application in the Chancery Court for the purpose of enabling the applicant to move the Bankruptcy Court. In this case two points are clear; firstly, that a trustee had been appointed for the purpose of carrying out the composition; and secondly, that but for r. 211 referred to by the learned Judge which had the force of law and which laid down that no separate action would lie and that the remedy would be by application to the Bankruptcy Court, the learned Judge would have held he had jurisdiction. In the absence of such a rule in this Court, there is, therefore, no reason whatever to hold that the right of separate action is precluded or barred.

Further cl. (2) of s. 30 is merely enabling. It is a summary remedy given by the Statute. There are no words there excluding the jurisdiction of the ordinary Courts. In the absence of express statutory provision excluding the jurisdiction of the ordinary Tribunals no right of action could be deemed to have been taken away. Furthermore, cl. (2) of s. 30 refers obviously only to cases where there is something in the provisions of the composition or scheme which are capable of being enforced in the Bankruptcy Court. In the present case, however, no such provision would seem to exist capable of enforcement on application to the Bankruptcy Court. On that ground also, therefore, cl. (2) of s. 30 has no application.

The case of *Edwards v. Coombe* (2) is a decision which throws considerable light on the question now under discussion. That was in the year 1872. There was then no such rule as the present r. 215 or r. 211 of the Bankruptcy rules of the year 1886. Justice Willes in that case decided that it was competent to a non-assenting creditor notwithstanding a resolution for composition under s. 126 of the Bankruptcy Act on 1869 to sue for his original debt where the debtor has failed to pay or tender the composition within the time agreed or within a reasonable time, and that the creditor was not restricted to the summary remedy by application to the Courts of Bankruptcy provided by that section. I may here observe that the provision for summary

remedy referred to in that section is in terms identical with cl. (2) of s. 30 of the Presidency Towns Insolvency Act of 1909. That learned Judge referring to the summary remedy states that a remedy given in Bankruptcy Courts may be very valuable, that a creditor may avail himself of the course of proceedings if he thinks fit, but his ordinary common law remedy still subsists until he elects to avail himself of the powers of the Court of Bankruptcy. At another place in the same judgment that learned Judge observes that it is the composition that has to be accepted and not a mere agreement of the other creditors and that the non-payment of composition was the failure of a condition going to the root of the arrangement and that the original debt remains and may be resorted to notwithstanding the resolution.

The following sentence, however, from the concluding portion of the judgment of Justice Willes may have some bearing and may also require to be considered:—"We dispose of this case without entering into a consideration as to whether it might be more or less desirable that the equitable summary remedy of the creditor should be enforced rather than the ordinary common law remedy."

In spite of the fact that in our judgment the plaintiff-appellant in this case has got a concurrent remedy by separate action, we should have been disposed to refer him to the summary remedy indicated in cl. 2 of s. 30 of the Presidency Towns Insolvency Act on the general principle that the parties should as far as possible be relegated to the remedies provided in special enactments, were it not for the circumstance that there appears to be no provision in the composition and arrangement in this case, which is capable of any summary enforcement. Any other remedy that may be open to the plaintiff under that Act could scarcely be called summary. It, therefore, follows that there is nothing in the Bankruptcy Law which renders the present suit unsustainable. The plaintiff is clearly entitled to be paid as composition, in respect of the balance due to him in the amount of the debt with interest thereon at Rs. 1-3-0 per cent. per mensem from the date of the loan till the date of the decree of the Original Side after giving credit for the sale-proceeds of the securities, and the learned Judge erred in dismissing the suit entirely against the first defendant.

The decree of the Original Court will, therefore, accordingly be modified and a decree will be passed against the first defendant for the amount of such a balance at 8 annas in the rupee or in other words for the moiety of such balance. As the point on which the appellant had now succeeded, was not argued before the learned Judge in the Original Court, there will be no order as to the costs of the appeal. The memorandum of objections is also dismissed.

v. N. v. Memorandum of objections dismissed.

Z. K.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE

No. 2684 of 1922.

April 30, 1925.

Present:—Mr. Justice Suhrawardy
and Mr. Justice Duval.

RAM CHANDRA AGARWALA

AND ANOTHER—DEFENDANTS—

APPELLANTS

versus

SYAMESWARI DASYA—PLAINTIFF

—RESPONDENT.

*Registration Act (XVI of 1908), ss. 17 (1) (d), 49--
Construction of document—Lease, unregistered, whether
admissible in evidence—Admission, erroneous, of
Counsel on point of law, whether binding.*

An erroneous admission by Counsel on a point of law is of no effect and does not preclude a party from claiming his legal rights in the Appellate Court. [p. 99, col. 1.]

A document began by describing itself to be an agreement for letting out a *basa bari* and a *tin ghar* and contained the following statement "you having come to me and Rs. 150 having been fixed as the annual *jama* of the said *basa bari* and the *tin ghar* I let out the same to you for carrying on your trade and commerce therein." Then followed a clause as to the way in which the expenses for repairs were to be met. It was then laid down that after the accounts had been made up and the amount of money expended on the repairs totalled, there would be a fresh deed and that on re-payment of the debt incurred by the owner in respect of the repairs the owner would be able to make a new settlement of the land according to his wish. Then followed certain conditions as to the maintenance of boundaries, payment of damages for injuries to the *ghar* not caused by accident, keeping the house in repair by the owner, etc.:

Held, that the document was a lease for a number of years and not being registered was not admissible in evidence. [p. 99, col. 2.]

Appeal against a decree of the Special Subordinate Judge, As-sam Valley Districts, dated the 21st July 1922, affirming that of

the Munsif, Dhubri, dated the 3rd December 1921.

Dr. Bijan Kumar Mukerjee (for Babu Rupendra Kumar Mitter) and Babu Dharmadas Set, for the Appellants.

Mr. Abani Nath Bhattacharjya and Babu Nirod Bandhu Roy, for the Respondent.

JUDGMENT.

Duval, J.—This appeal arises out of a suit in ejectment. The mother of the present plaintiff had a house in Gouripur Bazar in the District of Goalpara and in 1901 the defendants became her tenant at the rental of Rs. 90 a year and had a shop in the premises. In 1910 the house having been found to be dilapidated the parties met and it was arranged that the lease should continue at Rs. 150 a year after repairs but as the lady had no money the defendants would advance the money for putting the house in order without interest and that the money would be recovered by a deduction of Rs. 75 a year from the present rent of Rs. 150 a year. There was a further term that until the money due on the repairs was re-paid the defendants would not be ejected. Shortly after this the mother of the plaintiff who was an old lady of 90 years of age died and has been succeeded by her daughter the present plaintiff. In 1920 the present suit was brought to eject the defendants from the house. The defendants set up a document (Ex. C.) under which they stated they were not liable to be ejected until the whole debt had been paid off by payment of Rs. 75 a year. The Munsif, however, found that this deed not having been registered, the defendants were not protected as they were only tenants at-will and that as notice had been served, the tenancy had been terminated by that notice and so he gave a decree to the plaintiff to eject the defendants in payment of the balance due to the extent of Rs. 875 and allowed them a certain time within which to remove the additional houses. Against this order the defendants appealed. On the appeal coming up before the Subordinate Judge the learned Pleader appearing for the appellant conceded that the position of his clients was that of the tenants-at-will and that they were liable to be ejected but in the circumstances of the case the amount of compensation granted by the Court below was inadequate. The learned Subordinate Judge, therefore, only dealt with the question of compensation and came to the conclusion that Rs. 875

allowed to the defendants was the proper amount.

In appeal before us it is first urged that this admission by the Pleader for the defendants did not bar the point as to the validity or otherwise of the lease or whether the defendants are liable to be ejected at all being taken in second appeal. There is no doubt that this is so. I only refer to the case of *Secretary of State for India v. Sibaprosad Jana* (1), where it was stated following the decision of the Judicial Committee in the cases of *Jotendromohun Tagore v. Ganendromohun Tagore* (2), and *Beni Pershad Koeri v. Dudhnath Roy* (3), that an erroneous admission by a Counsel on a point of law is of no effect and does not preclude a party from claiming his legal rights in the Appellate Court. The question of the amount of compensation is not argued before us in second appeal. The only question taken before us is that the document (Ex. C.) though not registered gave them a right under which they could not be ejected and anyhow it did not create a present demise and was only an agreement and not a lease: and that anyhow the principle laid down in the case of *Walsh v. Lonsdale* (4), as to part performance will apply to this case. The question, however, in this case is whether, as a matter of fact, it was in consequence of this document as a lease that the defendants came into possession of this property. An examination of the document in my mind leaves no doubt in this respect. The document, began by describing the deed to be an agreement for letting out *basa bari* and a *tin 'ghar'* and it says as follows at the beginning "you having come to me and Rs. 150 only having been fixed as the annual *jama* of the said *basa bari* and the *tin ghar*, I let out the same to you for carrying on your trade and commerce therein". Then follows a clause in the document as to the way in which the expenses for repairs would be met. It then lays down that after the accounts have been made and the amount of money expended therefor totalled, there would be a fresh deed. It also says that on re-payment of the debt the plaintiff will be able to make any new settlement of the land accord-

ing to her wish. In the third paragraph there are certain other conditions such as, to the maintenance of boundaries, payment of damages for injuries to the *ghar* not caused by accident, keeping the house in repair (if the lessor does not make the repair the lessee will make it and deduce the expenses thereof from the rent reserved). This clearly shows that this document purports to be a lease: and if it was lease for a limited number of years and as the Pleader for the appellant argues for 20 years, it required to be properly stamped and registered. This has not been done. In my opinion, therefore, the Munsif's decision, which was affirmed by the Subordinate Judge, that the defendants were no more than tenants-at-will is correct, I would, therefore, dismiss the appeal with costt. In doing so, however, I will order that the defendants be given three months' time from the date of the decree of this Court within which to remove the additional house and give up the property on receipt of compensation. The rent due to the plaintiff up to the date of giving up of possession will be set off against the compensation.

Suhrawardy, J.—I agree.

Z. K.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 73 of 1925.

July 21, 1925.

Present:—Mr. Justice Daniels.

Musammam GULAB DEI—PLAINTIFF—
APPLICANT

versus

G. I. P. RAILWAY—DEFENDANT—
OPPOSITE PARTY.

Carriage of goods—Goods consigned to Railway Company for carriage—Freight paid at fixed rate—Wagon used larger than that necessary—Consignor, whether liable for additional freight.

Where goods are consigned to a Railway Company for carriage and freight is paid according to the rates laid down in the Company's rules, the Company has the right of re-measurement and re-calculation of the goods on the arrival of the goods at their destination, but this does not entitle the Company, when it has made a contract with the consignor to convey his goods at a particular rate on the amount of goods consigned, subsequently and without his knowledge to alter the entire basis of calculation merely because for their own convenience they have used for the conveyance of the goods a much larger wagon than was actually necessary. In such a case the consignor is not liable to pay any additional freight by reason of a larger wagon having been used for the conveyance of the goods. [p. 100, col. 1.]

(1) 45 Ind. Cas. 983; 27 C. L. J. 447.

(2) 18 W. R. 359; 9 B. L. R. 377; 1 A. Sup. Vol. 47; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 82 (P. C.).

(3) 27 C. 156; 26 I. A. 216; 4 C. W. N. 274; 7 Sar. P. C. J. 58; 14 Ind. Dec. (N. S.) 103 (P. C.).

(4) (1882) 21 Ch. D. 9; 52 L. J. Ch. 2; 46 L. T. 858; 31 W. R. 109.

Civil revision from an order of the Judge, Small Cause Court, Agra, dated the 11th of October 1924.

Dr. K. N. Katju, for the Applicant.

Mr. Ladli Prasad Zutshi, for the Opposite Party.

JUDGMENT.—The question raised in this revision is as to the correctness of an additional charge of Rs. 170 levied by the Great Indian Peninsula Railway from the applicant *Musammatt Gulab Dei* on account of 315 maunds of waste paper consigned from Bombay to Agra and delivered to her at the latter place. The name of the person despatching the goods was Mangalji Ganesh. The Railway receipt was made out in his own name, but was subsequently endorsed to the firm of Lachhman Das-Mul Chand. It was stated in the plaint that the plaintiff, namely, the present applicant, is the proprietor of that firm. The goods were charged at Bombay at the maund-rate of 8-annas per maund applicable to waste paper under the "station-to-station rate list" given on page 111 of the Great Indian Peninsula Railway Goods Tariff Part 1-B. The rate is given under No. 264 and the commodity is described as "Paper, waste, O. R. W/300-L. The initials 'O. R.' mean owner's risk; the words 'W/300' mean as explained on page 80 of the Goods Tariff, Part 1-A, that the rate applies to a minimum wagon-load of 300 maunds per 4-wheeled wagon, and a larger minimum, 450 or 600 maunds per 6-wheeled or bogie wagon. If the amount loaded in the wagon is larger than the minimum, freight is to be paid on the actual weight. 'L' indicates that the loading was to be done by the consignor. The Railway Company put a wagon at the consignor's disposal for loading the goods, and granted him a rail receipt showing that the waste paper was charged on the full amount of 315 maunds at the maund-rate of 8-annas. Rs. 157 at this rate was paid by the consignor in advance before the receipt was issued. On arrival at Agra the Railway claimed that owing to the goods having been loaded in an 8-wheeled bogie wagon they were entitled under r. 52-A to charge, not for 315 maunds actually consigned, but for a consignment of 40 tons or nearly 700 maunds at the same rate. They, therefore, demanded from the recipient the sum of Rs. 170 which is now in dispute and refused to deliver the goods until that sum was paid.

I am not prepared to accept the inter-

pretation of this rule which the learned Subordinate Judge has adopted. It is quite true that the Railway Company reserve to themselves a right of re-measurement and re-calculation on the arrival of the goods at their destination, but this does not entitle them, when they have made a contract with the plaintiff to convey his goods at a particular rate on the amount of goods consigned, subsequently and without his knowledge to alter the entire basis of calculation merely because to suit their own convenience they have used for the conveyance of the goods a much larger wagon than was actually necessary. It is perfectly clear that the consignor would never have agreed to consign the goods in this form if he had been told beforehand that he was going to be charged on considerably more than double the amount of waste paper he wished to despatch. I, therefore, find that the Railway Company were not entitled to make the additional charge which they did make in this case, and that the plaintiff's claim was well-founded.

An objection has been taken on behalf of the respondents that in their written statement the Railway Company challenged the right of the plaintiff to sue, and that no finding has been arrived at on this point. The plea was certainly taken in the written statement, but when the case came to trial no issue was framed upon it. The sole issue which was framed was whether the plaintiff was entitled to a refund of the overcharge. Under these circumstances it must be taken that the point was not pressed at the trial.

For the reasons already given I allow this revision and decree the plaintiff's suit with costs.

Z. K.

Revision allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 865 OF 1923.

May 26, 1925.

Present:—Justice Sir Ewart Greaves, Kt., and Mr. Justice Mukerji.

MOHAMMED USMAN—

PLAINTIFF—APPELLANT

versus

ABDUL RAHAMAN AND OTHERS

—DEFENDANTS—RESPONDENTS.

Construction of document—Mortgage or sale—Inten-

[90 I. C. 1925]

tion of parties—Evidence of conduct, whether admissible—Inadequacy of consideration, effect of—Muhammadan parties—Practice.

It is well-known that documents are executed by Muhammadans in which they conceal, or at least try to conceal, the real nature of the transaction and attempt to make out that the transaction is an out-and-out sale although, as a matter of fact, the intention of the parties is to create a mortgage. In considering a document, therefore, of this nature where the question arises whether the document is a deed of sale or a deed of mortgage, regard must be had to this practice where the parties are Muhammadans. [p. 101, col. 2.]

In order to construe such a document intrinsic evidence afforded by the terms of the document must be taken into consideration and the Court must also take into consideration the facts which may legitimately be proved with a view to showing in what manner the language of the document is related to the existing facts and may also refer to the contrast between the value of the property and the consideration that passed in money. Evidence relating to the subsequent conduct of the parties themselves, however, is not admissible as showing their intention. [p. 102, col. 1.]

In the case of such a document the absence of any mention of a definite date by which the transferor can by re-paying the amount of the consideration claim a re-transfer of the property does not indicate that the deed is not one of mortgage, nor is the absence of any reservation to the transferee of the right to recover the money paid by him or of a stipulation authorising the transferor to sue for redemption a safe criterion for the determination of the question. [p. 102, col. 2.]

A deed of transfer ran as follows:—"I have been in the ownership and possession of land fit for erection of shops by right of my purchase within the boundaries mentioned below situated in the line to the north of the road facing westward in Bander Bazar Chak. Now for my own necessity on receipt from you of Rs. 400 in cash as the price of that shop land I sell to you the same and I and my descendants cease to have right therein. You from this day being in ownership and possession in these lands, continue to enjoy the same with the rights of transfer by gift and sale, etc. I and my successors cease to have any right thereto. I make over my *kobala* of purchase dated the 11th *Sravan*, 1287. Moreover when I or my heirs would return the purchase price to you and your heirs you shall give up the properties. And I shall get this *kobala* registered within the period of limitation." It was found that the consideration for the transfer was wholly inadequate:

Held, that the inadequacy of the price coupled with the mention in the deed of the need of money on the part of the vendor and the stipulation as to the return of the price to the vendee and the re-conveyance of the property indicated that the document was intended to be one of mortgage by way of conditional sale and not one of sale out-and-out. [p. 103, col. 1.]

Appeal against a decree of the Subordinate Judge, First Court, Sylhet, dated the 8th January 1923, reversing that of the Munsif, Second Court, at Sylhet, dated the 20th March 1922.

Babu Satyendra Kishore Ghose, for the Appellant.

Mr. Gopal Chandra Das and Babu Nirod Bandhu Roy, for the Respondent.

JUDGMENT.

Mukerji, J.—The question raised in this appeal is as to the true construction of a document dated the 26th *Jaistha* 1308 B. E. The Courts below differed in construing the document, the Court of first instance holding that it was a mortgage by way of conditional sale and the lower Appellate Court being of opinion that it was a deed of out-and-out sale. The document runs in these words "I have been in the ownership and possession of land fit for erection of shops by right of my purchase within the boundaries mentioned below situated in the line to the north of the road facing westward in Bander Bazar Chak. Now for my own necessity on receipt from you Rs. 400 in cash as the price of that shop land I sell to you the same and I and my descendants cease to have right therein. You from this day being in ownership and possession in these lands, continue to enjoy the same with the rights of transfer by gift and sale, etc. I and my successors cease to have any right thereto. I make over my *kobala* of purchase dated the 11th *Sravan* 1287. Moreover, when I or my heirs would return the purchase price to you and your heirs you shall give up the properties. And I shall get this *kobala* registered within the period of limitation." There is a further stipulation in the document which runs in these words "Moreover if I pay you back the said price of Rs. 400 then you will without any objection give up the lands sold and return the connected deeds, etc. I shall seek the protection of Court if you do not return the same." In construing the document in the present case it should be remembered that the transaction was between parties who were Muhammadans and it is well-known that documents are executed by Muhammadans in which they conceal or at least try to conceal the real nature of the transaction and attempt to make out that the transaction is an out-and-out sale, although, as a matter of fact, the intention of the parties was to create a mortgage. The learned Subordinate Judge was of opinion that the deed was one of out-and-out sale. He relied upon certain pieces of evidence which is evidence relating to the subsequent conduct of the parties themselves as showing their intention. This evidence has been laid down by the Judicial Committee in the case of *Maung*

Kyin v. Ma Shwe La (1) as not admissible in a case where no third parties are involved or no question of fraud arises. In order to construe the document intrinsic evidence afforded by the terms of the document has to be taken into consideration and the Court has also to take into consideration the facts which may legitimately be proved with a view to showing in what manner the language of the document was related to the existing facts and may also refer to the contrast between the value of the property and the consideration that passed in money. These principles have been laid down by this Court in the case of *Abdul Gaffur v. Jamal* (2) and also by the Judicial Committee in the very recent case of *Narsingherji Gyanagerji v. Panuganti Parthasaradhi* (3).

So far as the first of these elements is concerned, namely, the adequacy or otherwise of the consideration of the transaction there is no discussion of it in the judgment of the learned Subordinate Judge, while in the judgment of the learned Munsif it appears that the consideration mentioned in the document was Rs. 400 whereas the executant of the document had purchased it for Rs. 600 long before the date of the document in question. This clearly shows that the consideration was wholly inadequate. It was certainly one of the matters to be taken into consideration in determining the real character of the document. The learned Subordinate Judge in dealing with this question has referred to the decision of this Court in the case of *Kamini Kumar Chowdhury v. Latifanissa Chowdhurani* (4). That decision affords us very little assistance inasmuch as we are not in a position to know exactly what the terms of the document in that case were.

The learned Subordinate Judge says that the document on the face of it purports to be a *kobala*, that the word 'sale' is clearly mentioned in the document and it is also

(1) 42 Ind. Cas. 642; 27 C. L. J. 175; 22 C. W. N. 257; 15 A. L. J. 825; 33 M. L. J. 648; 3 P. L. W. 185, 6 L. W. 777; 23 M. L. T. 36; 20 Bom. L. R. 278; (1918) M. W. N. 300; 45 C. 320; 9 L. B. R. 114; 11 Bur. L. T. 21; 44 I. A. 238 (P. C.).

(2) 21 Ind. Cas. 90; 18 C. L. J. 228; 17 C. W. N. 1053.

(3) 82 Ind. Cas. 993; 40 C. L. J. 481; (1924) A. I. R. (P. C.) 226; 47 M. 729; 20 L. W. 701; 10 O. & A. L. R. 1172; 47 M. L. J. 809; (1924) M. W. N. 915; 27 Bom. L. R. 4; 29 C. W. N. 216; 51 I. A. 305; 26 P. L. R. 18; 23 A. L. J. 161; L. R. 6 A. (P. C.) 41; 1 O. W. N. 684 (P. C.).

(4) 24 C. W. N. clxxv (175).

stated in the document that the purchaser, his sons and grandsons are to enjoy the lands and the executant gives up his right and authorises the purchaser to transfer the same by sale or gift, etc. These terms undoubtedly would go to show that the object of the executant was to make out that the document would purport to be one representing an out-and-out sale. But that is a matter of very little consequence if we take into consideration the fact that the document was executed between the Muhammadans and even if the real object of the parties was to create a mortgage they might conceal that intention by using terms and expressions of this description. The learned Subordinate Judge then goes on to say that there is absence in the document as to certain date within which the money was to be re-paid. This omission, however, would not indicate that the deed was not one of mortgage, as will be seen from the decision of this Court to which I have already referred—the case of *Abdul Gaffur v. Jamal* (2). The document in that case provided that if ever the vendor or his sons or son's sons or other heirs paid up the price the vendee or his sons or his son's son or other heirs would be bound to re-convey the homestead. As was observed by Mr. Justice D. Chatterjee in that case whose decision was upheld on appeal by the Chief Justice Sir Lawrence Jenkins and Mr. Justice Mookerjee that if the term is indefinitely long it should be taken as indicating that an absolute sale was not meant. So the mere absence of the mention of a certain date is no indication as to the real character of the document. Then the learned Subordinate Judge says that there was no mutual agreement in the document for bringing a suit for redemption. But the absence of any reservation to the purchaser of the right to recover his purchase-money or of a stipulation authorising the grantor to sue for redemption is not always a safe criterion for the determination of the question. The learned Subordinate Judge says that the executants parted with possession immediately after the execution of the document; but it is usual in such cases to put the mortgagee in possession and set off the rents against the interest.

These are all the circumstances upon which reliance has been placed by the Subordinate Judge in arriving at the conclusion that the document was one of out-and-out sale. The learned Subordinate Judge says

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that the condition as to making over of the property on receipt of the price paid is at best a solatium to the vendor. What probably he means by this finding is that although there is a condition of re-purchase attached to the sale which he thought was the real nature of the transaction that condition could not be given effect to in the absence of specific mention of the date by which the re-purchase was to be made.

On the whole I am of opinion that the circumstances upon which the learned Subordinate Judge has relied for coming to this conclusion do not necessarily lead to the conclusion that the document was one of out-and-out sale. On the other hand the inadequacy of the price coupled with the mention in the deed about the need of money on the part of the vendor, and the stipulation as to return of the purchase price to the vendee and the re-conveyance of the property indicate that the document was intended to be one of mortgage by way of conditional sale. I am, therefore, of opinion that the decision of the learned Subordinate Judge with regard to the construction of this document is not right and that the Munsif arrived at a proper decision on this point.

In this view of the matter, in my opinion, the judgment of the learned Subordinate Judge should be set aside and that of the learned Munsif restored with costs of this Court as also of the Court of Appeal below.

Greaves, J.—I agree.

Z. K.

Appeal allowed.

ODUH JUDICIAL COMMISSIONER'S COURT.

SECOND RENT APPEAL No. 3 OF 1925.

August 24, 1925.

Present:—Mr. Dalal, J. C.

RAM ASREY—DEFENDANT—APPELLANT

versus

Khan Sahib Munshi QUBUL AHMAD—

PLAINTIFF—RESPONDENT.

Landlord and tenant—Rent in excess of that allowed by law—Repeal of law, effect of—Rent, whether can be recovered.

Where the rent fixed is excessive and contrary to law as in force at the time when it is fixed, the subsequent repeal of the law has not the effect of enabling the landlord to recover the amount of such rent.

Second appeal against a decree of the Third Additional District Judge, Lucknow, at Hardoi, dated the 30th September 1924, upholding that of the Assistant Collector, First Class, Belgaum, District Hardoi, dated the 6th July 1924.

Mr. *Raj Narayan Shukla*, for the Appellant.

Mr. *Ram Charan*, for the Respondent.

JUDGMENT.—The decision of the learned Judge of the lower Court on the point of law is incorrect and on the point of fact it is summary as is usually the case with this learned Judge. The defence of a tenant who was sued for arrears of rent was that the rent claimed was contrary to the provisions of s. 47 of the Oudh Rent Act which was prevalent in 1919 when the holding was let to him. The lower Appellate Court held that s. 47 of the Oudh Rent Act was repealed by Oudh Rent (Amendment) Act (IV of 1921) s. 28 so the rent claimed by the plaintiff was legal. This is not a correct view of the law. The rent was excessive and contrary to law at the time it was fixed. The law applicable would be the law of the time when the defendant was admitted to the tenancy. At that time there could have been an enhancement of Rs. 180 only with respect to the half rent recoverable by the plaintiff. According to the defence the plaintiff could recover rent at the rate of Rs. 25-14-9 only. This defence was correct and ought to have been allowed by the lower Appellate Court.

On facts the lower Appellate Court has written something which it is difficult to understand. It says that there was nothing to show that in the rent paid by the previous tenant, any land of the Rani of Hathaura was included. This observation must be due to want of knowledge of the record. The *khataunies* showing the area of land held by the previous tenants Bardi, Murli and Kallu and the statement of the *patwari* prove that the defendant is holding at present the identical lands from both the defendant and the Rani of Hathaura. Even the plaintiff never contested this statement of fact advanced by the defendant.

In the result I reduce the amount decreed against the defendant to Rs. 27-13-6 with proportionate interest and costs. The rest of the plaintiff's claim is dismissed with costs of all the Courts.

N. H.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE

No. 1647 OF 1923.

June 8, 1925.

Present:—Mr. Justice Cuming and
Mr. Justice Chakravarti.BIDHUMUKHI AND OTHERS—DEFENDANTS
—APPELLANTS

versus

GOBINDA CHANDRA PAL—PLAINTIFF—
RESPONDENT.*Bengal Tenancy Act (VIII of 1885), s. 49—Evidence Act (I of 1872), s. 115—Lease of homestead land—Agreement not to eject lessee—Lessor putting himself forward as owner of permanent heritable tenancy—Estoppel—"Raiyat," "kaimi mourashi," meaning of.*The words "*kaimi mourashi*" are quite appropriate when used with respect to a permanent *jama* of a piece of homestead land, and apply very aptly to a non-agricultural tenancy. [p. 105, col. 2.]The word "*raiya*t" does not necessarily mean an agricultural tenant. It is often used in the *moffussil* in its wider sense of meaning a tenant in general. [*ibid.*]The lessee of a piece of homestead land is ordinarily a tenant and not a *raiya*t. [*ibid.*]

Where a lessor agrees not to eject the lessee from the lands demised, he is bound by the contract made by him unless he can show that the contract is invalid in law. [p. 105, cols. 1 & 2.]

Where a lessor of a piece of homestead land puts himself forward as the owner of a permanent heritable tenancy describing his tenure as *kaimi mourashi* and agrees not to eject the lessee from the land, the agreement is not invalid in law and the lessor is estopped from subsequently contending that he is an occupancy tenant and that the lessee is an under-*raiya*t and that the agreement not to eject the lessee is invalid. [p. 106, col. 1.]

Appeal against a decree of the District Judge, Noakhali, dated the 5th March 1923, affirming that of the Munsif, First Court, Lakhmipur, dated the 29th November 1920.

Babus Ramesh Chandra Sen and Jitendra Kumar Sen Gupta, for the Appellants.

Mr. Gunada Charan Sen and Babu Nagnendra Chandra Chaudhuri, for the Respondent.

JUDGMENT.**Chakravarti, J.**—This is an appeal by the defendants and it arises out of a suit for *khas* possession of certain lands by the plaintiff after service of notice under s. 49 of the Bengal Tenancy Act. The plaintiff stated that the defendants took an under-*raiya*t lease from them in 1293 of 1 *kani* of land for a term of 9 years and that the plaintiff on the expiration of the term of the lease served a notice upon the defendants under s. 49 of the Bengal Tenancy Act and that the defendants having refused to vacate the lands this suit is brought for*khas* possession of the land covered by the under-*raiya*t lease of the defendants.The defence of the defendants was that they were the owners of *kaimi mourashi* tenancy of the homestead of one Jagamohun Bhuiya measuring about 2 *kanis* of lands and that in 1293 the defendants sold the same to the plaintiff and on that very day they took a sub-lease by a registered *patta* from the plaintiff of a portion of the land sold by them to the plaintiff which was their own homestead comprising an area of 1 *kani* at a rent of Rs. 16 a year which was fixed for 9 years and that it was agreed by the plaintiff in that lease that the defendants shall never be liable to ejectment by the landlord. The defendants further alleged that the tenancy sold by them to the plaintiff was a permanent lease-hold interest in homestead land containing building, tanks, garden, etc., and the plaintiff described his own right in the sub-lease as that of a *kaimi mourashi raiya*t and in that capacity he granted the sub-lease to the defendants and, therefore, the plaintiff was estopped from showing that he was merely an occupancy *raiya*t and further that the Bengal Tenancy Act did not govern this case.The learned Munsif held that the plaintiff was a *raiya*t with right of occupancy and that the defendants were under-*raiya*ts and, therefore, the plaintiff was entitled to eject the defendants after service of notice under s. 49 of the Bengal Tenancy Act, which he found was duly served on the defendants. The Trial Court decreed the plaintiff's suit.

On appeal by the defendants the learned District Judge has affirmed the decree of the Court of first instance and against this decree the defendants have preferred this appeal.

The learned District Judge finds that in the entry in the Record of Rights the defendants were recorded as "settled *raiya*ts under a *raiya*t" which is clearly impossible.The learned Judge held the entry in the Record of Rights that the defendants were under-*raiya*ts with a right of occupancy is of no avail to them because, they have failed to adduce any evidence that there was a local custom to the effect that under-*raiya*ts could acquire a right of occupancy.The learned District Judge further held that the plaintiff was not estopped from showing that he was a *raiya*t with right of

occupancy. In this view he held that the decision of the Full Bench in the case of *Chandra Kanta Nath v. Amjad Ali Hazi* (1) was applicable to this case and that the decree made by the Trial Court was correct and dismissed the appeal.

In this second appeal the learned Vakil for the appellants raised the following points :—

Firstly.—That the learned District Judge was in error in holding that the entry of the Record of Rights was as stated by him and this mistake has vitiated his judgment.

Secondly.—That the description of the landlord in the lease of 1293 that they were "*kaimi mourashi raiyat*" did not mean that they were *raiya*s with right of occupancy but it meant that the plaintiff had a permanent and heritable tenancy in the land ; the word '*raiya*' meant a tenant and not an agricultural *raiya* as the lease was evidently of *bastu* land, namely, the homestead of Jogu Mohan Bhuiya.

Thirdly.—That the plaintiff was estopped from alleging that he was merely an occupancy *raiya* and not the holder of a permanent heritable tenancy of *bastu* lands.

Fourthly.—That the entry in the Record of Rights was that the under-*raiya* of the defendants was with right of occupancy and that the onus of proof showing the contrary lay on the plaintiff and not upon the defendants as was erroneously held by the learned District Judge.

Fifthly.—That the Bengal Tenancy Act did not apply to this case and that a notice under s. 49 of the Bengal Tenancy Act did not terminate the tenancy and, therefore, the plaintiff had no right to eject the defendants.

Sixthly.—That in the circumstances of the case the defendants were entitled to claim for the lands which was their homestead, the benefit of s. 182 of the Bengal Tenancy Act.

As to the first point, Mr. Sen who appeared for the respondent very frankly admitted that the learned Judge misread the entry in the Record of Rights. I shall deal with the question as to the effect of the entry in the Record of Rights when correctly read.

It is undisputed that the lessor is bound by the contract which he made and by which he agreed not to eject the tenants unless he

can show that the contract is invalid in law. He seeks to do so by alleging that the lease on the face of it shows that the right of the lessor was that of an occupancy *raiya* and, therefore, a sub-lease for more than 9 years is void.

The first question, therefore, which requires consideration is as to what was the status of the landlord and does the lease on the face of it show that the lessor was an occupancy *raiya*.

The lease does not contain any indication that the lease was for agricultural land and the lease was for agricultural purposes. The entire area of the land was described as the homestead of Jaga Mohan Bhuiya consisting of and comprising "*garden, road gopat, khil, chatan with tank and pond*" and the 1 *kani* let out to the defendants was described as the remaining 1 *kani* of land comprising the "*bhita garden, pathway, gopat, khil chatan, ditches and tank appertaining to your residential homestead.*"

The lessor described his right to quote the words of the lease (*kaimi mourashi raiya*) in the homestead of Jaga Mohan Bhuiya and a sub-lease of the homestead of the vendor was granted by the sub-lease of 1293. The words *kaimi mourashi* are quite appropriate when used with respect to a permanent *jama* of a piece of homestead land. The only justification for calling this as an agricultural lease is the use of the word *raiya*. The word '*raiya*' does not necessarily mean an agricultural tenant. It is often used in the *mofussil* in its wider sense of meaning a tenant in general. If the word is read with the context I think the word should be read to mean a tenant of homestead land. The lessee of a piece of homestead land is ordinarily a tenant and not a *raiya*. The lease-hold interest described is of lands forming homestead and there is no indication in the lease that any cultural land was demised.

The description of "*kaimi mourashi*" applies very aptly to a non-agricultural tenancy. If the lands were agricultural or agricultural lease was intended the word occupancy *raiya* so well known would have been used. I am, therefore, clearly of opinion that the lessor intended to put forward himself as the owner of a permanent heritable tenancy of a homestead land and in the face of the lease that is the only meaning which can be ascribed to the words. The plaintiff, in my opinion, has failed to show that the

(1) 61 Ind. Cas. 466; 32 C.L. J. 296; 25 C. W. N. 4; 48 C. 783.

agreement not to eject the sub-tenant is invalid in law.

On the construction of the lease which I have put upon it, the plaintiff's case would fail because, the Bengal Tenancy Act will have no application to the sub-lease held by the defendant.

In the circumstances of this case it is not necessary to deal with all the points raised on behalf of the appellants.

Even assuming that the plaintiff was an occupancy *raiyat* I think that the principle laid down by the Full Bench if applied to this case, the plaintiff would be estopped from showing that he was an occupancy *raiyat*, or that the defendants were under-*raiya*ts and that the agreement not to eject the defendants was invalid.

The plaintiff in order to show that the estoppel does not arise must show that the sub-lease "on the face of it" was by an occupancy *raiyat*. As I have already pointed out the lease described the right of the plaintiff as "*kaimi mourashi*" as distinguished from an occupancy *raiyat*. It is true that an occupancy right is also permanent and heritable. The lease shows that the lands were *bastu* lands, and, therefore, it cannot be said that the sub-lease on the face of it was one granted by an occupancy *raiyat* to an under-*raiyat*. The plaintiff is, therefore, estopped from showing that the defendants were under-*raiya*ts.

The learned District Judge, as I have already said, took an erroneous view of the entry in Record of Rights. He is, also in error in saying that the onus of proving that the defendants acquired an occupancy right under a local custom, lay on them. The Record of Rights is in their favour and it was for the plaintiff to rebut it.

We think, therefore, that the plaintiff is not entitled to eject the defendants and his suit must fail and is dismissed with costs in all Courts.

Cuming, J.—I agree.

Z. K.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 2153
OF 1922.

September 16, 1924.

Present:—Mr. Justice Ramesam
and Mr. Justice Reilly.

NADUVIL MADAM PARAMESWARA
BHARATIGAL *alias* AZHAKAPRA
SWAMIYAR AVARGAL—PETITIONER

versus

T. P. S. ISSOOP ROWTHAN AND OTHERS
—RESPONDENTS.

Religious endowment—Custom—Succession—Mutt—Head of mutt in Native State, ex-officio trustee of public temple in British India—Dismissal from headship of mutt by Government of Native State, whether effects forfeiture of trusteeship of temple.

Where the head of a *mutt* situate in a Native State was, as such, the trustee of a public temple in British India which latter was, however, an independent institution governed by its own usages, and the Government of the Native State in exercise of its sovereign powers dismissed the head of the *mutt* and appointed another person to the office, and it was found that all the proved successions to the two offices were to simultaneous vacancies both in the *mutt* and the temple caused by the death of the prior incumbents:

Held, that the dismissal of the head of the *mutt* did not operate to effect a forfeiture of and create a vacancy in the trusteeship of the temple, and that the person appointed as the head of the *mutt* did not automatically succeed to the trusteeship of the temple which had not been vacated. [p. 111, cols. 1 & 2.]

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to direct that Naduvil Madam Parameswara Bharatigal *alias* Azhakapra Swamiyar Avargal, Trustee of Naduvil Mutt, and as such the Udama of Pudukode Devaswom, be brought on record as appellant in Second Appeal No. 1080 of 1922, preferred to the High Court against a decree of the District Court of South Malabar, in Appeal Suits Nos. 1041 and 1059 of 1920, preferred against the decree of the Court of the District Munsif, Alatur, in Original Suit No. 194 of 1917 and allowed to proceed with the said second appeal.

This petition coming on for hearing on 7th August 1923 after service of notice on the former Madathipathi, upon perusing the petition and the affidavit filed in support thereof, the counter-affidavit filed on behalf of the 9th respondent, former Madathipathi, the two reply affidavits on behalf of the appellant and the further counter-affidavit, dated 14th April 1923, and filed by the former Madathipathi and upon hearing the arguments of Mr. S. Srinivasa Ayyangar and Mr. T. S. Anantaraman, for the Peti-

tioner, and of Mr. T. R. Ramachandra Ayyar and Mr. N. R. Krishna Ayyar, for the 9th Respondent, former Madathipathi, the 4th and 8th Respondents having died and no legal representatives having been brought on record within the time allowed by law and the other respondents not appearing in person or by Pleader the Court (Odgers and Hughes, J.J.) made the following

ORDER.—The preliminary question in Second Appeal No. 1080 of 1922 is whether the applicant Parameswara Bharatigal *alias* Azhakapra Swamiyar is entitled to carry on the appeal under the provisions of O. XXII, r. 10 (1). It is alleged that this Swami has displaced the former head, one Narayana Bharatigal *alias* Kappiyur Swamiyar, as head of the Naduvil Madam in Trichur, Cochin State. It is objected that even if this is so, it does not affect the latter's rights over the Pudukode Devaswom which is situated in British India. The question which is preliminary and must be tried is whether the Pudukode Devaswom in British India is appurtenant to and forms part of the institution of Naduvil Madam, Trichur, Cochin State, and whether the trusteeship of this Madam and the Pudukode Devaswom has devolved on Azhakapra Swamiyar. Evidence on this point will have to be taken.

It should be added that it was at one time alleged before us that Kappiyur Swamiyar was of unsound mind. This allegation has now been withdrawn and no question will arise as to this.

The District Judge of South Malabar is requested to hear and determine this point and submit his findings in two months.

Ten days will be allowed for objections to the finding after the return of the same is posted up in the notice board of the High Court.

In compliance with the above order the District Judge of South Malabar submitted the following

FINDING.—1. This petition has been sent down by the High Court under its order, dated 7th August 1923, for a finding whether the Pudukode Devaswom in British India is appurtenant to and forms part of the institution of Naduvil Madam in Cochin State and whether the trusteeship of this

Madam and the Pudukode Devaswom has devolved on Azhakapra Swamiyar. In his affidavit before the High Court in these proceedings, Azhakapra Swamiyar claims to be the head of the Naduvil Madam by virtue of his appointment by the Cochin Government after the dismissal of his predecessor Kappiyur Swamiyar under the Cochin Regulation I of 1081 or 1906. He also claims that the Pudukode Devaswom is appurtenant to Naduvil Mutt. In his counter-affidavit, Kappiyur Swamiyar claims that he owns this Naduvil Mutt, that the Pudukode Devaswom is not subordinate to the Naduvil Mutt, but is an independent institution, that he is in possession of the Pudukode Devaswom, that the Cochin Government has not deprived him of the headship of the *mutt* and that he reserves his status as British subject. No issues were framed beyond those indicated by the High Court. The first question for consideration is whether the Pudukode Devaswom is appurtenant to the Naduvil Mutt or, as the counter-petitioner contends, an independent institution. A quantity of documents has been filed to show that the Devaswom has always been under the management of the head of the Naduvil Mutt. The plaint in this suit filed by Kappiyur Swamiyar is itself relevant. Therein he styles himself head of Naduvil Mutt and Udama of Pudukode Devaswom. Udama usually implies ownership and certainly does not admit the idea of independence. Rama Variar, petitioner's witness no 1, holds lands under the Pudukode Devaswom and was ordered to take renewal not by the Devaswom, but by the manager of the *mutt*, Ex. A. Receipts granted by the same person (Exs. B, C) bear the name of the *mutt* head but they are in connection with the Devaswom property. Exhibit D evidences receipt for money paid to the agent at the *mutt* office. Exhibit E series shows that the accounts of the Devaswom were kept at the *mutt* office. Exhibits G, H, J are demises of Devaswom lands by Kappiyur Swamiyar. Exhibit N is a power-of-attorney granted by Kappiyur Swamiyar to the present petitioner in which the Devaswom property is described as being in charge of the *mutt*. Exhibit Q is another plaint filed by Kappiyur in which he admits that the Devaswom property is under the *mutt*. There are similar admissions by his predecessor-in-title referred to in the judgment, Ex. T. Subordinate Devaswoms are

admitted in the *Malabar Gazette* notice, Exs. AA. Exhibits KK-1 to 19 are also *kanom* demises granted by the head of the *mutt*. Exhibit 11 series are accounts kept for the Devaswom at the *mutt* head office in which two serial numbers are given, one for the Devaswom and one for the *mutt*. The temple accounts were kept separate from the *mutt* accounts as evidenced by Exs. 14, 16, 18, 19 series. Counter-petitioner's witness No. 1 stated that the Madathipathi of the Naduvil Mutt is the Urallan *ipso facto* of all the Devaswoms and likewise his successor. All the amounts received from the Devaswom are entered in the headquarter accounts. In the light of this evidence, it is impossible for the counter-petitioner to contend that the Devaswom is independent of the *mutt*. No doubt it is treated as a separate endowment, and no one has ever suggested that its property or income is mixed indiscriminately with that of the *mutt*. Nevertheless it is quite clear that the immemorial managers of the Devaswom have been the heads of the *mutt* for the time being. I find that the Pudukode Devaswom in British India is appurtenant to Naduvil Mutt in Trichur in this sense that the head of the Naduvil Mutt has always acted as manager or trustee of the Devaswom.

2. It remains to decide on whom the headship of the *mutt* has devolved. Kappiyur Swamiyar was found to have succeeded to the headship of the *mutt* in High Court's order in C. M. P. Nos. 3842, 3862 and 3,863 of 1915, Ex. 24. In 1906 the Cochin Government passed Regulation I of 1081 (Ex. U) empowering the Diwan to call upon the trustees of any institution—and under s. 4 (2) Madathipathis are included in the term trustee—to furnish accounts (s. 5) empowering him to fine any trustee who disobeys such order and ultimately to dismiss him (s. 7). Acting in pursuance of this Regulation, the Diwan fined Kappiyur Swamiyar on 26th November 1920, Ex. W, and finally dismissed him on 18th March 1922, Ex. Y. In his review petition of 27th October 1922, Ex. 57, Kappiyur Swamiyar admits his removal from the headship of the *mutt* and the appointment of the petitioner in his stead and requests that the order may be revised. "In the interests of the *mutt* the cancellation of the order of dismissal is urgently needed and the petitioner, therefore, humbly prays for its cancellation." In his

further petition, dated 8th March 1923, Ex. 58, he again admits that he is removed from the headship of the *mutt* and that the petitioner has been appointed to its management with disastrous results to the working of the *mutt*. The petition sets forth that the order of dismissal was passed under the misapprehension of the true facts, but I do not find that the right of the Cochin Government to dismiss the Swamiyar for good cause is disputed. It has been argued before me that the order under this Regulation is an act of a foreign Government which need not be regarded by British Courts, and also that even if Kappiyur Swamiyar was legitimately dismissed from the headship of the Naduvil Mutt, nonetheless, he would still continue to be the trustee for such property under the control of the *mutt* as happens to lie in British territory. The general principle is clearly enunciated in Dicey's Conflict of Laws, head III, page 23: "Any right which has been duly acquired under the law of any civilized country is recognized and, in general, enforced by English Courts, and no right which has not been duly acquired is enforced or, in general, recognized by English Courts." No one disputes that the sovereign power exercised by the Government of Cochin includes the right to control religious bodies and when once this right is embodied in the form of a regulation, that regulation becomes part and parcel of the constitution of the institutions which it controls. Kappiyur Swamiyar was only head of the Naduvil Mutt because he succeeded to the headship in accordance with the constitution of that body. This point was very fully discussed in the previous proceedings, first in this and subsequently in the High Court, Ex. 24. Now that the order of the Cochin Government has been passed dismissing him he has lost the headship equally in accordance with the constitution of the body.

3. It was argued that even if the position of the parties had been thus determined in the Native State of Cochin, still that could not affect a claim to succeed to immoveable property in British India. I see no force in this argument, and the analogy of adoption which was pressed by the petitioner appears to me to be sound.

In *Keesara Venkatappoyya v. Nayani Venkataranga Rao* (1), the principal plaintiff

issued for the recovery of real property in British India claiming to be the duly adopted son of the daughter of the last owner. The adoption was by virtue of an unregistered authority to adopt executed in a Native State which would have been invalid in British India, but none the less was held to render the adopted son capable of inheriting real property in British India.

4. The counter-petitioner relies strongly upon the ruling in *Goswami Shri Girdharji v. Madhowdas Premji* (2). The question which determined that suit was whether the trustee of a certain shrine who had been deported from the State of Odeypore had been removed from his office of trustee by a competent Tribunal (page 614). It was held that the deportation in that case did not deprive the plaintiff of his trusteeship. But in the present suit where the counter-petitioner has been dismissed under a Regulation expressly devised for the control of trustees, it cannot be held that there has been no competent Tribunal. There is no necessity that the Tribunal should be judicial, so that the petitioner would have to sue for a judicial declaration that the order passed under the Regulation was valid, before he could cite the authority of that order in British India. So far as the British Courts are concerned the action of the Native State is tantamount to the action of a private party acting in accordance with the law of the locality. A private person legally adopts or a Diwan legally dismisses and appoints, and the British Courts admit the validity of such legal action. The right which has been duly acquired (to repeat Dicey) is recognized.

5. Accordingly I find that the trusteeship of the Madam and of Pudukode Devaswom has devolved on Azhakapra Swamiyar, the petitioner.

The Civil Miscellaneous Petition coming on for hearing after the return of the finding from the lower Court upon the issue referred by this Court for trial on the 27th, 28th and 29th August 1924 and the 1st September 1924, upon hearing the arguments of Mr. T. S. Anantanarayana Ayyar and Mr. S. Srinivasa Ayyangar, for the Petitioner, and Mr. T. R. Ramachandra Ayyar and Mr. N. A. Krishna Ayyar for the 9th Respondent, the former Madathipathi, the 4th and 8th Respondents having died and

no legal representatives having been brought on record within the time allowed by law and the other respondents not appearing in person or by Pleader and the petition having stood over for consideration till this day, the Court made the following

ORDER.

Ramesam, J.—In 1917, one Narayana Bharati *alias* Kappiyur Swamiyar filed a suit as Udama of the Pudukode Devaswom against certain Muhammadans for declaration and injunction in respect of a site. The matter went up on appeal before the District Court of South Malabar and was decided against the Devaswom. A second appeal had to be filed. On the ground that Narayana Bharati had ceased to be the head of the Devaswom and that he himself became its head, one Parameswara Bharati *alias* Azhakapra Swamiyar filed the second appeal. He was asked to state how his right accrued. He then filed Civil Miscellaneous Petition No. 2153 of 1922, dated 25th August 1922, supported by an affidavit. In this affidavit it was alleged that the suit properties belonged to Pudukode Devaswom.

"The said Devaswom and all properties belonging thereto are appurtenant to and form part of the endowment of the Naduvil Madam situated at Trichur, Cochin State, and, as such, the head and trustee of the Naduvil Madam for the time being, is the Udama and Manager of the Pudukode Devaswom." The Cochin Government, acting under Regulation I of 1081 (M. E.) dismissed Narayana Bharati by its proceedings, dated 9th March 1922, from the office of the said Naduvil Madam and appointed by the same proceedings, the petitioner as head and trustee of the said Madam. The affidavit also alleged that the said Narayana Bharati had been of unsound mind for nearly one year; but this ground has since been abandoned and need not be referred to again. A counter-affidavit and reply affidavits were filed and our brothers (Odgers and Hughes, JJ.) called for a finding on the questions raised by these affidavits which are stated thus: "Whether the Pudukode Devaswom in British India is appurtenant and forms part of the institution of Naduvil Madam of Trichur, Cochin State, and whether the trusteeship of Madam and the Pudukode Devaswom has devolved on Azhakapra Swamiyar?" The District Judge, South Malabar, has

sent up his findings, and objections have been filed by the respondent (Narayana Bharati).

The learned Judge in the course of the finding has said "Ex-11 series are accounts kept for the Devaswom at the *mutt* head office in which two serial numbers are given, one for the Devaswom and one for the *mutt*. The temple accounts were kept separate from the *mutt* accounts as evidenced by Exs. 14, 16, 18, 19 series . . . No doubt, it is treated as a separate endowment, and no one has ever suggested that its property or income is mixed indiscriminately with that of the *mutt*." But he also said "In the light of this evidence, it is impossible for the counter-petitioner to contend that the Devaswom is independent of the *mutt*." Finally he stated his finding thus: "I find that Pudukode Devaswom in British India is appurtenant to Naduvil Mutt in Trichur in *this sense* that the head of the Naduvil Mutt has always acted as manager or trustee of the Devaswom."

Mr. S. Srinivasa Ayyangar who appeared for Parameswara Bharati has admitted before us that the two are entirely independent institutions and the endowments are separate and the Pudukode Devaswom is appurtenant to the Naduvil Madam only in the sense that the succession to Pudukode Devaswom is dependant on that to the Madam and in no other. His language is "for purpose of succession only, Pudukode is dependant." This very fair admission of Mr. Srinivasa Ayyangar reduces the points for determination to only one, *viz.*, what are the rules regulating the headship of Pudukode Devaswom? How is it vacated and how is a vacancy filled up? Apart from such rules of succession, the Pudukode Devaswom is not appurtenant to the Naduvil Madam.

Pudukode Devaswom is a public temple in British territory. It is not a private institution. It does not belong to any private individual or to any other institution—not even the Naduvil Madam. This is clear after the admission mentioned above. The Naduvil Madam is a *mutt* at Trichur, Cochin. Both institutions are governed by their respective usages and apart from usage, the law governing such institutions in the respective territories. In the present case, we are not concerned *directly* with Naduvil Madam. But we have to determine the usage regulating the Pudu-

kode Devaswom [*Gossami Shri Gridharji v. Romanlalji Gossami* (3)] and if, for the purpose of determining this question, we have to look to the rules or law regulating Naduvil Mutt, such rules or law will have to be adverted to only to that extent.

Now, let us turn to the history of the Pudukode Devaswom. We do not know when, by whom and subject to what regulations it was founded. So far as we know, its history begins in 1843. Exhibits I to V show that Arur Thirumumbil was the head of Naduvil Mutt and also manager of the Pudukode Devaswom. Exhibits VI to IX show that Vishnu Bharati *alias* Naduvath Swamiyar was the head of the *mutt* and Devaswom in 1846. Exhibit KK shows that he was succeeded by Manjanpatta Swamiyar and Ex. JJ shows that Hariswara was the Swami in 1880. Pakaravur Subramanya Swamiyar managed both the institutions from 1883 to 1892. He was succeeded by Thaikat Swami, whose regime covers the period of 1892—1895. Pakaravur Vishnu Bharati was head from 1895 to 1915. In his time there was an important litigation. His junior Swami sought to have him removed from the headship (Ex. T). He was succeeded by the respondent (Kappiyur Narayana Bharati) in 1915. In 1916 there was litigation between Pallipat Rama Bharati and him (Ex. 24). All these Swamiyars were heads both of the Naduvil Mutt and of the Pudukode Devaswom. As each Swami died, the senior of the Swamiyars initiated by him succeeded to the two offices. These are the facts from which any rule or rules (by way of usage) regarding the Devaswom have to be inferred.

One rule of succession that can be easily inferred is that, if the head of the Pudukode Devaswom dies and there is a vacancy the head of the Naduvil Mutt will succeed to the headship of the Devaswom also. By the very nature of the rule, the vacancy will be simultaneous in both the institutions and the same person succeeds to both. He first succeeds to the Naduvil Mutt and by reason of his position as head of the *mutt* and the simultaneous vacancy in the headship of the Pudukode Devaswom, he succeeds to the latter also. So much is admitted by both parties. But this is not enough to solve the problem before us. In the case before us there is no vacancy by death. There is a vacancy

(3) 17 C. 3; 16 I. A. 137; 13 Ind. Jur. 211; 5 Sar. P. C. J. 350; 8 Ind. Dec. (N. S.) 541 (P. C.).

in the case of the *mutt* by dismissal by a foreign Government. Does this vacancy involve a simultaneous vacancy in the headship of the Devaswom? Unless there is a vacancy, there is no need to look for a successor. The petitioner's contention is that the usage regulating the Devaswom not only involves that the successor in the headship of the *mutt* (on the death of the prior incumbent causing a vacancy in respect of the headship of both the institutions) also succeeds to the headship of the Devaswom, but also that the loss of the headship of the *mutt* by a cause other than death involves the divesting of the headship of the Devaswom. Once the divesting is found, the further succession can be easily ascertained. But what is the evidence for such usage as will involve the divesting of the headship of the Devaswom as a consequence of the dismissal from the headship of the *mutt*. There is no such evidence nor can there be such. As I have already pointed out, the only history available to us is from 1843, i. e., a period of eighty years. During this period, no such case has occurred. It is impossible to hold that the usage proved, viz., one relating to succession on vacancy covers the case, where there is no vacancy (strictly) and includes the proposition required by the petitioner that, the loss of the headship of the *mutt* involves a forfeiture of the headship of the Devaswom. The proposition or rule is penal in its nature and must be strictly proved. There is no such proof. On this ground we hold that the respondent (Narayana Bharati) has not lost the headship of the Devaswom as a result of the loss of the headship of this *mutt*, and he is the proper person to continue the second appeal. In this view, the further questions debated by the learned Vakils need not be considered.

One such question raised by Mr. Ramachandra Ayyar is that the removal from the secular headship does not necessarily involve the removal from the spiritual headship. The Cochin Government has removed his client only from the management. No human power can remove him from the spiritual headship. This may be so. But the further difficulty in the application of the argument is what is the kind of headship (spiritual or secular) that qualified the head of the *mutt* for the headship of the Devaswom? This itself

depends on usage and we have no materials to answer the question properly. Again, while conceding that a distinction may exist between the management and spiritual headship [see *Arunachellam Chetty v. Venkatachalapathi Guruswamikal* (4) and *Nataraja Tambiran v. Kailasam Pillai* (5)] in certain cases, it is doubtful whether, when the office is only one, we can split it up into two.

A second point raised by Mr. Ramachandra Ayyar is that we can go into the validity of the order of the Cochin Government, in so far as it affects an institution in British territory and if we find it not justified, refuse to recognize it in so far as it is sought to be applied to the Pudukode Devaswom. This contention raises interesting questions of Private International Law and has been ably argued on both sides. But, in the view taken by us, it need not be pursued.

I agree with the order proposed by my learned brother regarding substitution.

Reilly, J.—I agree that whatever may be the exact effect of the order of the Cochin Government on the position and rights of Narayana Bharati in the Naduvil Mutt, it has not been proved that according to the usage of the Pudukode Devaswom he has been divested of the office of trustee of that Devaswom. He must, therefore, be recognized as trustee of the Devaswom entitled to conduct litigation on its behalf. This petition must be dismissed with costs.

Respondent, Narayana Bharati, will be substituted for petitioner as appellant in Second Appeal No. 1080 of 1922.

Memorandum of costs will follow.

V. N. V.

Z. K.

Petition dismissed.

(4) 53 Ind. Cas. 288; 43 M. 253; 37 M. L. J. 460; (1919) M. W. N. 850; 17 A. L. J. 1097; 10 L. W. 642; 26 M. L. T. 479; 24 C. W. N. 249; 46 I. A. 204; 22 Bom. L. R. 457 (P. C.).

(5) 57 Ind. Cas. 564; 44 M. 283; (1920) M. W. N. 371; 39 M. L. J. 98; 18 A. L. J. 1041; 25 C. W. N. 145; 13 L. W. 301; 48 I. A. 1 (P. C.).

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 23 OF 1921.

April 28, 1925.

Present :—Mr. Raymond, A. J. C.

MULIBAI—PLAINTIFF

versus

SHEWARAM MENGHRAJ—DEFENDANT.

Contract Act (IX of 1872), s. 45—Partnership—Suit

by one partner to recover debt due to partnership, maintainability of—Other partners, whether necessary parties—Transfer of Property Act (IV of 1882), s. 130—Assignment of interest, mode of.

Ordinarily all the individuals constituting a partnership are necessary parties to a suit to recover a debt due to the partnership. Where there are several partners in a firm and only one of them files a suit to recover a partnership debt, the suit is not maintainable unless and until the other partners are brought on the record. Where, however, one of the partners is able to substantiate that the reason for the appearance of the other partners on the record has ceased to exist by reason of their ceasing to have any interest in the partnership, the suit is maintainable without bringing the other partners on the record. [p. 113, col. 2.]

Section 130 of the Transfer of Property Act provides only one mode of the devolution of the interest of one person to another and cannot be said to exhaust all other ways and means by which the interest of one person may be transferred to another. [p. 113, col. 1.]

Mr. Dipchand Chandumal, for the Plaintiff.

Mr. Fatehchand Assudamal, for the Defendant.

JUDGMENT.—The plaintiff in this suit is one Mulibai, wife of Hargundas. She states in her plaint that her mother Gangabai widow of Hiranand Lunidaram, carried on business in partnership with two other persons, Khushiram and Teckchand, both at Karachi and in Sukkur under the name of Hiranand Lunidaram. At Karachi the firm of Hiranand Lunidaram did some commission agency business for the defendant, and it is alleged that on this commission agency business, there is a sum of Rs. 3,398 odd due and payable by the defendant after the death of Gangabai. The plaintiff who describes herself as the only heir of Gangabai filed a suit against the two other partners for a dissolution of the partnership and settlement of the partnership account. The Suit No. 66 of 1917 was decreed by Sub-Civil Court of Sukkur and under this decree the plaintiff alleges that she alone became entitled to all the assets and liabilities of the firm of Hiranand Lunidaram, and she, therefore claims the right to maintain the present suit exclusively in her own name and on her own behalf.

With the consent of the Pleaders of the respective parties I confine my decision to only one point in the case, and that is whether Mulibai individually can maintain this suit. It has been strenuously contended by the defendant that she cannot and that the two other partners in the firm of Hiranand Lunidaram must be on the record either as plaintiffs or defendants. Suit No. 67 of 1917 in the Sukkur Sub-Civil Court was filed by the plaintiff Mulibai against

two persons Khushiram, a brother of Gangabai and a partner in the firm of Hiranand Lunidaram and Teckchand who was a managing partner of the business carried on in Karachi under the name and style of Hiranand Lunidaram. The suit resulted in a compromise decree, in terms of which it was held that the partnership existing between Gangabai, Khushiram and Teckchand was dissolved on the death of Gangabai, and all the assets and liabilities of the partnership firm of Hiranand Lunidaram were vested in the plaintiff and she alone was declared to have a proprietary interest in the said firm of Hiranand Lunidaram and entitled exclusively to recover all the outstandings due to it. A consideration of the terms of this decree is important for, in my opinion, it throws considerable light on the question raised, whether, Khushiram and Teckchand are necessary parties to the present suit.

It is also very significant to observe that both Khushiram and Teckchand were examined on commission in this case at the request of the defendant's Pleader. Both were asked "Are you interested in the assets and liabilities of the firm of Hiranand Lunidaram?" And the answers of both these witnesses were in the negative. It is abundantly clear from the evidence of Khushiram and Teckchand that since the decree of the Sub-Civil Court of Sukkur, they disclaim all interest in the firm of Hiranand Lunidaram. The question, therefore, arises whether despite this disclaimer and the terms of the aforesaid decree, Khushiram and Teckchand are yet necessary parties to the present suit, and the suit by Mulibai in her individual capacity is unmaintainable. Mr. Fatehchand for the defendant in contending that the suit by Mulibai alone is unsustainable relies mainly on the provisions of s. 45 Indian Contract Act. He argues that under the provisions of this section, it was obligatory on the plaintiff to place on record the other partners in the firm of Hiranand Lunidaram, as they are necessary parties. According to him, the decree of the Sub-Civil Court, Sukkur was purely one *in personam* and not *in rem* and hence not binding on the defendants who were not parties to it and, therefore, whatever be the effect of that decree on the partners *inter se*, it is perfectly ineffectual against the present defendants. Further, Mr. Fatehchand contends that if the plaintiff bases her cause

of action on the assignment to her by the other two partners of their interest in the firm of Hiranand Lunidaram such an assignment ought to fulfil the requirements of ss. 130 and 131 of the Transfer of Property Act and as this is wanting in the present suit, the interest of the two other partners in the firm cannot be said to have devolved upon the plaintiff.

Section, 45, Indian Contract Act is as follows:—

"Where a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests as between him and them, with them during their joint lives, and after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly."

This section is perfectly clear and unambiguous in its terms, and there can be no doubt whatever that in the case of a partnership all the individuals constituting it are necessary parties to a suit in which a debt due to the partnership is claimed. In the present suit, it is not denied that the amount claimed from the defendant was due to the firm of Hiranand Lunidaram, and, therefore, the right to claim this amount rests with all the partners in this firm. The question that now arises is whether by reason of the decree of the Sub-Civil Court, Sukkur, which unmistakably declares that the proprietary rights in the firm of Hiranand Lunidaram after its dissolution are vested in Mulibai exclusively, and she alone is entitled to the assets and liabilities of the firm, it was still obligatory on her to make Khushiram and Teckchand parties to the suit either as plaintiffs or as defendants. The industry and ingenuity of the respective Pleaders in this suit has not been successful in placing before me any case law on the subject for my guidance, and the point, therefore, seems to be, *res integra*. Though no doubt s. 130 of the Transfer of Property Act prescribes certain conditions for the assignment by one person to another of his interest in any particular subject-matter, to my mind this section provides one mode of the devolution of interest from one person to another, but could not be said to exhaust all other ways and means by which the interest of one person may be transferred to another. In the

present case, it has been established on the strength of the decree of the Sub-Civil Court that all the rights and interests of Khushiram and Teckchand in the firm of Hiranand Lunidaram have been assigned to the plaintiff, and I, therefore, take it that there has been a devolution by operation of law. To come to any other conclusion would be tantamount to render the decree of the Sub-Civil Court, Sukkur, nugatory. Both Khushiram and Teckchand of their free will and consent have relinquished all rights to any outstandings due to the firm of Hiranand Lunidaram. They have consented to all the proprietary rights in their firm being vested in the plaintiff, and they have further ratified their consent by their unequivocal admission that they have ceased to have any interest in the firm of Hiranand Lunidaram. Therefore, though there may be no doubt as to the normal necessity under s. 45, Indian Contract Act of having all the partners on the record in a suit brought to enforce a partnership claim, I do not think that it is absolutely obligatory to do so if one of the partners is able to substantiate that the reason for their appearance on the record has ceased to exist by reason of their ceasing to have any interest in the partnership. No doubt when there are several partners in a firm, and only one of them files a suit to recover a partnership debt, the suit would be unentertainable unless and until the other partners are on the record. This is what is really involved in the provisions of s. 45, Indian Contract Act, and a contravention of the provisions of the section would be to expose a debtor to harassment by a multiplicity of suits. But cases may well arise when only one of the partners may institute a suit. There may be collusion between the debtor and the other partners, or there may be an assignment of interest by the other partners to the partner suing. All the interests of the other partners may be devolved by operation of law on the partner suing. In these and the like cases provided they are satisfactorily established the applicability of s. 45, Indian Contract Act, to them, in my opinion, would cease to exist.

Mr. Fatehchand for the defendant urged that the defendant in the present suit was not a party to the suit in the Sukkur Court, and the decree therein could have no binding effect upon him. The Sukkur suit was as I have observed for the dissolution of the partnership and the settlement of the

partnership accounts, and the defendant would have no *locus standi* in that suit by the virtue of the decree passed therein the defendant can have no reasonable apprehension that he is still exposed to the risk of having a suit filed against him by the other partners in the firm of Hiranand and Lunidaram. Hence this objection to the maintainability of the suit by Mulibai alone cannot be allowed to prevail. It appears to me that it has been clearly established that Mulibai alone is competent to sue and the suit by her is, therefore, maintainable.

Suits Nos. 156 and 194 of 1921 have also been filed by the same plaintiff Mulibai in her individual capacity against other debtors of the firm of Hiranand Lunidaram and the same question as to her competency to sue alone has been raised by the Pleaders in either suit. I have heard the arguments of the Pleaders representing the defendants in these two suits, and it would suffice to embody my finding in the same judgment. There is only one point of difference between Suit No. 230 of 1921 and the two latter suits, and that is the absence of the evidence of the two other partners Khushiram and Teckchand, but this does not alter my opinion as to the maintainability of the suit by Mulibai alone, for the decree in the Sukkur Court, in my opinion, stands equally effective in all three suits.

Z. K.

Order accordingly.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1332
OF 1923.

April 2, 1925.

Present:—Mr. Justice Pearson and
Mr. Justice Chakravarti.

RAJ KRISTO GHOSE—PLAINTIFF—
APPELLANT

versus

BATA KRISTO GHOSE—DEFENDANT—
RESPONDENT.

Landlord and tenant—Bagat land—Lease for term of years—Ejectment—Tenant, liability of.

Where a lease is granted of a piece of *bagat* land for a term of years containing no indication that the tenant is to be treated as a *raiyat* or that the purpose of the tenancy is agricultural or horticultural, the lessee is bound by the contract which he has made and must give up possession of the land after the expiry of the term of the lease. [p. 115, col. 1.]

Appeal against a decree of the District Judge, Hooghly, dated the 7th of April 1923, reversing that of the Munsif, First Court at Sarampur, dated the 18th of June 1919.

Babu Peary Mohan Chatterji, for the Appellant.

Babu Shib Chandra Palit, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff for recovery of possession of certain lands on the allegations that he let out these lands to the defendant for a period of nine years and the defendant executed a *kabuliyat* on the 25th June 1906. This suit was brought after the expiry of the term of the lease after notice to quit was served upon the defendant. The defence of the defendant was that he never executed the *kabuliyat* and that the plaintiff was a *niskardar*, therefore he was a tenant under him and that, therefore, the defendant was a *raiyat* and as such was not liable to ejectment after the expiry of the term of the lease.

The Court of first instance found that the defendant did execute the *kabuliyat* and that the lands were garden lands and let out to the defendant not as a *raiyat*, and as the term of the lease had expired he gave a decree for possession to the plaintiff.

On appeal by the defendant there was a remand by the lower Appellate Court and on a second appeal to this Court that order of remand was modified and ultimately the case went again before the Trial Court and the Trial Court again came to the same conclusion as it did before and gave a decree to the plaintiff for possession. Against that decree the defendant appealed to the learned District Judge who has reversed the decree of the Munsif and has dismissed the plaintiff's suit.

The learned District Judge begins by saying that because the plaintiff is a *niskardar*, therefore, the defendant must be a *raiyat*, a conclusion which does not necessarily follow. The main question was what was the status of the defendant upon a proper and true construction of the lease under which he entered into possession. The learned District Judge does not at all direct his attention to that question as the primary question, because he has already assumed that the defendant must be a *raiyat*. The learned District Judge, however, finds that as the *kabuliyat* shows that there are some fruit trees on the land the purpose

of the tenancy must necessarily be horticultural and on that finding he dismisses the plaintiff's suit.

The present appeal, as I have already stated is by the plaintiff. The learned Vakil for the appellant contended that on a proper construction of the *kabuliyat* the learned District Judge ought to have held that the defendant was not a *raiya* but was a tenant of a piece of as the *kabuliyat* described, *bagat* land. The *kabuliyat* it was submitted does not show that the lease was intended for agricultural or horticultural purpose, and, therefore, the defendant could not invoke the provisions of the Bengal Tenancy Act for resisting the plaintiff's claim.

We are of opinion that the contention of the appellant is well-founded. The *kabuliyat* shows that the lease was for a piece of *bagat* land and it contains no indication that the defendant was to be treated as a *raiya* or that the purpose of the tenancy was agricultural or horticultural. The limitation as to the rights of the defendant indicated in the *kabuliyat* would clearly show that the lease was neither intended to be an agricultural lease nor a horticultural lease. We think, therefore, the defendant is bound by the contract he made, that is to give up possession of the land after the expiry of nine years.

In this view we think the decree made by the learned Munsif is correct and we restore that decree with costs both of this Court and of the lower Appellate Court.

Z. K.

Appeal decreed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 143 OF 1924.

July 15, 1925.

Present :—Mr. Simpson, A. J. C.
SRIPAT AND OTHERS—DEFENDANTS—
APPELLANTS

versus

HUBDAR AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 11
—Appeal purporting to be within time—Summary
rejection as time-barred—Appellate Court, duty of—
Limitation Act (IX of 1908), s. 5—Appeal filed beyond
limitation—Extension of time—Diligence of appel-
lant.

Under O. XLI, r. 11, C. P. C., the Court is bound to
fix a date for hearing an appellant. Where the

memorandum of appeal is in order and at least pur-
ports to be within time, it is not open to the Court to
reject the appeal summarily as time-barred. [p. 116,
col. 1.]

In a case, judgment was given by the First Court on
30th May 1923. The period of limitation for appeal
was 30 days. 31st May was the last working day of
the Court. Application for copy was made on 2nd
July 1923, the day on which the Court re-opened.
The copy was ready for delivery on 14th August but
it was despatched by post and received by the
applicant on 17th August. The Court was again
closed on that date, and the appeal was filed before the
District Judge on 27th August, the day on which the
Court re-opened :

Held, that the appellant acted with due diligence
and was entitled to have the time extended under the
provisions of s. 5 of the Limitation Act. [p. 116, col.
2.]

Miscellaneous appeal against an order
of the District Judge, Fyzabad, dated the
30th August 1923, confirming that of the
Subordinate Judge, Sultanpur, dated the
30th May 1923.

Mr. Haidar Husain, for the Appellants.

Nr. G. N. Misra, for the Respondents.

JUDGMENT.—This is a second appeal.
For the purposes of my present decision
it is not material what the suit was. As
a matter of fact it was a suit for parti-
tion, and I believe the substance of the
first appeal was an objection to the actual
partition by metes and bounds, which had
been suggested by a Commissioner appoint-
ed by the Court. The appeal came before
the learned District Judge of Fyzabad, and
he passed judgment in these words, "I have
examined the record and find that the
appeal is clearly beyond time and I,
therefore, reject this appeal summarily as
being time-barred."

This order was passed without fixing any
date for hearing the appellant, and without
hearing the appellant. The date of this
judgment is 30th August 1923. The appel-
lant applied in review on the 1st of Decem-
ber 1923. That application was dismissed
on 19th January 1924 on two grounds. The
first ground was that no such application
lay, because the conditions laid down in
O. XLVII, r. 1 had not been complied
with. The second reason was that the
District Judge came to the conclusion,
after hearing applicant's Pleader, that the
applicant had been beyond time. The
present appeal was filed on the 19th
January 1924.

The first objection taken against the
present appeal is that it is beyond time.
On this point I hold that it is within
time. The application for review was, in

my opinion, a proper application. The learned Judge has not specified in what respect the provisions of O. XLVII, r. 1 were not complied with. The applicant considered himself aggrieved by a decree from which no appeal had been preferred. The decree he complained of was made, in my opinion, in contravention of the law, seeing that under O. XLI, r. 11, a Court is bound to fix a date for hearing the appellant, and to hear him if he appears on that date. I do not think the judgment could be supported as having been made under O. XLI, r. 3, because the memorandum of appeal was in order, and at least purported to be within time. I, therefore, proceed to hear this appeal.

It might be open to me to proceed merely on the ground that the learned District Judge was wrong in his procedure, and ought to be directed now to fix a date for hearing the appellant or his Pleader; and then to pass orders according to law. But the learned Judge, in hearing the application for review, pronounced a decision with regard to limitation, and the question of limitation has been argued before me. I prefer, therefore, to decide the question of limitation now.

The date of the judgment of the First Court was 30th May 1923. The period of limitation is 30 days, which period would end on the 29th of June 1923. The appeal was in fact presented on the 27th of August 1923, the date of the 26th in the affidavit is a slip). The period spent in obtaining a copy is to be computed from the 2nd July 1923, when the application for copy was made to the 14th of August 1923, when the copies were posted to the appellant. The appeal is, therefore, beyond time according to the rules of computation laid down in s. 12 of the Limitation Act. But these rules operate very harshly against the appellant in the present case. The case is one for extension of time under s. 5 of the Limitation Act. Judgment was delivered on the 30th of May. The 31st was the last working day before the vacation. If the law is applied strictly, the appellant had to read and consider the judgment, to come to a decision whether he would or would not appeal, and file an application for copy of the judgment and decree, all in one day. It is unreasonable to expect him to get so much done in the time. Ordinarily the Legislature allows a month for

this purpose. This period may be cut down to any reasonable limit, but it is not reasonable to cut it down to twenty-four hours. Accordingly, I accept the application for copy on the 2nd of July, which was the very day on which the Courts opened after the vacation, as equivalent to an application made a month earlier. The applicant could have got his copies on the 14th of August by presenting himself at the Judge's Court, but I do not consider that he forfeits his claim to indulgence because he arranged to have the copies sent to him by post. They were despatched on the 14th of August and they reached him on the 17th of August. These three days cannot be excluded from the computation under s. 12 but they may be reckoned in considering the question of indulgence under s. 5. On the 17th of August the Courts were closed, and they did not re-open again until the 27th of August. The appeal was filed on the 27th of August.

I find, therefore, that the appellant acted with due diligence, and ought to have had the time extended under the provisions of s. 5 of the Limitation Act. Orders under s. 5 are discretionary orders and if the discretion had been exercised by the District Judge one way or the other, I should have hesitated before upsetting his order, but I do not find, either in the judgment on the appeal, or in the order rejecting the application for review, that this discretion has been exercised by the District Judge. It may, therefore, be exercised by me now, and I do so exercise it, and extend the period of limitation, and direct the learned District Judge to proceed to hear the appeal as if it had been presented within time. No order as to costs.

N. H.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 234 OF 1922.

July 15, 1925.

Present:—Mr. Justice Kanhaiya Lal
and Mr. Justice Lindsay.

Lala NARAIN DAS *alias* RAM
DAYAL—PLAINTIFF—APPELLANT
versus

RAM CHANDRA AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 2 (14), 66—

Sale by Receiver with approval of Court, whether sale under decree or order—Sale certificate, whether necessary—Section 66, applicability of.

Section 66 of the C. P. C. refers only to a case where there has been a sale in execution of a decree. [p. 118, col. 1.]

A sale by a Receiver with the approval of the Court is not a sale in pursuance of any decree or order of the Court and in the case of such a sale the Court does not grant a sale certificate nor does it confirm the sale. Section 66 of the C. P. C. has no application to the case of such a sale. [p. 118, col. 2.]

First appeal from a decree of the Subordinate Judge, Muzaffarnagar, at Meerut, dated the 27th February 1922.

Mr. P. L. Banerji, for the Appellant.

Mr. H. K. Mukerji and Dr. S. N. Sen, for the Respondents.

JUDGMENT.—After hearing the arguments in this case we are of opinion that the decree of the Court below must be reversed and the suit must be sent back for disposal on the merits.

The case is a somewhat peculiar one. The plaintiff Lala Narain Das *alias* Ram Dayal brought this suit originally against Ram Chander son of Kanhaiya Lal praying for his ejectment from a certain shop situated in Mandavi Ghalla in the city of Meerut.

The title which the plaintiff asserted to this shop was that it had been bought by his own brother from a Receiver who had been appointed by the Court in a partnership suit. The plaintiff asserted that his brother, who is also called Ram Chander, had purchased this property really on his behalf being at that time the guardian of the plaintiff who was then a minor.

Ram Chander son of Kanhaiya Lal joined issue regarding this question of title and stated that the title to the shop was not in the plaintiff but was in him. He stated that the purchase which had been made by Ram Chander son of Khem Chand (that is to say the brother of the plaintiff) was a purchase made on his, defendant No. 1's behalf, and he, therefore, insisted that Ram Chander son of Khem Chand should be made a party to the suit. This was done and the case then proceeded.

It appears that Ram Chander, the defendant No. 2, the brother of the plaintiff, purchased this shop on the 13th of September 1914 in the course of a sale made by a Receiver under the directions of the Court. The suit in which this Receiver was appointed was Suit No. 485 of 1911. We have at page 11 of our record the report of the Receiver which was dated the 15th of

September 1914 and which shows that he held an auction of certain shops on the 13th September 1914 and that shop No. 1 was sold to Ram Chander son of Khem Chand. The Receiver asked the Court to confirm the sale. Then we find that by a proceeding dated the 17th December 1914 the Court confirmed the sale in favour of the purchaser Ram Chander son of Khem Chand. A copy of this order is at page 12 of our record and it purports to be an order under O. XXI r. 92 (1) of the C. P. C. Later on the certificate as provided by O. XXI, r. 94 was granted to Ram Chander son of Khem Chand.

These facts being established the defence which was put forward in the present suit was that a sale certificate having issued to Ram Chander son of Khem Chand the suit was barred by the provisions of s. 66 of the C. P. C. Section 66 (1) provides that no suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claim.

Clearly if this provision is applicable to the facts of the case now before us the plaintiff is out of Court. It has, however, been argued that in the circumstances of this case this section has no application at all and having sent for the record of Suit No. 485 of 1911 we are satisfied that s. 66 has nothing to do with this case and that although a sale certificate under the provisions of O. XXI, r. 94 was issued that is no bar to the plaintiff's claim here. The facts may be briefly stated as follows:—Suit No. 485 of 1911 in the Court of the Subordinate Judge of Meerut was a suit brought for dissolution of partnership and for the taking of accounts. In that suit the plaintiffs were Ram Chander son of Kanhaiya Lal (defendant No. 1 in the present suit) and his minor son Ragho Mal. The defendants were Chhajju Mal, Piare Lal and others.

It appears from a reference to the record that after the institution of the suit a Receiver was appointed to take charge of the partnership property.

Eventually a preliminary decree was drawn up in the manner indicated in O. XX, r. 15 declaring the rights of the parties and giving directions as to how the pro-

perty was to be realized and administered.

After this preliminary decree had been passed we find from the record that the Receiver reported to the Subordinate Judge that there were a number of decrees outstanding against the firm consisting of the parties to the case. The Receiver informed the Subordinate Judge that the creditors were pressing their claims and were obtaining orders of attachment from the Court of the Additional Subordinate Judge of Meerut. He represented to the Court that the money owing to these judgment-creditors was a very substantial sum about Rs. 40,000 (forty thousand rupees) and he pointed out that interest was accumulating on these decretal amounts very rapidly. He, therefore, suggested to the Court that a certain portion of the partnership property might be sold in order to satisfy these decretal debts which were binding upon the partners, and we find from the order-sheet that the Subordinate Judge gave the Receiver authority to do his best for the parties and to sell whatever property he thought fit in order to satisfy as far as possible the demands of the decree-holders and in order to prevent further accumulation of interest.

It was in pursuance of this order that the Receiver sold the shop with which we are now concerned on the 13th September 1914. It is to be noticed that this sale was made long before the final decree in the partnership suit was passed. We may further mention that it appears from the record that the parties agreed to have this sale made by the Receiver in order to prevent the accumulation of these judgment debts; and lastly we have to mention that this matter came up before this Court in the course of appeal and the order of the Subordinate Judge empowering the Receiver to sell the property was affirmed.

We have it, therefore, that the sale to Ram Chander son of Khem Chand defendant No. 2 in this suit was a sale by a Receiver which took place in the circumstances to which we have referred and we do not see how it is possible to apply the provisions of O. XXI to a sale of this kind. There certainly was no sale in execution of decree and it seems to us that s. 66 of the Code refers to a case where there has been a sale in execution of decree. Part 2 of the C. P. C. in which s. 66 is to be found relates to execution and O. XXI also

relates to the execution of decrees and orders.

It has been argued before us that we ought to treat this sale as having been made in the execution of a decree because it was made under directions which were contained in the preliminary decree. We do not, however, think that that argument is sustainable. A preliminary decree is not capable of execution. Further we do not see how it is possible to describe this sale as being a sale in execution either of a decree or order. It is not, as we have said, a sale in execution of decree nor is it a sale in pursuance of an "order" as defined in s. 2 (14) of the C. P. C. "Order" means the formal expression of any decision of a Civil Court which is not a decree, but when the Subordinate Judge in the course of the proceedings in Suit No. 485 of 1911 gave authority to the Receiver to sell the property he was not issuing any order in this sense. He was not deciding anything between the parties to the case. He was simply giving a direction to the Receiver to dispose of the property for the benefit of all the parties to the suit. We are satisfied, therefore, that this sale was not carried out in pursuance of any decree or order as defined above. The learned Counsel for the appellant has referred us to a case which seems to be in point, reported in *Gulam Hossein Cassim Arif v. Fatima Begum* (1). The learned Judge in that case pointed out that a sale by a Receiver was not a sale by the Court but a sale under the Court and that in such cases the Court does not grant a sale certificate nor does it confirm the sale. The learned Judge differed from the previous decision of a Single Judge of the same Court to be found in *Minatoonnessa Bibee v. Khatonnessa Bibee* (2). We may also refer to another case to be found in *Parvathammal v. Chokalinga Chetty* (3) which supports the argument of the learned Counsel for the appellant. There it was held that an order under s. 34 of the Guardians and Wards Act directing a guardian to pay a sum of money out of his ward's estate for the marriage expenses of a person dependent on his ward is neither a decree nor an order executable as a decree under the C. P. C. The learned Judge

(1) 6 Ind. Cas. 300; 16 C. W. N. 394.

(2) 21 C. 479; 10 Ind. Dec. (N. S.) 949.

(3) 41 Ind. Cas. 341; 41 M. 241; (1917) M. W. N. 602; 6 L. W. 526.

referred to the definition of the term "order" in s. 2 (14) of the C. P. C.

We hold, therefore, that in the present suit the defence cannot be put forward that the sale certificate issued to Ram Chander defendant No. 2 is a bar to the maintenance of the present suit. The fact is that had the proper procedure been observed there would neither have been an order confirming the sale nor any certificate issued under the provision of O. XXI, r. 94. The procedure which was adopted was out of order. We, therefore, allow the appeal, set aside the decree of the Court below and send the case back to the Subordinate Judge of Muzaffarnagar for disposal on the merits. Costs here and hitherto will abide the result and in this Court will include fees on the higher scale.

Z. K.

Appeal allowed.

ODUH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 373 OF 1924.

August 19, 1925.

Present:—Mr. Dalal, J. C.

GHUTUR SINGH—PLAINTIFF—APPELLANT
versus

PHULANG SINGH AND OTHERS—

DEPENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1—Appeal pending—Review, whether should be granted—Review granted during pendency of appeal, effect of.

There is no necessity to grant a review of a decree while an appeal against the decree by the applicant for review is pending, inasmuch as the applicant can get the decree modified in the Appellate Court. [p. 120, col. 1.]

Where, however, a review is granted against a decree which is under appeal, the appeal becomes incompetent and cannot be proceeded with. [ibid.]

Appeal against the judgment and decree of the Additional Sub-Judge, Gonda, dated the 17th May 1924, reversing those of the Munsif, Utraula, dated the 19th December 1922.

Mr. Bishambhar Nath Srivastava for Mr. Bisheshwar Nath Srivastava, for the Appellant.

Mr. Ram Chandra, for the Respondents.

ORDER.—There has been a lot of confusion in the proceedings here. A Munsif of Utraula passed a decree for pre-emption directing deposit of Rs. 1,160. The vendee

Phulang Singh appealed to the District Judge who transferred the appeal for decision to the Additional Subordinate Judge. The appeal was filed on 19th January 1923 and on 8th January 1923 the plaintiff had applied to the Munsif's Court for review. This application for review had an unfortunate history. The District Judge thought that the Munsif who took the place of the Munsif who had passed the decree had not jurisdiction to entertain the application for review, so he transferred the application to one Court and then finally to the Court of the Subordinate Judge. On 6th October 1923 the Subordinate Judge Pandit Shiam Manohar Shargha accepted the application for review and altered the price from Rs. 1,160 to Rs. 460. Obviously the decree then became one passed by the Subordinate Judge.

The appeal filed on 19th January 1923 proceeded on its course and the Additional Subordinate Judge decided it.

This is a second appeal from the appeal heard by the Additional Subordinate Judge. Before I had noticed that the application for review was granted by a Subordinate Judge and not by a Munsif, I was prepared to have the appeal to the lower Court amended so that it may read as an appeal made from the decree of the 6th of October 1923. The plaintiff-appellant's learned Counsel here rightly pointed out that the appeal should have been made from the decree of the 6th October 1923; but as that view would have caused grave injustice to the defendant-respondent Phulang Singh I proposed to adopt the remedy of having the appeal to the District Judge filed on 19th January 1923 altered in the manner stated above.

This cannot be done now because Subordinate Judge cannot hear an appeal from a decree passed by another Subordinate Judge. The lower Appellate Court of the Additional Subordinate Judge ought to have discovered this difficulty.

The only course open now is to set aside all the proceedings and to direct the defendant-vendee Phulang Singh to appeal to the District Judge from the decree of the 6th of October 1923. Such an appeal would really be time barred. However, on account of the circumstances of the present case I give a direction to the District Judge to admit the appeal under s. 5 of the Limitation Act. The mistake really was committed by the Subordinate Judge

who granted a review while an appeal from the original decree was pending. There was no necessity for the review while an appeal from the original decree was pending, because the plaintiff-respondent in the Appellate Court could have got the decree modified in the Appellate Court [See provisions of O. XLVII, r. 1 (2), C. P. C.]

I quash all the proceedings in appeal and declare that the appeal to the Subordinate Judge became incompetent on the granting of the review. The decree of the lower Appellate Court is set aside.

At the same time I direct that if an appeal is filed by Phulang Singh from the decree of 6th October 1923 it shall be admitted by the District Judge of Gonda under s. 5, Limitation Act. I am afraid that nothing more can be done to help Phulang Singh. The attention of the District Judge shall be drawn particularly to this judgment of mine. Phulang Singh is directed to file an appeal, if he so desires, within one month of to-day's date.

Costs of the lower Appellate Court and here shall be borne by the parties.

Z. K.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 68 OF 1925.

July 9, 1925.

Present :—Mr. Justice Kanhaiya Lal.

MUTSADDI LAL—DEFENDANT—

APPLICANT

versus

BHAGWAN DAS—PLAINTIFF—OPPOSITE PARTY.

Limitation Act (IX of 1908), Sch. I, Arts. 7, 102—
Weighman's wages, suit for—Limitation.

A weighman employed to work at a shop is not a house-hold servant, nor is he an artisan, nor a mere labourer. He may be regarded in fact as a shop-keeper's assistant. A suit by a weighman for his wages is, therefore, governed by Art. 102 and not by Art. 7 of Sch. I to the Limitation Act.

Civil revision from an order of the Judge of the Court of Small Causes, Allahabad, dated the 16th January 1925.

Mr. Bhagwati Shankar, for the Applicant.

Mr. S. B. Johari, for the Opposite Party.

JUDGMENT.—The plaintiff was employed as a weighman in the shop of the defendant on a fixed monthly remuneration of Rs. 13 per mensem. He claimed his wages from the 12th February 1921 to the

2nd February 1922 which the Court below has allowed for a period of three years prior to the suit.

The question for determination is whether Art. 7 or 102 is applicable to the suit. Article 7 applies to suits for the wages of a house-hold servant, artisan or labourer and provides a limitation of one year from the date when the wages accrue due. Article 102 applies to a suit for wages not otherwise provided for and allows a period of three years from the date when the wages accrue due. As stated by Stroud (Judicial Dictionary, 2nd Edition, page 2205) wages include payment for any services; yet in general the word salary is used for payment of servants of a higher class and wages is confined to the earnings of labourers and artisans [Gordon v. Jennings(1)]. A labourer is defined as a man who digs and does other work of that kind with his hands. But a carpenter is not called a labourer because though he works with his hand his work requires skill and training [Morgan v. London General Omnibus Co. (2)]. A labourer, according to Wharton, is a servant in husbandry or manufacture not living *intra mœnia* who labours in a toilsome occupation and does work that requires little skill as distinguished from an artisan (Bouviers Law Dictionary, Volume II page 1819). A weighman employed to work at a shop is not a house-hold servant nor is he an artisan. He cannot be treated as a mere labourer employed to do task work, that is to hold the scales and weigh goods in a shop for a monthly salary. He can be asked to do other work of the shop when free. He has to count and add up, and may have also perhaps to calculate the price on the total quantity weighed and his work, therefore, cannot be treated as purely manual labour so as to make Art. 7 of the Act applicable. He may be regarded in fact a shop keeper's assistant, and Art. 102 has been rightly applied to the case. The arrears have been long due and interest thereon has been properly allowed. The application, therefore, fails and is dismissed with costs including fees in this Court on the higher scale.

N. H. Application dismissed.

(1) (1882) 51 L. J. Q. B. 417; 9 Q. B. D. 45; 46 L. T. 534; 30 W. R. 704; 46 J. P. 519.

(2) (1884) 53 L. J. Q. B. 352; 13 Q. B. D. 832; 51 L. T. 213; 32 W. R. 759; 48 J. P. 503.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 179 OF 1923.

March 30, 1925.

Present:—Mr. Justice Suhrawardy and
Mr. Justice Duval.NIRANKA SASHI ROY AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus

SWARGANATH BANERJEE—
DEFENDANT—RESPONDENT.

*Partition Act (IV of 1893), s. 4, application of—
When and by what Court order can be passed under s. 4—
Reconveyance to vendor after order under s. 4—
Civil Procedure Code (Act V of 1908), s. 99—
Appellant's case weak on merits—Interference with
irregular order.*

Section 4 of the Partition Act requires the presence of 3 conditions before the Court can take action under it: (i) the dwelling house should belong to an undivided family; (ii) a share thereof should have been transferred to a person who is not a member of such family, and (iii) the transferee should sue for partition. [p. 122, col. 1.]

The operation of s. 4 of the Partition Act comes into play after the Court has found that the stranger transferee is entitled to partition. In fact no order can be passed under the Partition Act before the Court has found that such a transferee has succeeded in establishing his claim for a partition of the undivided homestead. [ibid.]

A Court of Appeal is as much entitled to pass an order under s. 4 of the Partition Act as the Trial Court. The word "Court" in the section is not confined to the Trial Court, and the power conferred by the section may be exercised even by an Appellate Court. [p. 122, cols. 1 & 2.]

The right conferred by s. 4 may be exercised at any time before the final allotments take place. The section does not indicate as to when the willingness of a member of a family should be signified to the Judge to enable him to pass an order under s. 4. [p. 122, col. 2.]

In a partition suit by a purchaser from a co-sharer, the Appellate Court finding the purchaser's title as proved, sent back the record of the case to the Trial Court for effecting partition. After the latter Court had taken steps towards the appointment of a Commissioner for partition, the Appellate Court, on an application being made to it, passed an order under s. 4 of the Partition Act:

Held, that the Appellate Court had not lost its jurisdiction to pass the order it did merely because it had sent back the record to the Trial Court and that Court had taken some action in the matter. [ibid.]

Where an appellant's case is extremely weak on the merits, the High Court will not interfere under s. 99, O. P. C., with an irregular order of the Court below. [p. 123, col. 1.]

Where a purchaser reconveyed the property to the vendor after an order had been passed by the lower Appellate Court under s. 4 of the Partition Act the High Court declined to countenance the action, but permitted the vendor, under r. 10, O. XXII, C. P. C., to continue the appeal. [ibid.]

Appeal against an order of the Subordinate Judge, Burdwan, dated the 19th March 1923.

Babus Tarakeswar Pal Choudhury and Prakash Chandra Pakrashi, for the Appellants.

Babus Braja Lal Chakravarti and Susil Kumar Bose, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff Niranka Sashi Roy against an order of the lower Appellate Court passed under s. 4 of the Partition Act.

The facts of the case are that the plaintiff as a purchaser from a co-sharer of the defendant brought a suit for partition of several plots of land one of which was the homestead of the defendant. The Trial Court dismissed the suit on the finding that the plaintiff and his vendor had failed to prove their title to the lands in suit. On appeal the learned Subordinate Judge held that the plaintiff had succeeded in establishing his title and ordered that the partition should be made. Thereupon a preliminary decree for partition was passed by the Court of Appeal below on the 28th January 1922. On the 18th April 1922 the respondent presented an application before the Court of Appeal below purporting to be one for a review of its judgment praying that an order may be passed under s. 4 of the Partition Act of 1893 enabling the defendant-respondent to purchase the share in the homestead from the plaintiff. In the lands in suit the share of the plaintiff was 8-annas and that of the defendant Swarga Nath Banerjee the remaining 8-annas. The learned Subordinate Judge considered the matter and allowed the defendant's prayer and ordered that the "respondent be permitted to purchase the share of the appellant in the homestead land on payment of the valuation of the share to be found by the lower Court". It appears that before this application was made the record had gone down to the Trial Court and certain steps were taken towards the appointment of a Commissioner for partition. Against the order passed by the lower Appellate Court this appeal has been preferred by the plaintiff, and the order of the lower Appellate Court has been assailed on two grounds, first that there was no sufficient ground in law for the review of the judgment and the lower Appellate Court has acted illegally in granting the review and passing the order above referred to; and secondly the case as having gone back to the Trial Court the Court of first appeal had lost its seisin of the case and, therefore, had no jurisdic-

tion to pass the order under the Partition Act.

With regard to the first ground we do not feel called upon to express an opinion as to the regularity or otherwise of the proceedings in review taken before the lower Appellate Court. Admitting that these proceedings were irregular we do not think that there is any substance in the objection of the appellant to induce us to interfere with the order passed by the Court below. Section 4 of the Partition Act as have been held in *Khirode Chandra Ghosal v. Saroda Prasad* (1) requires the presence of 3 conditions before the Court can take action under it: *first*, that the dwelling house should belong to an undivided family: *secondly*, that a share thereof should have been transferred to a person who is not a member of such family, and *thirdly*, that the transferee should sue for partition. All these three requisites exist in the present case. The section directs that if any member of the family being a share-holder undertakes to buy the share of a transferee who is a person not being a member of such undivided family the Court shall direct the sale of such share to such share-holder. It seems to us that the operation of s. 4 of the Partition Act comes into play after the Court has found that the stranger transferee is entitled to partition. In fact no order can be passed under the Partition Act before the Court has found that such a transferee has succeeded in establishing his claim for a partition of the undivided homestead. The provisions of s. 4, therefore, seem to us to be separate and distinct from the decree in the suit. It may be said that it really follows the decree establishing the plaintiff's claim to partition. In our judgment, therefore, though the lower Appellate Court may not be correct in treating the defendant's application as an application for a review of its judgment which it undoubtedly purported to be, that Court had jurisdiction to pass the order under s. 4 even after the passing of the decree.

The next objection taken should not also prevail. It is said that the lower Appellate Court had lost jurisdiction over the case after it had pronounced its judgment and passed the decree in the plaintiff's appeal. As has been held in the case of *Pran Krishna Bhaduri v. Keshab Chandra Roy* (2) a Court of Appeal is as much entitled to

pass an order under s. 4 of the Partition Act as the Trial Court. In that case the prayer was made in the written statement before the Trial Court. But that Court made no order on the prayer. The Appellate Court confirmed the decree of the First Court and passed an order under s. 4 of the Partition Act. An objection was taken that the Appellate Court had no jurisdiction after the final decree in the suit had been made to make an order under s. 4. The learned Judges thought that the word "Court" is not confined to the Trial Court, but the power conferred by the section may be exercised even by an Appellate Court. This being conceded it now remains to be seen if the lower Appellate Court in this case has lost its jurisdiction to pass the order merely because the record was sent back to the Trial Court and that Court had taken some action in the matter. It is said that the proper Court to which an application under s. 4 of the Partition Act should be made now is the Trial Court. We do not say that that is not the Court to which such an application might be made. In our judgment the right conferred by s. 4 may be exercised at any time before the final allotments take place. But we think in the present case the learned Subordinate Judge did not lose his jurisdiction under s. 4. In the circumstances that have arisen in this case we can not say that the defendant was wrong in inviting the Court of Appeal to pass an order under s. 4 of the Partition Act. The Trial Court, if the application were made to it, might have said that it was bound to carry out the decree of the Appellate Court which was to effect partition of all the properties in suit. If, as has been held, the Appellate Court had jurisdiction to pass the order, we think the defendant has taken the easier course in the matter. The section does not indicate as to when the willingness of a member of a family should be signified to the Judge to enable him to pass an order under s. 4. In the present case we do not think that there was any unusual delay. The defendant considered his position with regard to exercising his right of appeal against the lower Appellate Court's decree and having decided that he should not prefer such an appeal he made the application to that Court under the Partition Act.

Conceding for argument's sake that the proceedings before the Appellate Court have been irregular, as we have found that

(1) 7 Ind. Cas. 436; 12 C. L. J. 525.

(2) 45 Ind. Cas. 604; 22 C. W. N. 515; 45 C. 873.

that Court had jurisdiction under s. 4 of the Partition Act to make the order it did, we think that under s. 99 of the C. P. C. we should not interfere with the order of the Court below as on the merits the plaintiff's case is extremely weak. The homestead is a small plot of land with the requirements for the use of the family. The plaintiff is an *Ugra-Kshatriya* and the defendant is a *Brahmin*. It will not be conducive to the happiness of either party to allow them to live side by side with partition walls erected between their rooms.

It further appears that after the order was passed by the lower Appellate Court under the Partition Act the plaintiff has reconveyed this property to his vendor presumably, as has been suggested, with a view to avoid the provisions of the Partition Act. We do not think that we should lend countenance to this course.

In the above view of the matter we dismiss the appeal with costs. Hearing-fee three gold *mohurs*.

There is an application by respondent No. 2 Radharani Debi who had originally sold her share in the homestead in suit to the plaintiff and who has re-purchased it from him praying that she may be substituted in the circumstances of this case. We have directed under O. XXII, r. 10 that she be added as an appellant and permitted to continue the appeal.

S. D.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1925 OF 1924.

March 18, 1925.

Present:—Mr. Justice Martineau.

KAHAN SINGH AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

NATHA SINGH AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 112—Child born during continuance of marriage between mother and alleged father—Legitimacy—Presumption.

The fact that a person was born during the continuance of a valid marriage between his mother and a certain man is, under s. 112 of the Evidence Act, conclusive proof that he is the legitimate son of that man, unless it is proved that the latter had no access to his wife at any time when the child could have been begotten. It is immaterial how soon after the marriage the child was born. The only question in

such a case is whether his mother had no access to the man whom she married at any time when the child could have been begotten.

Umra v. Muhammad Hayat, 79 P. R. 1907; 194 P. L. R. 1908; 133 P. W. R. 1907, followed.

Second appeal from an order of the District Judge, Ferozepore, dated the 20th May 1924.

Mr. Kanshi Ram, for the Appellants.

Dr. Nand Lal, for the Respondents.

JUDGMENT.—On the death of one Buta Singh his land was mutated in favour of the defendant as his son. A brother and a step-brother of Buta Singh have brought the present suit for a declaration that the defendant is not the legitimate son of Buta Singh. The suit was dismissed by the Subordinate Judge, but on appeal the District Judge gave the plaintiffs a decree, from which the defendant has filed a second appeal.

The learned District Judge has found that Buta Singh was married to the defendant's mother Bholi on the 2nd August 1889, and that the defendant was born on 23rd January 1890, and he thinks that because the defendant must have been begotten before his mother's marriage he is illegitimate. This is an entirely erroneous view of the law. The fact that the defendant was born during the continuance of the marriage between his mother and Buta Singh is under s. 112 of the Evidence Act conclusive proof that he is Buta Singh's legitimate son unless it is shown that Buta Singh and Bholi had no access to each other at any time when he could have been begotten. It is immaterial how soon after the marriage the defendant was born [see *Umra v. Muhammad Hayat* (1)]. The learned District Judge has discussed at some length the question whether the defendant was treated as Buta Singh's son, but this matter is entirely irrelevant. When it was found that the defendant was born after his mother had been married to Buta Singh the only question that remained was whether the plaintiffs had proved that Bholi and Buta Singh had no access to each other at any time when the defendant could have been begotten. There is not a particle of evidence on the record to prove this, and it follows that under s. 112 of the Evidence Act the defendant is conclusively proved to be the legitimate son of Buta Singh.

I accept the appeal, reverse the lower

(1) 79 P. R. 1907; 194 P. L. R. 1908; 133 P. W. R. 1907.

Appellate Court's decree and restore the decree of the Trial Court dismissing the suit. The respondent will pay appellants' costs in all the Courts.

Z. K.

Appeal accepted.

MADRAS HIGH COURT.

ORIGINAL CIVIL SUIT No. 207 OF 1924.
February 16, 1925.

Present:—Justice Sir Kumaraswami,
Sastri, Kt.

SHYAMA BHAI—PLAINTIFF
versus

PURUSHOTAMADOSS—DEFENDANT.

Res judicata—Co-plaintiffs—Grant to members of joint family—Nature of property granted—Estoppel—Setting up inconsistent cases.

In order to constitute *res judicata* between co-plaintiffs, there should be active controversy between them and an adjudication upon the point in dispute must have been essential for the purpose of giving a decree against the defendant. [p. 129, col. 2.]

Under the Hindu Law, as interpreted in Madras, where there is a grant to two persons, members of a joint Hindu family, the ordinary presumption is that the grant is to them as co-parceners. [p. 131, col. 2.]

Case-law considered.

A person is not precluded from setting in a litigation a case inconsistent with the one set up by him in a prior litigation. [p. 133, col. 1.]

Umrao Singh v. Lachhman Singh, 10 Ind. Cas. 285; 33 A. 344; 15 C. W. N. 497; 8 A. L. J. 465; 13 C. L. J. 519; 9 M. L. T. 507; 13 Bom. L. R. 404; 21 M. L. J. 637; 14 O. C. 133; 38 I. A. 104; (1911) 2 M. W. N. 242 (P. C.), relied upon.

In the absence of proof that a party acted on the faith of any representation by the other party, no question of estoppel can arise. [*ibid.*]

A contention put forward in a prior suit in support of a legal argument cannot by itself afford a foundation for an estoppel. [p. 133, cols. 1 & 2.]

Self-acquired property may be impressed with the character of joint property if it is dealt with as joint family property. [p. 134, col. 2.]

Rajanikanta Pal v. Jagmohan Pal, 73 Ind. Cas. 252; 50 C. 439; (1923) A. I. R. (P. C.) 57; 44 M. L. J. 561; 32 M. L. T. 149; 25 Bom. L. R. 683; 37 C. L. J. 515; (1923) M. W. N. 438; 18 L. W. 387; 27 C. W. N. 997; 9 O. & A. L. R. 805; 50 I. A. 173 (P. C.), relied upon.

Messrs. S. Srinivas Iyengar, G. Krishnaswami Iyer and R. Swaminathan, for the Plaintiff.

Messrs. K. Rajah Iyer and V. Ramaswami Iyer, for the Defendant.

JUDGMENT.—This is a suit by the plaintiff who is the widow and legal representative of one Goverdhanadoss against the defendant, her deceased husband's

brother, for a declaration that the plaintiff's husband and the defendant were members of a divided family, that the plaintiff's husband was entitled to a half share in all the properties devised under the Will of his father and that the plaintiff is entitled to a half share in the properties, which were decreed to the plaintiff's husband and the defendant, in C. S. No. 163 of 1917, for partition and delivery to the plaintiff of her share and in the alternative for maintenance at Rs. 500 a month and arrears.

One Raghunathadoss, who was the father of the plaintiff's husband and the defendant, was carrying on a large business, as a jewel merchant: He died about the 20th of October 1903, leaving behind him, the plaintiff's husband and the defendant, his sons. He left a Will, dated the 19th of October 1903, which is probated and which I shall refer to later on. The Will directs the executors, after payment of certain legacies, to hand over the residue of the estate to the plaintiff's husband, when he attains the age of 23 and the defendant, when he attains 21. The executors obtained possession and were in management of the estate. The plaintiff's husband and the defendant filed C. S. No. 163 of 1917, against the executors for an account and for possession of the properties, bequeathed to them and a decree was passed in that suit, in their favour, in execution of which they got possession of the properties, moveable and immoveable. A few months after getting the decree in that suit, the plaintiff's husband died.

The plaintiff's case is that both by virtue of the Will of Raghunathadoss and the decree in C. S. No. 163 of 1917, her husband and the defendant obtained the properties, as tenants-in-common and not as joint tenants and that she is entitled to one half share in the properties, which were recovered in execution and which formed part of the properties of the testator Raghunathadoss. She contends that by reason of the contentions, raised by her husband and the defendant that they took the properties as tenants-in-common, the defendant is estopped from setting up any title to the properties, by right of survivorship, even assuming that they were not tenants-in-common, under the terms of the Will. The plaintiff states that on the date of her husband's death, which took place on the 28th June 1920, she was a minor 16 years old, that she continued to live in her hus-

band's house, for a short time and thereafter she went to live with her parents, that the defendant who was the *de facto* guardian and who was in possession of the properties of her husband, is bound to account to her for such properties and that the defendant in 1924, asserted his rights to all the properties by survivorship and declined to hand over her share to her. She states that the defendant in reply to a notice set up an arrangement, whereby she was only entitled to the interest on Government paper, of the face value of Rs. 10,000 of the $3\frac{1}{2}$ per cent. loan, which was set apart for her maintenance and had no further rights. She denies any such arrangement and states that even if the arrangement is valid, it is not binding on her.

The defendant filed a written statement, wherein he denies that the plaintiff's husband and he were divided in interest and states that he, the plaintiff's husband and their father Raghunathadoss were members of a joint family, that under the terms of the Will, the property was given to him and his brother, as members of a joint family and not as tenants-in-common, that the parties are not governed by the Mayukha but by the Mitakshara, as they migrated to Madras, several years ago and have not adopted the law, as prevailing in Madras, that in C. S. No. 163 of 1917, the plaintiff's husband did not sue as a tenant-in-common, or claim a devise as such, that the question as to whether he and his brother took as "tenants-in-common, or as joint tenants was not one of the main issues in the suit and was not necessary for the determination of that suit, that there can be no estoppel, that he never retained possession of the properties, on the ground that they were the separate properties of the plaintiff's husband, that till the death of the plaintiff's husband, they were members of a joint family, enjoying the properties as members of such a family, that he never took possession of any of the properties, as the guardian of the plaintiff, but that he took the properties, as the surviving member of a joint family, that soon after the death of the plaintiff's husband, a settlement was arrived at, in respect of the maintenance of the plaintiff, in the presence of her father and other relations, interested in her welfare, whereby Government promissory notes of the face value of Rs. 10,000 were to be endorsed over, in her favour

and the same set apart, to secure her maintenance and she was to be paid, as and when necessary, the interest accruing on the promissory notes and she was also allowed to have her *sridhana* jewels of the value of Rs. 6,000 that the agreement was acted upon by all the parties and by the plaintiff, after she attained majority, that she cannot now repudiate it, that the total income of the properties never exceeded Rs. 300 or Rs. 400 a month and that the claim of Rs. 500 a month for maintenance is excessive. He denied the correctness of the schedule to the plaint.

The defendant also filed a counter claim, stating that the plaintiff is in possession of family jewels, of the value of Rs. 4,435, which she was allowed to keep for her temporary use and that she has not returned them, in spite of demands.

The plaintiff filed an answer to the counter-claim, denying that the defendant is entitled to any of the jewels claimed, on the ground that they were lent to her and stating that her husband gave her some jewels absolutely out of natural love and affection, and that she is not in possession of any family jewels. She states that the claim, if any, is barred by limitation.

The following preliminary issue was settled:—

Is the nature of the estate taken by the plaintiff's husband and the defendant, under the Will of Raghunathadoss *res judicata*, by reason of the decision in C. S. No. 163 of 1917?

After hearing the arguments on this issue, I was of opinion that the matter is not *res judicata* and I intimated to the parties that I would give my reasons, after hearing the suit on its merits:

The following further issues were raised:—

1. Did the defendant and the plaintiff's husband take the properties, under the Will, as tenants-in-common, or as joint tenants?

2. Is the defendant estopped from pleading that he took the properties as a joint tenant?

Particulars as to the reason for estoppel will be given in 14 days.

3. Did the plaintiff's husband and the defendant become divided, by reason of the case set up by the 2nd defendant in C. S. No. 163 of 1917, that the parties took as members of a divided family?

4. Did the plaintiff's husband and the defendant treat the properties, which they

got, under the will, as joint family properties, so as to bring into operation the law of survivorship?

Defendant will give particulars of the treatment, which he states constituted joint family property, but which is otherwise separate in 14 days.

5. Was there an agreement between the plaintiff's father and the defendant as alleged in para. 17 of the written statement and had the plaintiff's father any authority to act for the plaintiff in respect thereof?

6. Assuming that he had authority and that there was an agreement, is it binding on the plaintiff?

7. Did the plaintiff ratify the arrangement and is she estopped from disputing its validity?

Defendant will give particulars as to ratification in 14 days.

8. Did the defendant lend the plaintiff any jewels, as alleged in the counter-claim, or were the jewels, which the plaintiff admits, she has got, given by her husband, as alleged in her reply to the counter-claim and what is their value?

9. If it is held that the plaintiff is entitled to any maintenance, apart from the agreement, to what maintenance, arrears of maintenance and residence, is she entitled?

Preliminary Issue.—Raghunathadoss, the father of the plaintiff's husband and the defendant, left a Will of which Probate was obtained, wherein he gives certain annuities to his daughters and directs his executors to hand over the residue to his sons, namely, the plaintiff's husband and the defendant. The material portion of the Will, as translated in the Probate, runs thus as follows. After referring to his illness, the testator says.

"Therefore, as long as I live, I am the owner (of my property). After me, my two sons (are owners), 1. Elder (son) Babu age 10; 2. Second (son) Chendulal age 8. These (sons) are minors. Therefore, I appoint four executors.....I appoint these four persons (executors). These four persons are to recover, after my death, whatever I own (in the shape of estate, jewellery and outstandings) and out of the jewels they may keep (intact) such as are fit to be preserved and keep a list in writing of the same. (They) are to sell off the rest and invest the sale-proceeds in Government bonds and to utilise the interest, for defraying the house-

hold expenses and to go on devoting (or spending) the rest of (the interest) for (the use of or benefit of) my children, according to the custom of our caste and in such manner, as my sister Jamu Boi approves (or chooses or wishes or directs).

(They are) to celebrate the marriage of my sons, in a respectable or decent (literally good) way. (Such money as remains on hand, after defraying those expenses) is to be laid by and to be handed over to both my sons, to the elder one when he attains the age of 23 and to the younger one, at 21 and take receipts from them (in respect of the same). The boys are to be given a respectable education and are to be looked after generally (literally are to be protected.)"

The executors obtained Probate of the Will and were in possession and management of the estate. The plaintiff's husband and the defendants, being dissatisfied with the management of the executors and alleging misappropriation, waste and breaches of trust, filed C. S. No. 163 of 1917, on the 24th of April 1917, against three of the executors, who were then alive. The plaint in that suit, after setting out the Will and alleging that the first plaintiff was born on the 16th of November 1893 and the second plaintiff on the 29th of May 1896 and both were of full age and entitled to recover the estate, under the terms of the bequest, gives various acts of breaches of trust, misconduct, and misappropriation. The plaintiffs prayed for an enquiry, as to the assets left by the deceased testator, and the amounts recovered by the defendants, or might have been recovered by them, but for their wilful default and neglect, for an account of the monies, which the defendants used for their own trade, for profits or compound interest at half yearly rests, on such sums, for handing over to the plaintiffs the properties belonging to the estate, of which the defendants were in possession, for an injunction and for other reliefs.

The defendants in that suit filed written statements denying all acts of misconduct and stating that they acted, in conformity with the provisions of the Will.

The plaint was amended and in answer to the amended plaint, a plea of limitation was raised and that formed the subject-matter of the fourth issue in that suit. I held that the suit was not barred by limitation.

The plea of limitation was raised on two grounds. As regards the properties, which were admitted to be in the possession of the executors, it was contended that on the true construction of the Will, the legacies became payable immediately on the death of the father and that the suit was barred by limitation, as it was brought more than 12 years after the said date. As regards the properties which did come into the hands of the executors, it was contended that as the plaintiffs were members of a joint family and as the legacies were impressed with the character of joint family property and as the first plaintiff attained majority more than three years before the date of the suit, and was competent to give a valid discharge, any claim for damages for neglect of duty or breaches of trust was barred by limitation. As regards the properties, which remained in the hands of the executors and actually held by them, I held that the suit cannot be barred by limitation, that if they were trustees s. 10 of the Limitation Act would apply and that if the suit was one for legacy, it became payable only when the first plaintiff attained the age of 23 and the second plaintiff the age of 21 and that they had 12 years from that date to sue. It is not material for the purpose of this case, to refer to this aspect of the case any further. As regards the claim, in respect of the properties, which did not come into the hands of the executors, and in respect of which the claim was based on breaches of trust and neglect of duty to get in assets or devastavit, alleged to have been committed by them, the question was incidentally, raised, as to whether the suit was barred, on the ground that the plaintiffs were members of an undivided family and the Will gave the properties to them jointly, the suit would be barred, as it was brought within three years, after the second plaintiff attained majority. I may state, in this connection, that there was nothing in the pleadings, which raised this question specifically. In the course of the arguments before me, this point was raised and I had to decide it. The following is my judgment on that question:

"Mr. Rajah Iyer (who appeared for the plaintiffs in that suit) argued that even as regards those claims, (i. e.) claims in respect of breaches of trust, damages for neglect of duty (etc.) they are covered by s. 10 of the Limitation Act and referred to

the passage in *Cursetjee Pestonjee Bottliwalla v. Dadabhai Eduljee* (1) referred to by me above and several English decisions, prior to the passing of the Trustee Act. I do not think there is much use in discussing the question at any length, as I am (sitting as a Single Judge) concluded by the decision of Wallis, C.J., and Oldfield, J., in *Kotta Tholasingham Chetty v. Veda-challa Aiyah* (2) where it was held that s. 10 of the Limitation Act does not apply to suits against trustees for failure to reduce the trust properties into possession.

So far as the second plaintiff is concerned, the suit is brought within three years of his attaining majority and is *prima facie* not barred. It is argued, however, that the plaintiffs are members of a joint family, that the legacies to them stand impressed with the character of a joint family property and that as the first plaintiff attained majority, more than three years before the date of the suit, and was competent to give a valid discharge, the suit is barred against the second plaintiff also. So far as Madras is concerned, it must now be taken as settled, that a father can bequeath property to his sons in towns, which would carry with it all the incidents of a joint family property. I need only refer to *Nagalingam Pillai v. Ramachandra Tevar* (3) and *Yethirajulu Naidu v. Mukuntha Naidu* (4) and to the recent decision of *Abdur Rahim and Oldfield, JJ., in Indoji Jithaji v. Kothapalli Rama Charlu* (5). It is, no doubt, true that a Company was taken in *Jugmohandas Mangaldas v. Sir Mangaldas Nathubhoy* (6) and *Kishori Dubian v. Mundra Dubian* (7) but I am bound by the current authority in this Court. As observed in *Nagalingam Pillai v. Ramachandra Tevar* (3), the question "whether, in any given case, property was intended to pass to the son as ancestral, or self-acquired property is a question of intention, turning on the construction of the instrument of gift." Turning to the present Will, I do not think that the intention of the testator was to pass the property, as an ancestral property. He distinctly states that the executors were to give it to each of

(1) 19 M. 425; 6 Ind. Dec. (N. S.) 1001.

(2) 42 Ind. Cas. 514; 41 M. 319; (1917) M. W. N. 651; 6 L. W. 523; 22 M. L. T. 388.

(3) 24 M. 429; 11 M. L. J. 210.

(4) 28 M. 363; 15 M. L. J. 299.

(5) 51 Ind. Cas. 146; 10 L. W. 498.

(6) 10 B. 528; 5 Ind. Dec. (N. S.) 742.

(7) 10 Ind. Cas. 565; 33 A. 665; 8 A. L. J. 757.

the plaintiffs, when they attain a particular age and to get receipts from each of them, so that he clearly did not intend one son to bind the other by any acquittance. If he wanted the property to pass as joint family property, he would have directed the executors to hand over the estate, as soon as his eldest son attained majority or an age, when the testator thought it safe to hand over the property to him. Though no doubt, it is, under the law as administered in this Presidency open to a father to bequeath property as joint family property, I think Courts ought not easily to impress a legacy with that character. It is again difficult, to see how the first plaintiff could, in the face of the express terms of the Will, have required the executors to deliver to him the share of the second plaintiff during his minority and give a valid discharge to the executors, as regards the second plaintiff's share. Section 7 of the Limitation Act requires that there should be a person who can give a valid discharge, without the concurrence of the minor, as pointed out by their Lordships of the Privy Council in *Nobin Chandra Barua v. Chandra Madhab Barua* (8) and by Bhashyam Iyengar, J., in *Ahinsa Bibi v. Abdul Kader Saheb* (9). The section will have no application otherwise. The executors could not, under the terms of the Will, have handed over the share of the second plaintiff to the first plaintiff. It has been held in *Neelam Tirupathirayudu Naidu v. Vinyamuri Lakshminarasamma* (10), where there is a minor beneficiary that the executors had no power to deliver the property to the minor's guardian; *a fortiori*, where the Will specifically directs that the legacy should be delivered to a minor when he attains a certain age and an acquittance should be obtained from him. As regards suits for account, the effect of s. 7 has been discussed by Sir Bhashyam Iyengar in *Ahinsa Bibi v. Abdul Kader Saheb* (9) while it has held that, even though there were adult partners, a suit for an account of a dissolved partnership was not barred, as one of the persons entitled to an account was a minor. I do not think that the suit as regards the second plaintiff is barred".

(8) 36 Ind. Cas. 1; 44 C. 1; 20 M. L. T. 430; 21 C. W. N. 97; 11 A. L. J. 1199; 18 Bom. L. R. 1022; 31 M. L. J. 836; 24 C. L. J. 509; (1916) 2 M. W. N. 565; 5 L. W. 452 (P. C.).

(9) 25 M. 26.

(10) 17 Ind. Cas. 597; 38 M. 71; (1912) M. W. N. 1237; 12 M. L. T. 530; 23 M. L. J. 599.

It will be seen from my judgment in that case that the question as to the nature of the estate, taken by the plaintiffs in that suit whether they took it as tenants-in-common or as joint tenants, was not raised in the pleadings; nor was there a specific issue, on the construction of the Will, but it was taken in the course of the argument, to support one aspect of the general plea of limitation. It is, no doubt, true that in the course of the argument, the position taken up by the executors was that the plaintiffs in that suit took the estate as joint tenants, while the present defendant raised the opposite contention that he and the plaintiff's husband took the estate as tenants-in-common, the legacy to each being distinct and separate, payable at different times, though his present contention is that they took the estate as joint tenants. Moreover, I held that, even if the plaintiffs in that suit were members of an undivided family, and took as joint tenants the suit was not barred, for other reasons.

A point was taken that as the present defendant and the plaintiff's husband were co-plaintiffs, in C. S. No. 163 of 1917, there can be no *res judicata*, as between them; but I think the same principles of *res judicata*, as between co-defendants would apply to co-plaintiffs. I need only refer to *Rakhmini v. Dhondu* (11) and *Mookkan v. Naga Pillai* (12), and think that if a finding as between co-plaintiffs is necessary, before the Court can give any relief against the defendants there is no reason why that finding should not be *res judicata*, as between co-plaintiffs. I find it, however, difficult to see how the question as to the nature of the estate, which the plaintiffs took in that case, which was not raised in the pleadings, but was only used an argument, on one of the branches of the case, as to limitation, and which was not essential to give plaintiffs any relief would be *res judicata*. I think the main tests to be applied are whether there was active controversy between the plaintiffs and whether that adjudication was necessary, to enable the Court, to grant any relief against the defendants. Having regard to the pleadings in that suit, it is clear that the plaintiffs did not care, if they got the property as joint tenants or tenants-in-common, because no question of survivorship would arise, until one of

(11) 14 Ind. Cas. 466; 36 B. 207; 14 Bom. L. R. 128,

(12) 38 Ind. Cas. 213; (1917) M. W. N. 14.

them died. Both of them attained the age when, under the terms of the Will, possession had to be given to them. There was, therefore, no active controversy between the plaintiffs. All that appears is that, during the course of the argument, the second plaintiff in that suit, by his Vakil, met the plea of limitation, by arguing that the plaintiffs took the estate as tenants in-common and not as joint tenants. The other plaintiff adopted that argument and I hold that, for the purpose of deciding the question of limitation, the Will, on its face, suggested that the property was given to them, as tenants-in-common. Active co-operation there was between the plaintiffs; but that does not make it an active contest on any issues between them because the interests of the present parties are now adverse and the plaintiff claims through one of the parties to the previous litigation.

It is argued by Mr. Srinivasa Iyengar, for the plaintiff, that active controversy can only mean controversy, which the nature of the case admits and need not appear expressly on the pleadings and that where the plaintiff raises a contention which but for the admission or consent of the co-plaintiff would be a matter in controversy, Expl. III to s. 11 would apply. It is contended that as there was a controversy between one of the plaintiffs in that suit and the defendant and as the other plaintiff accepted the contention of the co-plaintiff, he cannot subsequently be heard to contend that in another suit he can raise the question anew, because, if he had raised the contention in the previous suit, there would have been an adjudication. Reliance is placed on *Krishnan Nambiar v. Kannan* (13). In that case, the plaintiff purchased some land from the second defendant, as the *karnavan* of a *tarwad*, to which the second defendant and the other defendants belonged. The land was in the possession of third parties. The vendor and the purchaser jointly sued for possession, but they failed to prove that the vendor had any title to the land. The plaintiff instituted the suit against the vendor, to recover the purchase-money with interest and the defendants wanted to show that they had title. It was held that the matter was *res judicata*. The learned Judges Benson and Boddam, JJ., observed:

"In that litigation the present plaintiff and the second defendant (as representing the *tarwad*) were joint plaintiffs, and it was then found as between each of them and the persons in possession of the property, that the second defendant and his *tarwad* had no title to the property. The title to the property is, therefore, *res judicata*, as between the persons in possession and the second defendant and his *tarwad*. It is idle to contend that, in these circumstances, any useful purpose was, or could be, served, by admitting evidence as to the *tarwad's* alleged title".

No authorities were referred to and the case was not followed in *Mookkan v. Naga Pillai* (12) and was dissented from in *Hub Ali v. Hammun* (14).

I think the authorities are clear that in order to constitute *res judicata* between co-plaintiffs, there should be active controversy between them and the point in dispute must have been essential, for the purpose of giving a decree against the defendant. In *Rakhmini v. Dhondo* (11), the widow and the son of a deceased person sued a stranger to recover some jewels and a decree was passed in favour of the mother, on the ground that she was the absolute owner of the jewels. Later on, the son filed a suit against the mother, to establish his title to recover the jewels. The plea of *res judicata* was raised and it was held that there was no *res judicata*, as there was no final adjudication between the plaintiffs in that suit and it was of no consequence to them in that suit, as to who succeeded, Chandavarkar, J., after referring to *Ramchandra Narayan v. Narayan Mahadev* (15), observed as follows:—

"As was held in that case, a finding in a suit as between co-defendants becomes *res judicata* in a subsequent suit only when it was essential for the purpose of giving relief to the plaintiff in the previous suit. So also as between co-plaintiffs a finding to become *res judicata* must have been essential for the purpose of giving relief against the defendants. Now here, in the previous suit, it was a matter of no consequence whatever to the defendant therein for the purposes of the relief to be given against him whether Rakhmini succeeded or whether Dhondo succeeded. Therefore, the

(14) 11 Ind. Cas. 936; 8 A. L. J. 807.

(15) 11 B. 216; 11 Ind. Jur. 301; 6 Ind. Dec. (N. S.) 142.

(13) 21 M. 8; 7 Ind. Dec. (N. S.) 362.

plea of *res judicata* raised in this second appeal must be disallowed".

In *Pratab Udainath Sahi Deo v. Ganesh Narain Sahi* (16), Sir Dawson Miller, C. J., and Jwala Prasad, J., in dealing with the question of *res judicata*, as between co-plaintiffs, observed as follows:—

"There was no dispute between the plaintiffs in that suit as to the Maharaja's right to resume or the fact that the tenure had to come to an end, on the death of Lachaminath. The principle laid down in *Cottingham v. Earl of Shrewsbury* (17), can, therefore, have no application. There was no conflict of interest between the co-plaintiffs and the decision cannot, in my opinion, be held binding as *res judicata*, on their successors; [see *Ramchandra Narayan v. Narayan Mahadev* (15).]"

A similar view was taken in *Hub Ali v. Hammun* (14), where it was held, that to constitute *res judicata*, there should be a difference between the co-plaintiff and some controversy between them.

So far as co-defendants are concerned, the requisites, necessary to support the plea of *res judicata*, have been considered in numerous cases and the principles are quite clear. In *Sankaramahalingam Chetty v. Muthulakshmi* (18). Seshagiri Iyer, J., refers to all the cases on the point and observes as follows:—

"The principle underlying the bar of *res judicata*, as between the co-defendants has been the subject of discussion in three recent cases, *Achanta Venkatasurya narayana v. Yellapragadu Shiva Sankara Narayana* (19), *Fakirchand Lallubhai v. Naginchand Kalidas* (20) and *Jadav Chandra Sarkar v. Kailash Chandra Singh* (21). The first requisite is that there should be active controversy as against each other between the parties arrayed on the same side; *per* Muthusami Iyer, J., in *Venkayya v. Narasamma* (22) and *Tanjore Ramachandra Ram v. Vellayanadan Ponnusami* (23). Secondly, the adjudication *inter se* between

the co-defendants should be necessary to give the appropriate relief to the plaintiff. (See *per* West, J., in *Ramchandra Narayan v. Narayan Mahadev* (15) and Wigram, V. C. in *Cottingham v. Earl of Shrewsbury* (17), and Jessel, M.R. in *Keran v. Crawford* (24)."

In the earlier case, the Vice-Chancellor says:—

"But, if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains".

There are numerous other decisions, laying down the same requisites; but I think it is unnecessary to refer to them.

Applying these tests to the present case, I do not think that any of the requisites, which are necessary to constitute *res judicata*, as between co-defendants, exists so as to make the question, as to the nature of the estate taken under the Will, *res judicata* and I find the preliminary issue against the plaintiff.

The next issue is whether the plaintiff's husband and the defendant took the properties, under the Will of their father, as tenants-in-common, or as joint tenants. In the previous litigation, the parties accepted the translation attached to the Probate of the Will, as correct. Nobody impugned its correctness. There was no evidence, let in on this point. The main reason, which influenced me, in holding that they took the estate as tenants-in-common, was that under the Will, there were two separate deliveries of properties contemplated and that two separate receipts were to be taken from the two sons of the testator. If there had to be two separate deliveries of properties and two separate receipts taken, it seemed to me, in the absence of any evidence, to be clear that a tenancy-in-common was contemplated by the testator, because when the property was given to the elder son and a receipt taken from him, it *prima facie* would be of his share in the residue, and similarly, when the property was handed over to the second son, at a different period and a receipt taken from him, it would also involve the same consequence. In the present suit, however, the translation, annexed to the Probate, is challenged by the

(16) 70 Ind. Cas. 232; (1921) Pat. 369.

(17) (1843) 67 E. R. 530; 3 Hare 627; 15 L. J. Ch. 441.

(18) 43 Ind. Cas. 860; 33 M. L. J. 740.

(19) 27 Ind. Cas. 861; 17 M. L. T. 85; 2 L. W. 101.

(20) 33 Ind. Cas. 23; 40 B. 210; 17 Bom. L. R. 1106.

(21) 34 Ind. Cas. 429; 21 C. W. N. 693; 25 C. L. J. 322.

(22) 11 M. 204; 4 Ind. Dec. (N. s.) 142.

(23) 14 M. 258 at p. 264; 16 I. A. 37; 6 Sar. P. O. J. 30; 15 Ind. Jur. 224; 5 Ind. Dec. (N. s.) 181 (P. C.).

(24) (1877) 6 Ch. D. 29; 46 L. J. Ch. 729; 37 L. T. 322; 25 W. R. 49.

defendant as incorrect and evidence on the point has been adduced.

The case for the defendant is that, according to a proper translation of the Will, it was not necessary that there should be two deliveries at different times or that two receipts should be taken, but that what was contemplated was a single handing over, when the legatees attained the age of 23 and 21 and the taking of a single receipt. It is pointed out that as there was a difference of about two years in the ages of the plaintiff's husband and the defendant, the testator, in the Will, said that the first son should get "the property" at 23 and the second son should get the property at 21, so that there may be a simultaneous delivery of property; otherwise, there was no reason, why the elder son should get it, when he is 23 and the younger son when he is 21. It is also contended that the Gujarati word in the Will is "receipt" and not "receipts" and that, therefore, only one receipt was contemplated, the word "receipts" in the translation annexed to the Probate being incorrect. On this point, evidence was adduced and the defendant examined Mr. Nanabhai Devai, a Vakil of this Court, who was appointed Commissioner to translate a number of Gujarati documents and Mr. Batheena the Gujarati Interpreter of this Court. Mr. Nanabhai Devai, who is a Gujarati gentleman, and whose mother-tongue is Gujarati, has made a translation of the Will and it has been filed. The evidence of Mr. Nanabhai Devai supports his translation of the Will and he states that from a reading of the Will, only a single handing over was meant. He says that as there was a difference of two years between the ages of the elder and the younger sons, which continued throughout, only one delivery was contemplated, when the testator used the words "to the elder one, when he attains the age of 23 and to the younger one at 21". Mr. Batheena, the Gujarati Interpreter, has given his translation of the Will and it has also been filed. He seems to be of opinion that the Will can be translated, both as is done in the Probate and as is translated by Mr. Nanabhai Devai.

If the original Will is capable of the two interpretations put on it, namely, (1) that there should be two separate deliveries and two separate receipts taken, and (2) that there should be a single delivery to both of them, on one and the same occasion and

only one receipt taken, one has to see the surrounding circumstances and the other terms of the Will, to come to a conclusion as to the nature of the estate taken, as the Will does not say anything as to what the nature of the estate is to be. It is not disputed that Raghunathadoss the father and his two sons were living as members of one family, Raghunathadoss being the father and managing member, and the sons being minors under his protection. The Will begins by saying that the testator was the owner of the property, as long as he lived and after him his two sons, (the word "owners" being supplemented by the Interpreter). He gives the names of his two sons and says that as they are minors, he appoints four executors. He mentions the duties, which the executors are to perform and so far as the clause of disposition is concerned, all he says is that the executors are to hand over to his sons the property, when the elder attains the age of 23 and the younger when he attains the age of 21 and to take receipts from them. There does not seem to be any reason to suppose, from the terms of the Will, that the testator intended his sons to be separate, as from the date of his death and they were to have separate interests in the property and there are no express words in the Will, from which such an intention necessarily follows. I think the result of the authorities, in Madras, is that where there is a grant to two persons, who form members of a joint family, the ordinary presumption is that the grant is to them as co-parceners. I need only refer to *Nagalingam Pillai v. Ramachandra Tevar* (3), *Yethirajulu Naidu v. Mukuntha Naidu* (4), *Venkatarameiah Pantulu v. Subramaniam Pillai* (25), *Indoji Jithaji v. Kothapalli Rama Charlu* (5) and *Rajarajeswara Dorai v. Sundarapandujaswami* (26). It is, no doubt, true that the view taken in Bombay and Allahabad is that, where property is given to two persons, without stating what interest they are to take, they should take it as tenants-in-common. The question was recently raised before the Privy Council in *Lal Ram Singh v. Deputy Commissioner of Partabgarh* (27), but their

(25) 26 Ind. Cas. 393; 16 M. L. T. 489.

(26) 27 Ind. Cas. 283; 27 M. L. J. 694 at p. 716.

(27) 76 Ind. Cas. 922; 45 A. 596; (1923) M. W. N. 591; (1923) A. I. R. (P. O.) 160; 9 O. & A. L. R. 746; 21 A. L. J. 777; 26 O. C. 257; 33 M. L. T. 355; 10 O. L. J. 513; 50 I. A. 265; 47 M. L. J. 280; 29 O. W. N. 86 (P. O.).

Lordships while pointing out the conflict of authority did not decide the question. They observe as follows:—

"It appears that there has been great diversity of opinion in the High Courts in India, as to the effect in a Mitakshara family of a bequest made by a father of property which in the father's hands was self-acquired, to his son. In Calcutta, in 1863, the point first arose in the case of *Muddun Gopal v. Ram Buksh* (28), when it was held that such property would be ancestral, and this has been followed in the later case of *Hazarimal Babu v. Abani Nath Adhurjaya* (29), decided in 1912. In Madras, upon the whole, the view seems to be that the father can determine, whether the property which he has so bequeathed, shall be ancestral, or self acquired on the principle of *cujus est dare ejus est disponere*; but that unless he expresses his wish that it should be deemed self-acquired, it is ancestral. See *Tara Chand v. Reeb Ram* (30), and compare it with *Nagalingam Pillai v. Ramachandra Tevar* (3) and other cases. In Bombay, on the other hand, the principle of intention seems to have been accepted, if it makes the property ancestral, but if there be no expression of intention it is deemed self-acquired. See *Jugmohandas Mangaldas v. Sir Mangaldas Nathubhoy* (6) and *Nanabhai Ganpatrav v. Acharatbai* (31). At Allahabad the decision was that such property is self-acquired. See *Parsotam Rao v. Janki Bai* (32) decided in 1907. Finally, in Oudh, in the case of *Rameshar v. Rukmin* (33), decided in 1909, after a review of all the cases, it was held that: Where self-acquired property is bequeathed to sons, in the absence of language clearly indicating the testator's intention that the property should be held by the sons subject to the incident of survivorship, it should be presumed that each son takes an interest which passes to his heirs at his death..... But their Lordships deem it unnecessary to pronounce upon these points. It may be that some day this Board will have to decide between the conflicting decisions of the Indian High Courts, and it may be that when this time comes, this Board will prefer to go back to

the original text of the Mitakshara and put its own construction upon that text. It is not necessary to do so in this case."

In this view of the authorities, I think that, sitting as a Single Judge, I should follow the Madras decisions, which, as pointed out by their Lordships of the Privy Council, uphold the view that unless the father, in disposing of the properties expresses that they should be deemed self-acquired in the hands of the sons, the properties should be treated ancestral.

As regards the contention of Mr. Rajah Iyer, for the defendant, that the Will of Raghunadadoss is merely a document, appointing a guardian of his minor sons, and is not a bequest to them, I think the terms of the Will, which gives annuities to the daughters and the residue to his sons, is clearly testamentary, in its character. Reference has been made to *Poorendra Nath Sen v. Hemangini Dasi* (34), *In the matter of the last Will & Testament of Bukthawar Mull Sowcar* (35), *Somasundara Mudaly v. Duraisami Mudaliar* (36) and *Jagannatha Gajapathi Anaga Bheema Deo v. Kunja Behari Deo* (37). I do not think these cases have any application, having regard to the terms of the Will in question. The words "after me my two sons are owners" amounts to a bequest. In *Jugmohandas Mangaldas v. Sir Mangaldas Nathubhoy* (6), *Lalit Mohun Singh Roy v. Chukkun Lal Roy* (38), and *Chuni Lal v. Bai Muli* (39), the words "shall be the owner, etc." were construed as constituting a bequest.

I hold, on the first issue, that the plaintiff's husband and the defendant took the properties as joint tenants.

2nd Issue:—It is difficult to see how there can be any estoppel in this case. It is argued by Mr. Srinivasa Iyengar for the plaintiff, that estoppel arises, because of the conduct of the present defendant, in C. S. No. 163 of 1917. It is alleged that he put forward the contention that, under the Will of his father, he and his deceased brother took the estate of their

(34) 1 Ind. Cas. 523; 36 C. 75; 12 C. W. N. 1002.

(35) 23 M. 133; 8 Ind. Dec. (N. S.) 490.

(36) 27 M. 30; 13 M. L. J. 283.

(37) 64 Ind. Cas. 458; 44 M. 733; 14 L. W. 398; (1921) M. W. N. 713; 41 M. L. J. 648; 30 M. L. T. 124; 26 C. W. N. 374; 24 Bom. L. R. 600; 4 U. P. L. R. (P. C.) 32; (1922) A. I. R. (P. C.) 162; 48 I. A. 482 (P. C.).

(38) 24 C. 834; 24 I. A. 76; 1 C. W. N. 387; 7 Sar. P. C. J. 155; 12 Ind. Dec. (N. S.) 1224 (P. C.).

(39) 24 B. 420; 2 Bom. L. R. 46; 12 Ind. Dec. (N. S.) 812.

(28) 6 W. R. 71.

(29) 18 Ind. Cas. 625; 17 C. W. N. 280; 17 C. L. J. 38.

(30) 3 M. H. C. R. 50.

(31) 12 B. 122; 6 Ind. Dec. (N. S.) 567.

(32) 29 A. 354; 4 A. L. J. 257; A. W. N. (1907) 77.

(33) 12 Ind. Cas. 770; 14 O. C. 244.

father as tenants-in-common and obtained judgment on that footing, that the plaintiff's husband believed in and acted upon the truth of the statement made by the defendant and obtained a decree, along with the defendant in the previous suit, that but for such conduct and misrepresentation, on the part of the defendant, the plaintiff's husband would have obtained an express declaration from the Court, as to his rights, under his father's Will and obtained a separate decree in his favour, or the plaintiff's husband would, before his death, have brought about an express deed of partition between himself and the defendant, that the defendant having obtained possession of the properties of his deceased father, as a legatee under his father's Will, he is now estopped from saying that he acquired it under any other title, that the defendant having elected to take the properties of his father's Will he is estopped from disputing the validity of the Will, or any of its provisions, as against the plaintiff's husband, and that he is also estopped from saying that he pleaded tenancy-in-common, with a view to evade the provisions of the Limitation Act and to commit a fraud upon the Court.

There is no evidence, which would support the question of estoppel, on any question of fact. As I shall show later on, after the decree in C. S. No. 163 of 1917 and even though the case of tenancy-in-common was set up, the defendant and the plaintiff's husband acted and continued to act, as if they were members of a joint family. They carried on business jointly, treated the funds in common, borrowed in common and made no difference, as regards the properties, which they took under the Will. It is difficult to see how, in the absence of any evidence to prove that the plaintiff's husband acted on the faith of any representation made by the defendant, any question of estoppel would arise. In *Umrao Singh v. Lachhman Singh* (40), it was held by their Lordships of the Privy Council that a person is not precluded from setting up an inconsistent case in a subsequent litigation; (see the observations at page 355*). I do not think it can be said that the contention put forward in the previous suit, in support

of a legal argument, can by itself become a foundation for any estoppel.

I find the second issue against the plaintiff.

3rd Issue:—It is difficult to see how the plea set up, as to the nature of the estate taken by the parties, under the Will of Raghunathadoss, in the previous suit, can of itself effect a partition. There was no unambiguous intention expressed anywhere, in the previous proceedings by the plaintiff's husband or by the defendant, that they intended to sever any antecedent status and to become thenceforward members of a divided family. Their conduct, which I shall refer to later on, negatives any such intention.

4th Issue:—This issue relates to the way in which the plaintiff's husband and the defendant treated the properties, which they got under the Will. On this part of the case, the evidence, I think, is clear that, after getting the decree in C. S. No. 163 of 1917, the plaintiff's husband and the defendant treated the properties as joint properties. It appears from the proceedings in C. S. No. 206 of 1918, which was filed by the sister of the defendant against the defendant and the plaintiff's husband, that all the parties proceeded on the footing that they were members of an undivided family. In the plaint, Ex. 25 the defendants are described as members of a joint undivided Hindu family and in the written statement, Ex. 26, the defendants admit this fact. A consent decree was passed and it has been filed as Ex. 27. The accounts produced by the National Bank of India and the Bank of Madras show that a joint account was opened in the names of the plaintiff's husband and the defendant. Exhibit 13 shows that the plaintiff's husband got a sum of Rs. 500 from Mr. Singarachariar, as remuneration for collecting a debt and he opened an account in the National Bank, Ex. 15. Defendant says that cheques were drawn and the moneys used for family expenses and out of that, a carriage was purchased from Lucas and Company, which both the brothers were using. A sum of Rs. 5,000 was jointly borrowed by them, from Mangammal Jessa Singh (see account books Exs. 9, 10 and 11). Out of this, a sum of Rs. 3,325 was remitted to the account of Goverdhanadoss and the balance was carried to a joint account, newly opened by the two brothers and the account goes on. The

(10) 10 Ind. Cas. 285; 33 A. 344; 15 C. W. N. 497; 8 A. L. J. 465; 13 C. L. J. 519; 9 M. L. T. 507; 13 Bom. L. R. 404; 21 M. L. J. 637; 14 O. C. 133; 38 I. A. 104; (1911) 2 M. W. N. 242 (P. C.).

*Page of 33 A.—[Ed.]

amount borrowed from Mangammal Jessa Singh is re-paid, out of the monies got from the National Bank, by the pledge of Government promissory notes Ex. 15, an extract from the National Bank accounts shows that a balance of Rs. 40-14-0 which was to the credit of the plaintiff's husband in his account was carried forward to the new account, Ex. 19, opened on the 25th of May 1917, in the names of both the brothers. Ex. 9, the cash-book, shows that the debt borrowed from Mangammal Jessa Singh was renewed on the 10th and 14th May 1917. Exhibit 15, the extract, shows that a sum of Rs. 3,325 was paid into the National Bank, out of the monies borrowed from Mangammal Jessa Singh; Ex. 9, also shows this. Monies were borrowed by both the brothers from the National Bank and Mangammal Jessa Singh was re paid. It appears from Ex. 20 that both the brothers got credit from the National Bank to a joint limit of Rs. 20,000 for over-drafts. Exhibit 19, the Pass Book, shows that the drawings and the payments were in their joint names. The cash-books and the ledger filed show clearly that there was only one joint account kept by the brothers, in respect of the family expenses and income. There is nothing to show that the brothers were even contemplating a separation of interest. The evidence of the defendant is that monies were borrowed jointly by pledge of their personal jewels, from Lakhur Krishnayya Vasa Baliah and Suklal; and the cash-book Ex. 9 contains details of such pledges; and the raising of monies. These debts were discharged by cheques on the National Bank, which were met out of the over-draft, obtained on Government promissory notes, which both the brothers got under the decree in C. S. No. 163 of 1917. Exhibit 20 is the letter from the Bank, showing that a joint account was opened and Ex. 21 series are letters from the Bank, in respect of the account. The ledger, Ex. 11, and the cash-book, Ex. 9, support the evidence of the defendant. Two accounts were opened in the Imperial Bank. There was a loan account, as appears from Ex. 22 series, under which the two brothers raised Rs. 15,000, on the 15th of March 1918, on the security of Government promissory Notes. Exhibit 19 is the Pass Book. There was also an account opened in 1917 and the letter to the Bank shows that the money was payable to either or survivor.

The letters from the Bank are marked as Ex. 22 series. It also appears that the expenses of the brothers were treated as common expenses, there being nothing to show for whose benefit they were incurred. For example, medical expenses, expenses for plaintiff's *seemanthan*, expenses for the plaintiff's child, household expenses, are all entered in one account, without any indication, that they were to be attributable to each of the brothers, according as the expenses were incurred, for the one or the other. So far as the income from the properties is concerned, there is no distinction made. All the rents are brought into a common account and the expenses are met as I said before in common. Taxes are paid jointly and so far as the dealings with the Banks and the account-books go, there is no indication that the brothers ever intended to live, as members of a divided family and separate in status. On the contrary, all the indications point to their living as members of a joint family. We find joint loans from strangers, joint dealings with the Banks and joint pledges of Government promissory notes, which they got under the decree. We also find that the brothers carried on a joint jewel business and utilised the jewels, which they got under the decree for such business. There was joint lending and borrowing of money, by the brothers. Under these circumstances, I think that even if the brothers took the legacies, which they got under the Will, as tenants in common, they by their conduct threw them into a common stock and treated the properties as joint properties. In *Rajani-kanta Pal v. Jagmohan Pal* (41) their Lordships of the Privy Council deal with the case of mingling of properties and hold that self-acquired property may be impressed with the character of joint property, by its being dealt with as joint family property.

[Note:—The rest of the judgment is devoted to a discussion of facts and is, therefore, omitted.—Ed.]

V. N. V.

Order accordingly.

S. D.

(41) 73 Ind. Cas. 252; 50 C. 439; (1923) A. I. R. (P. C.) 57; 44 M. L. J. 561; 32 M. L. T. 149; 25 Bom. L. R. 683; 37 C. L. J. 515; (1923) M. W. N. 438; 18 L. W. 387; 27 C. W. N. 997; 9 O. & A. L. R. 805; 50 I. A. 173 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 43 of 1923.

April 25, 1924.

Present:—Mr Baker, J. C., and

Mr. Prideaux, A. J. C.

AGENT, G. I. P. RY. CO.—DEFENDANTS—
APPELLANTS

versus

JASRUP SHRINATH—PLAINTIFF—
RESPONDENT.

Limitation Act (IX of 1908), s. 19, Sch. I, Art. 31—Suit against carrier to recover damages for non-delivery—Limitation—Suggestion to settle matter, whether extends limitation—Civil Procedure Code (Act V of 1908), O. XLI, r. 1—Appeal—Copy of judgment not filed—Notice issued—Copy, whether dispensed with.

A suit against a carrier for compensation for non-delivery of goods irrespective of whether failure to deliver is due to a tort or to a breach of contract is governed by Art. 31, Sch. I to the Limitation Act. [p. 136, col. 2.]

Mutsaddi Lal v. B. B. & C. I. Ry. Company, 58 Ind. Cas. 547; 42 A. 390; 2 U. P. L. R. (A.) 84; 18 A. L. J. 377, *Jaldu Venkatasubba Rao v. The Asiatic Steam Navigation Co. of Calcutta*, 30 Ind. Cas. 810; 39 M. 1; 29 M. L. J. 342; 2 L. W. 805; 18 M. L. T. 236; (1915) M. W. N. 644 (F. B.), *G. I. P. Ry. Company v. Raisett Chandmull*, 19 B. 165; 10 Ind. Dec. (N. S.) 112, *Haji Ajam Goolam Hossein v. Bombay and Persia Steam Navigation Company*, 26 B. 532; 4 Bom. L. R. 447, *Great Indian Peninsular Railway Company v. Ganpat Rai*, 10 Ind. Cas. 122; 33 A. 514; 8 A. L. J. 513, *Lal Mohan Hazra v. East Indian Railway Company*, 70 Ind. Cas. 857; (1922) A. I. R. (C.) 330, *Indian General Navigation and Railway Co. v. Nanda Lal*, 3 Ind. Cas. 469; 13 C. W. N. 851, *Moti Ram v. East Indian Railway Co.*, 103 P. R. 1906; 2 P. L. R. 1907; 31 P. W. R. 1907 and *Ali Mohamed v. The Great Indian Peninsular Railway Co.*, 31 Ind. Cas. 474; 11 N. L. R. 174, relied on.

Radha Sham Basak v. Secretary of State for India, 34 Ind. Cas. 130; 44 C. 16; 23 C. L. J. 517; 20 C. W. N. 790, distinguished.

A suggestion made by a defendant that the matter might be settled, headed "without prejudice," does not operate to extend limitation, as it cannot be treated as an admission of liability. [p. 137, col. 2.]

A memorandum of appeal stated that a copy of the judgment appealed against would be filed afterwards. The appeal was admitted on presentation and notice was ordered to be issued to respondent:

Held, that it must be taken that the Court had dispensed with a copy of the judgment. [*ibid.*]

Appeal against the judgment of the District Judge, Nimar, dated the 28th February 1923, in Civil Suit No. 3 of 1921.

Messrs. K. J. B. Kanga and A. V. Khare, for the Appellants.

Messrs. G. M. Gupta, S. B. Khale and N. V. Deo, for the Respondents.

JUDGMENT.—The facts in these two appeals are similar, and the points arising in both of them are the same and may be disposed of in one judgment, although the

lower Court has written two separate judgments.

There is no dispute as to the facts which are set out in the judgments of the learned District Judge. Put briefly, they are that one Shamji Bhawanji had dealings in cotton with the plaintiffs' firms on which he was indebted to them. The plaintiffs in both suits were in possession of bales of cotton belonging to Shamji Bhawanji, 100 bales in the case of Jasrup Shrinath and 200 bales in the case of Radhakisan Jaikisan on account of the money due to them by Shamji Bhawanji, and the plaintiffs handed over these bales of cotton to the defendants G. I. P. Ry. for carriage to Bombay consigned to plaintiffs themselves and got the Railway receipts for them. But by a fraud, to which the Goods Clerk at Harda and Shamji Bhawanji were parties, bogus Railway receipts were issued by the Clerk in favour of Shamji Bhawanji although no goods were actually delivered. The marks on the bales were altered so as to make them correspond with the false Railway receipts and the bales were consigned to the firm of Arjun Khemji in Bombay, who took delivery of them, instead of to the plaintiffs. The plaintiffs were thus deprived of the cotton, they had consigned, through the fraud of the Goods Clerk at Harda, who is a servant of the Railway Company. The fraud was promptly discovered and the matter was put in the hands of the Police. Criminal proceedings then ensued, with which we are not concerned. Out of the 300 bales 79 bales were sold by Arjun Khemji and ultimately under the orders of the Court all the bales were sold and the money was deposited in the Bank in the name of Arjun Khemji under an agreement between him and the Railway Company. The plaintiffs have brought these suits to recover the value of the cotton from the Railway Company.

The Railway Company have brought a suit in the High Court at Bombay against Arjun Khemji, which is still pending. It is admitted on behalf of the Railway Company that the plaintiffs have a lien on the goods, and it is also admitted, in view of the ruling in *Sherjan Khan v. Alimuddi* (1) following the decision of the House of Lords in *Lloyd v. Grace Smith &*

(1) 34 Ind. Cas. 598; 43 O. 511; 20 C. W. N. 268; 23 C. L. J. 225.

Co. (2) the Railway Company are liable for the fraud of their servant, the Goods Clerk.

The principal question in this case is that of limitation. It is contended on behalf of the Railway Company that the suits are governed by Art. 31 of the Limitation Act, and that limitation began to run in 1919 when the goods ought to have been delivered, and, therefore, the suits which were brought in 1921 are barred by limitation. The District Judge of Khandwa held that the suits were not barred by limitation, being governed by Arts. 115 and 48 of the Limitation Act, and awarded the plaintiffs Jasrup Shrinath Rs. 18,740-5-4 with interest from 11th April 1921 till the date of the decree, and the plaintiffs Radhakisan Jaikisan Rs. 37,480-10-8 with interest from 31st March 1921 till the date of the decree.

It is admitted that there has been conversion. The learned District Judge was of opinion that bogus receipts were issued and that the marks on the bales were altered, which took place at Harda. The conversion was complete before the goods left Harda and the defendant Company carried the goods not for the plaintiffs who had consigned them but for the person in whose favour the conversion had been effected, that is for Shamji Bhawanji; hence the defendants were not carriers for the plaintiffs and so Art. 31 of the Limitation Act has no application and the case falls under Art. 48, or viewed as a matter of contract there is a breach of contract by the defendants due to their failure to convey the goods on behalf of the plaintiffs to Bombay and hence the suit would fall under Art. 115 of the Limitation Act. In either case the suits are in time. It is contended by the learned Advocate-General, Bombay, who represents the appellants that all the High Courts are agreed that a suit against a carrier for compensation for non-delivery of goods is governed by Art. 31 whether the non-delivery is due to conversion or to any other reason.

He relies on the following cases, *Mutsaddi Lal v. B. B. and C. I. Ry. Company* (3) in which it was held that the article applies to suits by a consignor or consignee. *Jaldu Venkatasubba Rao v. The Asiatic*

Steam Navigation Co. of Calcutta (4) in which it was held by the Full Bench that by the amendment in 1899 of the Indian Limitation Act the Legislature clearly indicated its intention that Art. 31 should apply to a claim against a carrier for compensation for non-delivery of goods irrespective of whether the suit was laid in contract or in tort. Article 49 is inapplicable to such a case and even if it were, its operation would be excluded by the provisions of the special Art. 13 as amended on the principle *Generalia specialibus non-detrogant*.

In *G. I. P. Ry. Company v. Raisett Chandmull* (5) Farran, J., expressed the opinion that the Legislature must have intended when in general terms limiting the responsibility of carriers to make compensation for loss of goods to two years after the loss, to make that time the outside period within which they could be sued, whether the claim was laid in tort or as arising out of contract, and that liberally interpreted almost all claims against a carrier, unless he were actually in possession of the goods uninjured are for loss of or injury to goods.

In *Haji Ajam Goolam Hossein v. Bombay and Persia Steam Navigation Company* (6) which was a claim for non-delivery, Art. 31 was applied: cf. also *Great Indian Peninsular Railway Company v. Ganpat Rai* (7). The same view has been taken by the Calcutta High Court in *Lal Mohan Hazra v. East Indian Railway Company* (8) where it was held that a suit against a carrier for compensation for non-delivery of goods consigned to him is governed by Art. 31. Article 115 of the Act applies only to suits for compensation for breach of any contract specially provided for in the Act. This case follows the *Indian General Navigation and Railway Co. v. Nanda Lal* (9). The Punjab case is *Moti Ram v. East Indian Railway Co.* (10) where it was held that Art. 31 covers a suit for compensation for non-delivery, whether the failure to deliver was tortious or due to breach of contract. The same view was taken by this Court in *Ali Mohamed v. The Great Indian Penin-*

(2) (1912) A. C. 716; 81 L. J. K. B. 1140; 107 L. T. 531; 56 S. J. 723; 23 P. L. R. 547.

(3) 58 Ind. Cas. 547; 42 A. 390; 2 U. P. L. R. (A.) 84; 18 A. L. J. 377

(4) 30 Ind. Cas. 840; 39 M. 1; 29 M. L. J. 342; 2 L. W. 805; 18 M. L. T. 236; (1915) M. W. N. 644 (F. B.).

(5) 19 B. 165; 10 Ind. Dec. (N. S.) 112.

(6) 26 B. 562; 4 Bom. L. R. 447.

(7) 10 Ind. Cas. 122; 33 A. 544; 8 A. L. J. 543.

(8) 70 Ind. Cas. 857; (1922) A. I. R. (C.) 330.

(9) 3 Ind. Cas. 469; 13 C. W. N. 851.

(10) 108 P. R. 1906; 2 P. L. R. 1907; 30 P. W. R. 1907.

sular Railway Co. (11). There is thus a consensus of opinion among all the High Courts as to the applicability of Art. 31 to all cases of non-delivery whether founded on tort or contract. The only case to the contrary is that in *Radhe Sham Basak v. Secretary of State for India* (12) where defendants denied the delivery of goods.

It has been contended on behalf of the respondents that their case is not one of non-delivery but of conversion and breach of contract, and that all cases quoted are cases of non-delivery. This, however, makes no real difference. The cause of action in this case is the defendant's failure to deliver the goods.

Non-delivery may be due to many causes of which conversion is one, but the cause of action is the non-delivery of the goods, whether due to loss, theft, destruction, conversion or misdelivery to somebody else. If the defendants had delivered the goods to the plaintiffs they would have no cause of action, even if the bales had been wrongly marked with the name of somebody else. Mr. Rustomji in his Commentary on the Limitation Act at page 292 differs from the opinion of Starling that all suits against carriers in respect of goods delivered to them for carriage fall under Arts. 30 and 31, but there seems to be no grounds for making such a distinction. As pointed out by one of the referring Judges in *Jaldu Venkatasubba Rao v. The Asiatic Steam Navigation Co. of Calcutta* (4) appears that the Legislature intended to provide exceptionally for the case of carriers on account of the difficulty of investigating and settling claims preferred against them after a long lapse of time in respect of a few articles out of the quantity of goods that are constantly passing through their hands.

We are, therefore, of opinion that Art. 31 applies to these cases whether based on tort or contract. The plaintiffs show that the suits are based on breach of contract.

It is contended on behalf of the respondents that assuming that Art. 31 applies, the suits are in time, as the date from which limitation is to be counted under that Article is when the goods ought to be delivered, which is an uncertain time, and if there is an agreement that the goods should remain longer with the carrier,

limitation will be proportionately extended. The Railway Company were trying to get back the bales and were leading the plaintiffs to believe that delivery would be given. Reference is made to *Jugal Kishore v. The Great Indian Peninsular Railway* (13). In that case no time was fixed for the delivery of the goods and there was no refusal to deliver up to well within a year of the suit. In both the present suits the plaintiffs give certain dates in April 1919 as the dates when the goods ought to have been delivered, and damages were claimed on the basis of the price of cotton at Bombay at that date. Afterwards the market fell. The learned District Judge has referred to the Railway Company's letter of May 1919, but that is two years before the institution of the suits.

A subsequent suggestion made by defendants' Solicitors that the matter might be settled, headed "without prejudice," cannot operate to extend limitation. The Railway Company do not appear ever to have admitted their liability. The suits are, therefore, in our opinion, barred by limitation and must be dismissed.

It has been contended that the appeals should be rejected as they are not accompanied by copies of the judgment appealed against, as required by O. XLI, r. 1, C. P. C.

The memorandum of appeal in each case stated that the copy of judgment would be given afterwards, and as the appeals were admitted on presentation, notice being ordered to issue to the respondents, it must be taken that the Court dispensed with the copy of judgment. In any case this is a matter between the Court and the appellant.

The result is that the decrees of the lower Court in both cases must be set aside and the suits dismissed with costs. The plaintiffs may have their remedy against Arjun Khemji who actually received the goods and in whose possession the sale proceeds are, or against the defendants in another suit after recovery of the sale proceeds from Arjun Khemji.

Z. K.

Appeal accepted.

(13) 68 Ind. Cas. 981; 45 A. 43; 20 A. L. J. 792; 4 U. P. L. R. (A.) 219; (1923) A. I. R. (A.) 22.

(11) 31 Ind. Cas. 474; 11 N. L. R. 174.

(12) 34 Ind. Cas. 130; 44 O. 16; 23 O. L. J. 547; 20 O. W. N. 790.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1216 OF 1921.

September 26, 1924.

Present:—Mr. Justice Devadoss.**DRONAMRAJU LAKSHMI AND ANOTHER**
—PLAINTIFFS—APPELLANTS*versus***IMMANI SESHAYYA AND OTHERS—**
DEFENDANTS—RESPONDENTS.*Mortgage, usufructuary—Term fixed for redemption—Mortgagee, failure of, to carry out terms of mortgage—Redemption before expiry of term, whether can be allowed—Accounts, basis of—Procedure—Appellate Court, whether can take notice of matters after institution of suit.*

Where under the terms of a mortgage the mortgagee is asked to pay himself the principal and interest out of the rents and profits of the mortgaged property, he is entitled to remain in possession till the mortgage-debt is wiped off from the rents and profits of the property. [p. 139, col. 1.]

When a term is fixed in a usufructuary mortgage-deed and possession is given to the mortgagee, unless there be a clause in the mortgage-deed itself enabling the mortgagor to redeem the mortgage at any time he chooses, the mortgagee is entitled to remain in possession till the close of the term. In such a case it cannot be said that the term fixed in the mortgage-deed is only for the benefit of the mortgagor, it is equally for the benefit of the mortgagee as well as the mortgagor. [*ibid.*]

The presumption is that the right to redeem and the right to foreclose arise at the same time and where a date is fixed for the payment of the mortgage-debt and the mortgagee cannot foreclose earlier, the mortgagor also cannot redeem before the appointed time. [p. 139, col. 2.]

Where a mortgagee undertakes to pay out of the rents and profits of the land mortgaged to him a certain amount for the expenses of the mortgagor he is bound to carry out the term of the contract and when he undertakes to pay beriz on the land, his failure to pay it would amount to a breach of the contract as it would thereby expose the land to be attached and sold for arrears of beriz. In such a case if the mortgage-deed fixes a term for redemption, a Court of Equity will grant relief to the mortgagor and allow him to redeem the property before the expiry of the term. [p. 140, cols. 1 & 2.]

A mortgagee is not bound to accept the mortgage amount from the mortgagor if the latter tenders it before the expiry of the term fixed for redemption. But where the mortgagee is in possession of the mortgaged property, and unless there is a stipulation that all the rents and profits should be applied towards interest, whatever remains over and above the interest due on the mortgage amount is bound to be applied towards the reduction of the principal [p. 141, col. 1.]

In a suit for redemption of a usufructuary mortgage the plaintiff is entitled to have an account taken of the rents and profits of the mortgaged property. No question of limitation arises in such a case. So long as the relationship of mortgagor and mortgagee subsists, the mortgagee who is in possession of the mortgaged property is bound to account for the rents and profits of the land. But in taking the account, sums which the mortgagee should have paid to the mortgagor but has not paid, must be applied towards the reduction of the mortgage amount. [p. 142, cols. 1 & 2.]

Semble.—An Appellate Court can take cognizance of matters which have happened after the institution of a suit for the purpose, at any rate, of moulding the relief which the plaintiff is entitled to. This will, however, be done only in exceptional cases where it is necessary to prevent injustice or to avoid multiplicity of proceedings. [p. 141, col. 2.]

Case-law referred to.

Second appeal against the decree of the Court of the Additional Subordinate Judge, at Ellore, in A. S. No. 255 of 1920 (A. S. No. 271 of 1920, Sub-Court, Ellore), preferred against the decree of the Court of the Additional District Munsif, Tanuku, in O. S. No. 294 of 1918.

Mr. P. Somasundaram, for the Appellant.

Mr. G. Laxmanna, for the Respondents.

JUDGMENT.—One Venkatarayudu Pantulu mortgaged the plaint properties to one Venkanna by two deeds, Exs. A and B, on the 2nd May 1865. The equity of redemption was sold by the Court in execution of a money-decree against the mortgagor and was purchased by the plaintiff. He has brought the suit for the redemption of the mortgage against the defendants who are the representatives of Venkanna alleging that the mortgage-debt has been discharged and that he is entitled to have an account taken of the rents and profits of the mortgaged property. The District Munsif held that the plaintiff was not entitled to redeem the mortgage as the term of 55 years fixed in the mortgage-deed had not expired and he gave a decree for a certain amount which under the mortgage the mortgagee undertook to pay to the mortgagor. The plaintiff appealed and the Subordinate Judge of Ellore dismissed the appeal. The plaintiff has preferred this second appeal.

The first contention is that he is entitled to redeem the mortgage before the expiry of the term, as the term is only for his benefit. Mr. Somasundaram, who appears for the appellant, contends that the presumption is that the term fixed in the mortgage-deed is always for the benefit of the mortgagor and that he is entitled to redeem the mortgage at any time he likes. When possession is given to the mortgagee and the mortgagee is asked to pay himself the interest on the mortgage amount from the rents and profits of the mortgaged property and when the rents and profits are liable to fluctuation, it cannot be said that the term fixed in the mortgage is only for the benefit of the mortgagor. In such a case the term is equally for the benefit of the mortgagee as well as the mortgagor. It is

well settled that when a term is fixed in a usufructuary mortgage-deed and possession is given to the mortgagee, unless there be a clause in the mortgage-deed itself enabling the mortgagor to redeem the mortgage at any time he chooses, the mortgagee is entitled to remain in possession till the close of the term. Where the mortgagee is asked to pay himself the principal and interest out of the rents and profits of the mortgaged property, he is entitled to remain in possession till the mortgage-debt is wiped off from the rents and profits of the property. The appellant relied upon the case reported as *Mashook Ameen Suzada v. Marem Reddy* (1) as supporting his contention. The facts in that case, no doubt, are similar to the present. But what the learned Judge held in that case was that it was a mortgage and that the mortgagor was entitled to redeem the property. The case does not support the appellant's contention. In *Sri Raja Setrucherla Ramabhadra Raju Bahadur v. Sri Raja Vairicherla Surianarayana Raju Bahadur* (2), it was held that "where the parties agree that possession of the property shall be transferred to a mortgagee for a certain term, it may be inferred that they intended that redemption should be postponed till the end of the term, but the creation of the term is by no means conclusive on this point." *Pamurlapati Ankivedu v. Samurlapati Subbiah* (3) does not help the appellant. All that was held in that case was that a provision in the mortgage-deed whereby the mortgagee is to remain in possession after the payment of the mortgage-debt is unenforceable as it acts as a fetter upon the right to redeem. In *Mohammad Sher Khan v. Raja Seth Swami Dayal* (4) it was held that the provisions of s. 60 of the Transfer of Property Act were imperative and that the right of redemption cannot be taken away by any contract between the mortgagor and the mortgagee. Even an anomalous mortgage is subject to the provisions of s. 60.

The right of the mortgagor to redeem the

mortgage is not disputed but the question is, when does the right to redeem accrue? In *Bakhtawar Begam v. Husaini Khanam* (5) their Lordships of the Privy Council held: "Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period. But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property." In *Tirugnana Sambandha Pandara Sannadhi v. Nallatambi* (6) Muthusami Iyer, J., and Wilkinson, J., held "Having regard to ss. 60 and 62 of the Transfer of Property Act, the Legislature appears to have adopted the principle that in the absence of a stipulation to the contrary, the presumption is that the right to redeem and the right to foreclose arise at the same time, and that when a date is fixed for the payment of the mortgage-debt and the mortgagee cannot foreclose earlier, the mortgagor also cannot redeem before the appointed time." See also *Gunnam Dorayya v. Vadapalli Ayyamacharyulu* (7) and *Aga Mahammadally Beg v. Chandragiri Venkatapayya* (8).

In Ex. A the term fixed is 50 years and Ex. B extends the term by 5 years. So the period during which the mortgagee was entitled to remain in possession is 55 years from 1865. There is no provision in either of the deeds for the mortgagor redeeming the property before the expiry of 50 years and the appellant, therefore, is not entitled to ask for redemption of the mortgage merely on the ground that he has the equity of redemption.

The next point urged by Mr. Somasundaram is that the mortgagee has been guilty of a breach of contract and, therefore, he is entitled to sue for redemption before the expiry of the term fixed in the mortgage-deed. Under the contract evidenced by Ex. A it was agreed that the mortgagee should pay Rs. 60 to the mortgagor for his expenses, Rs. 95 towards beriz payable to

(1) 8 M. H. C. R. 31.

(2) 2 M. 314; 4 Ind. Jur. 500; 1 Ind. Dec. (N. S.) 489.

(3) 12 Ind. Cas. 382; 35 M. 744; 10 M. L. T. 256; (1911) 2 M. W. N. 231; 21 M. L. J. 1010.

(4) 66 Ind. Cas. 853; 44 A. 185; 30 M. L. T. 220; 9 O. L. J. 81; 42 M. L. J. 584; 25 O. C. 8; 20 A. L. J. 476; 35 C. L. J. 468; 24 Bom. L. R. 695; (1922) M. W. N. 378; (1922) A. I. R. (P. C.) 17; 4 U. P. L. R. (P. C.) 50; 28 C. W. N. 79; 49 I. A. 60 (P. O.).

(5) 23 Ind. Cas. 355; 36 A. 195 at p. 199; 18 O. W. N. 586; 26 M. L. J. 474; 12 A. L. J. 473; 19 C. L. J. 477; (1914) M. W. N. 411; 15 M. L. T. 389; 16 Bom. L. R. 314; 1 L. W. 813; 41 I. A. 84 (P. C.).

(6) 16 M. 486; 2 M. L. J. 272; 5 Ind. Dec. (N. S.) 1015.

(7) 25 Ind. Cas. 797; 27 M. L. J. 295 at p. 293; 16 M. L. T. 226; (1914) M. W. N. 618.

(8) 48 Ind. Cas. 379; 35 M. L. J. 287.

the Sircar, and Rs. 4 for village expenses and should apply the balance of the income of the property, namely, Rs. 80 towards the liquidation of his debt, and the debt should be liquidated in the course of 55 years. It is contended by Mr. Somasundaram that the mortgagee failed to pay Rs. 60 to the mortgagor as agreed to by him and failed also for several years to pay the beriz of Rs. 95 and also the amount payable for village expenses and, therefore, there having been a breach of contract on the part of the mortgagee, the plaintiff is entitled to redeem the mortgage. When the parties to a mortgage agree to certain terms it is the duty of both parties to adhere to the terms of the mortgage. In this case the mortgagee undertook to pay annually Rs. 60 to the mortgagor for his expenses and it is admitted that he did not pay this amount to him. The contention of Mr. Lakshmananna for the respondent is that the mortgagor was entitled to sue for Rs. 60 in case of default and he is not entitled to treat the non-payment of Rs. 60 or failure to pay Rs. 60 per annum as a breach of the contract between the parties and he relies upon the clause in the document: "If the amount of Rs. 60 payable to me every year is not paid in any year, you should relinquish a portion in proportion to the *kist* payable to me." He urges that it was open to the mortgagor to have asked the mortgagee to relinquish a portion of the land capable of yielding Rs. 60 and if the latter declined to do so the former should have brought a suit for the amount and he is not entitled to treat the default to pay Rs. 60 as a breach of the condition in the mortgage-deed. I am unable to accept this contention. Where the mortgagee undertakes to pay out of the rents and profits of the land mortgaged to him a certain amount for the expenses of the mortgagor he is bound to carry out the term of the contract and when he undertakes to pay beriz on the land, his failure to pay it would amount to a breach of the contract as it would thereby expose the land to be attached and sold for arrears of beriz. In this case, the mortgagee undertook to pay 3 different sums for 3 different purposes and he not having paid those sums as agreed to by him, I think it is equitable that he should not be allowed to insist upon one of the terms of the mortgage-deed being given effect to when he himself gives a go-by to the other terms of the deed. The mortgagee remaining in

possession for a number of years is in consideration of his not only applying a portion of the rents and profits towards his debt but also in consideration of his meeting certain demands which ought to be met out of the income of the property. In a case like this, I think, a Court of Equity ought to give relief to the mortgagor and allow him to redeem the property before the expiry of the term.

I am supported in this view by the observations of Richards, C. J. and Bannerji, J. in *Chhatku Rai v. Buldeo Shukul* (9): "We think that on equitable grounds the defendants not having performed what we deem to be a most essential part of the contract so far as they are concerned, the plaintiffs ought to be allowed to redeem the property before the expiration of the period of 10 years." No doubt the facts in that case are not very similar to those of the present. There the mortgagees failed to discharge prior encumbrances which they had undertaken to discharge and they having been in possession of the mortgaged property, and in receipt of rents and profits thereof allowed interest to accumulate in respect of the encumbrance. The learned Judges held that "if the mortgagees were allowed to remain in possession of the property over the full period of 10 years taking the profits, the plaintiff will be without any proper or effectual remedy." The principle of the decision is applicable to the present case. Mr. Lakshmananna contends that the mortgagor should have enforced payment of the amount payable to him by a suit. I do not think that the mortgagor should have been driven to file a suit year after year for the recovery of the amount payable to him by the mortgagee, nor was he bound to pay beriz on the land year after year and bring a suit every year against the defendant for the amount paid by him. In order to show that both mortgagors and mortgagees should carry out the terms of the contract embodied in the mortgage-deed I may refer to the case in *Seaton v. Twyford* (10). Sir James Bacon, V. C., observed as follows: "The mortgagor who stipulates that he shall have 5 years to pay the mortgage-money must of necessity, whether it is expressed or not, undertake at the same time that, if he fails to do that which is

(9) 17 Ind. Cas. 340; 34 A. 659 at p. 662; 10 A. L. J. 330.

(10) (1871) 11 Eq. Cas. 591; 40 L. J. Ch. 122; 23 L. T. 648; 19 W. R. 200.

incumbent upon him during the period of 5 years to do, the restriction upon the mortgagee shall thereupon cease." In India the non-payment of interest by the mortgagor to the mortgagee is not a sufficient ground for the mortgagee to bring a suit for sale before the expiry of the period fixed for payment of the principal but the decision shows that both parties should carry out the terms of the contract entered into by them.

If the mortgage amount has been paid off, the right to redeem accrues, and if a suit for redemption is not brought within the statutory period it will be barred. The Privy Council held in *Bakhtawar Begum v. Husaini Khanum* (5) that a suit for redemption was barred inasmuch as it was alleged by the plaintiff that the mortgage-debt became satisfied in 1838. The mortgagee not having paid the amount payable to the mortgagor, was bound to apply that amount in reduction of the mortgage-debt. When the mortgagee is in possession of funds arising from the rents and profits of the mortgaged premises, he is entitled to pay himself first the interest on the mortgage amount and whatever remains over and above he is bound to apply towards the reduction of the capital. The mortgagee is not bound to accept the mortgage amount from the mortgagor if he tenders it before the expiry of the term. But where he is in possession of the mortgaged property, and unless there is a stipulation that all the rents and profits should be applied towards interest, whatever remains over and above the interest due on the mortgage amount is bound to be applied towards the reduction of the principal. This is clear from *Thompson v. Hudson* (11). In that case Lord Romilly, M. R., held that when the mortgagees received a considerable sum of money by sale of a portion of the mortgaged property they were not entitled to charge interest on the whole of the principal amount mortgaged and keep the amount realized by sale in their hands. He held that that sum should have been applied in part payment of the mortgage amount. I may refer in this connection to an observation of Mr. Justice Mahmood in *Jaijit Rai v. Gobind Tiwari* (12). "By a long course of decisions

it has been settled in India that even a special agreement to the effect that the mortgagee shall remain in possession until payment of the debt is made in one sum does not prevent the mortgage from being at an end whenever the mortgagee has realized both the principal and interest from the usufruct. This rule, though it probably originated in the express provisions of the old Regulations, is so consonant with equity that it deserves recognition by the Courts, even irrespective of statutory provisions".

It was next urged by Mr. Somasundram that the term of 55 years expired in 1920 after the decree in the District Munsif's Court and before the appeal was filed in the District Court and he is, therefore, entitled to ask for an account. In the view I have taken of the right of the mortgagor to ask for redemption, I do not think it is necessary to discuss this point in detail. In *Sethrucherla Rama Chandra v. Maharajah of Jeypore* (13) the learned Judges observe: "It has been held in several cases that the Appellate Court can take cognizance of matters which happened after the institution of the suit for the purpose, at any rate, of moulding the relief which the plaintiff was entitled to.... This will be done only in exceptional cases, where it is necessary to prevent injustice or avoid multiplicity of proceedings." Mr. Lakshmanan relies upon *Ramanadan Chetti v. Pulikutti Servai* (14) and *Govinda v. Perumdevi* (15) and contends that what happened subsequent to the institution of the suit should not be taken as a ground for giving relief to the plaintiff. In *Govinda v. Perumdevi* (15) the plaintiff sued for a declaration that a certain alienation made by a widow was invalid. Pending the appeal the widow died. He applied to amend the plaint by adding a prayer for possession. The Court held that it could not give permission to amend the plaint. In *Ramanadan Chetti v. Pulikutti Servai* (14) the person who acquired the lessor's title brought a suit to eject certain trespassers from the leasehold property. Pending the appeal, the term of the lease expired. He asked leave to amend the plaint pending the appeal by

(11) (1870) 10 Eq. Cas. 497; 40 L. J. Ch. 28; 23 L. T. 278; 18 W. R. 1081.

(12) 6 A. 303 at p. 308; A. W. N. (1884) 92; 3 Ind. Dec. (N. S.) 944.

(13) 34 Ind. Cas. 411; (1916) 1 M. W. N. 354; 19 M. L. T. 360.

(14) 24 M. 288; 8 M. L. J. 121; 7 Ind. Dec. (N. S.) 559.

(15) 12 M. 136; 4 Ind. Dec. (N. S.) 444.

adding a prayer for possession. The Court held that such an amendment could not be granted. In the two cases there were two causes of action. The cause of action on which the suit was based was one and a different cause of action arose when the appeal was pending. But here the cause of action is the same, namely, the right of the plaintiff to redeem the mortgage. The plaintiff asks for redemption on the ground that the mortgage has been discharged and now the term having expired pending the appeal he relies upon that and says he is entitled to redeem. Possession of the mortgaged properties has been given to the plaintiff. So the question of redemption of the mortgaged properties is only of an academic interest. The real question is whether he is entitled to an account. It would not be right to drive the plaintiff to another suit for the purpose of taking an account on the ground that on the date of the suit the term of the mortgage had not expired. But as I have already held that the mortgagor was entitled to bring a suit on the date of the discharge of the mortgage amount, the contention of the respondent that the plaintiff is not entitled to rely upon what happened subsequent to the institution of the suit need not be considered.

The plaintiff is entitled to have an account taken of the rents and profits of the mortgaged premises. There is no question of limitation arising in the case. So long as the relationship of the mortgagor and mortgagee subsists, the mortgagee who is in possession of the mortgaged premises is bound to account for the rents and profits of the land. *Vide, Parasurama Pattar v. Venkatachalam Pattar* (16). It was observed in that case: "So long as the relationship of mortgagor and mortgagee continues, the obligation of the mortgagee to make all payments provided in the mortgage-deed also subsists. At the time of redemption, when the mortgagor is required to pay the amount due by him under the mortgage, the mortgagee is also bound to give him credit for all payments which he is bound to make under it". See also *Jaijit Rai v. Gobind Tiwari* (12). The plaintiff is entitled to be given credit for all the sums received by the mortgagee. His contention is that

the mortgage was discharged so far back as 1887. The amounts which the mortgagee undertook to pay the mortgagor and to the *zamindar* and for village expenses should be applied in taking an account towards the reduction of the principal amount of the mortgage. See in this connection *Ram Avatar v. Tulsi Prosad Singh* (17).

It was feebly urged by Mr. Lakshman that the amount of Rs. 60 was a personal allowance and the plaintiff as an auction-purchaser of the equity of redemption was not entitled to get that amount. There is nothing in the document, Ex. A, to show that Rs. 60 payable to the mortgagor was a personal allowance. That amount was agreed to be paid by the mortgagee as only a portion of the rents and profits was sufficient for liquidating the debt, and the plaintiff who has purchased the equity of redemption is entitled to rely upon the terms of the document. I do not think there is any thing in this contention. The plaintiff is entitled to the amount of Rs. 60 payable to the mortgagor in whose shoes he stands.

The plaintiff is entitled to have an account taken of the sums received by the mortgagee. I set aside the decree of the lower Courts and direct the District Munsif to take an account of the rents and profits of the mortgaged property. In taking the account, sums payable by the mortgagee should be applied towards the liquidation of the mortgage amount and after the date of the discharge of the mortgage amount, the mortgagee is liable for the rents and profits to the mortgagor. The plaintiff is entitled to the costs of this appeal, and to the costs in the lower Courts.

The memorandum of objections having been posted to be spoken to this day, the Court delivered the following

JUDGMENT.—The memorandum of objections is dismissed.

Appellant is entitled to refund of Court-fee paid in this Court.

V. N. V.

Decree set aside;

Z. K.

Memo. of objections dismissed.

(17) 11 Ind. Cas. 713; 14 C. L. J. 507; 16 C. W. N. 137.

(16) 21 Ind. Cas. 701; 25 M. L. J. 561; (1918) M. W. N. 198.

LAHORE HIGH COURT.

CIVIL CASE No. 1560 OF 1921.

March 3, 1925.

Present:—Mr. Justice Broadway and
Mr. Justice Jai Lal.SALIGRAM AND OTHERS—DEFENDANTS
—APPELLANTS

versus

MOHAN LAL—PLAINTIFF—RESPONDENT.

*Hindu Law—Joint family—Alienation of family
property—Repairs to family dwelling house—Neces-
sity.*

Money required for the purpose of effecting repairs to the family dwelling house is required for a necessary purpose which would justify an alienation of family property. In such a case the alienee is not required to have an estimate prepared of the sum required for the proposed repairs. If the evidence shows that on making enquiries the alienee was satisfied that repairs were about to be made, any sum reasonably necessary for such repairs would be regarded as having been advanced for necessity. [p. 144, col. 1.]

Appeal from a decree of the Senior Sub-Judge, Lahore, dated the 10th March 1921.

Lala Fakir Chand and Mr. M. N. Mukerji,
for the Appellants.

Messrs. Anant Ram and Jagan Nath
Agarwal, for the Respondent.

JUDGMENT.—On the 6th of August 1914 one Seth Shib Das, a clerk in the Railway Audit Department, borrowed a sum of Rs. 5,000 on a mortgage of two houses, from Pandit Jia Lal and Mohan Lal, father and son. It was represented to them that the money was needed to pay a prior mortgage held by the Lahore Bank Limited, and to execute certain repairs to the property mortgaged. On the same date Shib Das executed a rent deed agreeing to be the mortgagee's tenant of the property mortgaged and to pay a sum of Rs. 45 per mensem as rent, that amount being the equivalent of the interest payable under the mortgage-deed which was at the rate of 9 per cent. The mortgage-deed also contained a clause that if three months' interest had not been paid, from the date of default, the interest payable would be at the rate of Rs. 1-2-0 per cent. per mensem.

On the 13th of November 1919 the mortgagees instituted a suit against the mortgagor for recovery of Rs. 6,000 principal and Rs. 3,342-8-0 interest due under the mortgage-deed. Credit had been given for Rs. 640, which had been paid by Seth Shib Das. The defence set up by Shib Das was that the loan was not a loan at all, but that he had been duped into

signing these documents by the mortgagees who had entered into an agreement to join him (Shib Das) in certain *satta* (gambling). Later Shib Das' two sons, one a major and the other a minor, also desired to be impleaded and were impleaded. The plea they set up was that their father was a grossly immoral, debauchee, a whoremonger and a gambler and that the mortgaged property, being ancestral, was not chargeable with the payment of the amount claimed by the mortgagee.

The following issues were settled on the pleadings:—

(1) Was the mortgage in suit executed without consideration?

(2) Was the debt raised by defendant No. 1 Shib Das for family purposes or legal necessity?

(3) Is the debt tainted with immorality?

(4) What relief, if any, is the plaintiff entitled to?

(5) Is the rate of interest penal?

Later a sixth issue was added:—

(6) Whether the houses in suit are ancestral?

The parties led evidence and the learned Subordinate Judge found that full consideration had passed, that the houses were ancestral, that the enhanced interest was not penal, that the debt due to the prior mortgagee and a sum of Rs. 250 were chargeable to the property and granted the plaintiff a decree accordingly.

The decree as drawn up showed the principal amount due to be Rs. 4,579-8-3; interest Rs. 3,067-9-4 and costs Rs. 690 or a total of Rs. 8,337-1-7. This amount was declared to be due under the mortgage and it was directed that it should be paid by the 10th day of September 1921. On payment the plaintiffs were ordered to deliver up to the defendants or some other person properly appointed by him and entitled thereto all the documents and title-deeds in their possession relating to the mortgage property. Further it was ordered that if the payment was not made by the date fixed, the mortgaged property or so much of it as might prove sufficient, was to be sold and the proceeds of the sale paid into Court and applied in payment of the amount declared to be due. Finally it was ordered that if the net proceeds of the sale were insufficient to pay the amount due and any subsequent interest and costs in full, the plaintiffs would be at liberty to apply for a personal decree for the amount

of the balance against Shib Das alone who was declared personally liable under the decree to pay Rs. 3,422-6-8.

Against this decree the mortgagor and his two sons have filed a joint appeal while the mortgagees have filed cross objections in respect of the sum of Rs. 1,250 and interest thereon disallowed by the Court. On behalf of the appellants we have heard Mr. Fakir Chand while Mr. Jagan Nath has represented the mortgagees.

Admittedly the amount due and paid to the Lahore Bank cannot now be examined and Mr. Fakir Chand confined his attack to the sum of Rs. 250. This sum of Rs. 250 was a portion of Rs. 1,500 which had been paid by the mortgagees to the mortgagor in the presence of the Registrar at the time of registration. As stated above the necessity for this payment was stated in the mortgage-deed to be for business purposes and for building a house and purchasing land adjoining the house. When the two mortgagees were examined in Court as witnesses the son, Mohan Lal, frankly admitted that he had no personal knowledge of the matter but stated that he had been told by his father that the defendant Shib Das needed the money for repairs, alterations, etc. Pandit Jia Lal himself has sworn that this sum of Rs. 1,500 was given for repairs and for no other purposes. Ramji Das (P. W. No. 3), a broker, has stated that this transaction was negotiated by him and that the defendant Shib Das had already applied to the Municipality for sanction to construct a *barsati*. The learned Subordinate Judge has allowed Rs. 250 only on the ground that although *barsati* or *sabat* had been erected, one witness alone had stated that it had cost Rs. 250. Mr. Fakir Chand cited *Girdhari Lal v. Kishen Chand* (1). In our judgment that authority supports the contention of the respondents. There can be no doubt that repairs to a house would be regarded as "necessity" for the purposes of a suit of this nature. It is in evidence that the mortgagor, the father and head of the joint family, had represented that repairs to the building and the erection of a *barsati* were necessary. It would be exceedingly difficult for any person advancing money for repairs to a building to be called upon to have an estimate prepared of the sum re-

quired for the proposed repairs. It is in evidence and we believe this evidence that enquiries were made and that it had been discovered that repairs were actually going to be made and that an application had been made to the Municipality for sanction. In these circumstances we are unable to agree with the Court below in its finding that only Rs. 250 can be allowed as a charge on the property. In our judgment the whole of this amount must be allowed.

So far as the interest is concerned, although we are unable to see that the enhanced rate amount to a penalty, as Mr. Jagan Nath expresses himself, content with the original rate of 9 per cent. we fix the interest at that rate.

The appeal is, therefore, dismissed, and the cross-objections are accepted. The plaintiff will be granted a decree for Rs. 6,000 principal, and interest from the date of the mortgage-deed to the 3rd of September 1925 at the rate of 9 per cent. together with costs thereon.

It has been brought to our notice by Mr. Fakir Chand that the costs allowed in the decree are less than the proper amount claimable. Out of the total sum, Rs. 640 admittedly paid will be deducted and the balance will be payable on or before the 3rd day of September 1925. On payment the plaintiffs will deliver up to the defendants, or such persons as they appoint, all documents in their possession or power relating to the mortgaged property. In the event of the payment not being made on or before the said date, the mortgaged property, or such portion of it as may suffice, shall be sold. The proceeds of the sale, after defraying the expenses of the sale shall be paid into Court and applied in payment of the amount declared due to the plaintiff as stated above, together with any subsequent interest and costs that may have accrued or have been incurred. Finally, if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount or the balance against Shib Das alone. Future interest will be payable, in the event of the decretal amount not having been paid by the date fixed at the rate of 9 per cent. until realization.

Z. K.

Appeal dismissed.

(1) 85 Ind. Cas. 463; 5 L. 511; (1925) A. I. R. (L.) 240.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 317-B of 1923.

February 26, 1924.

Present :—Mr. Kinkhede, A. J. C.

BHAGWANTRAO—ACCUSED—APPLICANT
versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 176—Persons legally bound to give information to Police—Omission by some of such persons, whether offence.

The fact that some persons bound to give information have given that information while other persons who might be bound to give that information have omitted to do so, is no ground for their prosecution and conviction under s. 176 of the Penal Code.

Empress v. Sashi Bhusan Chuckrabutty, 4 C. 623; 2 Ind. Dec. (N. S.) 395, *Queen-Empress v. Gopal Singh*, 20 C. 316; 10 Ind. Dec. (N. S.) 214 and *In re Pandya Nayak*, 7 M. 436; 1 Weir 102; 2 Ind. Dec. (N. S.) 888, referred to.

Application for revision of an order of the Sessions Judge, Amraoti, dated the 25th September 1923, in Criminal Appeal No. 220 of 1923.

Mr. K. K. Gandhe, for the Applicant.

ORDER.—The learned Pleader who appeared for the applicant has very ably argued the question of fact as well as of law. On the question of fact I do not think the Trial Court was wrong in drawing the conclusion that the accused knew of the movements of Shankaria. The lower Appellate Court has, however, held that the accused knew of Shankaria's hiding place. I do not think the evidence on record supports this conclusion. There is no evidence to bring knowledge of the particular hiding place, namely, the *kadbi* stack, home to the accused.

The complaint was laid as imputing to the accused knowledge of the particular hiding place but the evidence falls short of it. The accused was charged for having intentionally omitted to give information which he was legally bound to give to the Police. The accused was not called upon to answer the charge with reference to the particular hiding place where Shankaria was found and re-arrested. Although I am not prepared to uphold the Sessions Judge's finding that the accused had knowledge of the particular hiding place, namely, the *kadbi* stack, still I agree with the Trial Court in holding that the accused was aware of the movements and visits of Shankaria to the village, and in fact he had interviews with Shankaria. I, therefore, think that there was technical omission on his part to give the information which he was legally

bound to give to the Police. But this is not sufficient to convict him.

The next question is whether he intentionally omitted to do so. The prosecution evidence shows that this information was known to several people. The Police also had this information as we find from P. W. No. 1's deposition. The particular hiding place may not have been known to Police until 31st July 1922, but that does not mean that the Police had no information, on the contrary it appears that they had. Under such circumstances the principle underlying the cases reported as *Empress v. Sashi Bhusan Chuckrabutty* (1), *Queen-Empress v. Gopal Singh* (2) and *In re Pandya Nayak* (3), that the fact that some persons bound to give information have given that information while other persons who might be bound to give that information have omitted to do so, was no ground for their prosecution and conviction under s. 176, Indian Penal Code, ought to be applied to this case. I, therefore, give the benefit of this principle to the accused in the particular circumstances of this case.

The accused has been the Patel for the last several years and this is the first omission so far as I could gather from the record for which he is charged. I, therefore, see no valid reasons for upholding the conviction and the sentence which are hereby set aside. The fine, if recovered, may be refunded to the accused.

G. R. D.

Conviction set aside.

K. S. D.

(1) 4 C. 623; 2 Ind. Dec. (N. S.) 395.

(2) 20 C. 316; 10 Ind. Dec. (N. S.) 214.

(3) 7 M. 437; 1 Weir 102; 2 Ind. Dec. (N. S.) 888.

LAHORE HIGH COURT.

CRIMINAL APPEAL No 108 of 1925.

April 20, 1925.

Present:—Mr. Justice Abdul Raoof and
Mr Justice Fforde.SAJJAN SINGH—CONVICT—APPELLANT
versus

EMPEROR—OPPOSITE PARTY.

Evidence Act (I of 1872), s. 33—Deposition of witness made before Committing Magistrate, whether admissible at trial—Death of witness, proof of—First Information Report based on hearsay, value of—Admission of guilt by several persons, proof of—General statement, value of.

Where the deposition of a witness made before the Committing Magistrate is sought to be admitted in

evidence at the trial in the Sessions Court, under s. 33 of the Evidence Act, the death of the witness must be first proved. In the absence of such proof the statement is not admissible in evidence under s. 33. [p. 146, col. 2.]

A First Information Report based entirely on hearsay cannot be tendered in evidence by the prosecution. [*ibid.*]

A First Information Report can only be used by the prosecution for the purpose of corroborating in the witness-box the person who supplied the information contained in the report. Where, however, the person who gave the First Information Report can himself only speak from hearsay, the report cannot be used to corroborate such inadmissible evidence. [p. 146, col. 2; p. 147, col. 1.]

A general statement by a witness that a number of persons admitted having committed a crime is valueless without some indication as to which of the persons made the admission in question with some particulars of what was actually said. [p. 147, col. 1.]

Criminal appeal from an order of the Sessions Judge, Ferozepore, dated the 20th November 1924.

Dr. Nand Lal, for the Appellant.

Mr. Abdul Rashid, for the Crown.

JUDGMENT.—The appellant, Sajjan Singh, has been convicted of murder under the provisions of s. 302 of the Indian Penal Code, and has been sentenced to death.

The story for the prosecution is shortly as follows:—On the 12th of July 1923, Sohan Singh and Pakhar Singh were ploughing their fields. Waryam Singh was engaged nearby in erecting a fence round his sugar-cane field. Sohan Singh and Pakhar Singh engaged in an altercation with Waryam Singh in the course of which Pakhar Singh threw a clod of earth at Waryam Singh. Mangal Singh, son of Wazir Singh, who was ploughing his field in the vicinity, came up to the altercants and separated them. Having done so he returned to his field which is at a distance of 200 *karams* from the place of altercation. Shortly afterwards Thakar Singh arrived with food for Pakhar Singh and Sohan Singh, and Amar Singh also arrived bringing food for his father Waryam Singh. Amar Singh was then told by Waryam Singh to go to the village and bring assistance, whereupon the former left on that errand. Within an hour of the departure of Amar Singh, Sajjan Singh appellant, Bhan Singh, Mehnga Singh, Pahara Singh and Pal Singh came on to the scene. Five of them were armed with *gandas* and one of them, Pahara Singh was armed with a *saila*. These six men fell upon Thakar Singh, Pakhar Singh and Sohan Singh, inflicting such injuries that Sohan Singh and Pakhar

Singh died on the spot, and Thakar Singh subsequently expired in the house of Mangal Singh having walked there with the aid of Mangal Singh.

This is the Crown case as presented by Mangal Singh, witness No. 4 for the prosecution. In addition to this witness the Court below has accepted the statement by another Mangal Singh, son of Sangat Singh, which was made before the Committing Magistrate. The learned Sessions Judge stated in his judgment that this witness had died before the case came to the Sessions Court and he purports to have admitted the statement under the provisions of s. 32 of the Indian Evidence Act. It is obvious that the statement in question could not have been admitted under any of the provisions of this section of the Evidence Act, and the learned Sessions Judge must have intended to rely upon s. 33 for its admission. Section 33 would have been applicable if the death of the witness whose deposition was sought to be admitted had been first proved. In the present case there was no such proof, and accordingly the statement is not admissible and must be excluded from consideration.

The Trial Judge has also relied upon the statements contained in a document described as the First Information Report. This document records an account of the crime given by a certain Khetu to the Police and taken down by Sub-Inspector Magha Ram. The information contained in this document is entirely based on hearsay and has been so described by the Trial Judge in his judgment. It is obvious that such a document cannot be tendered in evidence for the prosecution. Khetu, who was called as a witness, does not purport to know anything of the circumstances of the crime at first hand. He alleges that he obtained his information from Sundar Singh, a *lambardar* and he adds that Sundar Singh told him that he had not seen the murders with his own eyes but had heard of the same. It appears, therefore, that not only is this First Information Report based upon information which was hearsay, but the person from whom the informant obtained his knowledge had himself gained it from others. This is a glaring example of the improper use made in this province of a First Information Report. As such a document could only be used by the prosecution for the purpose of corroborating in the witness

box the person who supplied the information contained in the document, it ought to be fairly obvious that if the informant himself can only speak from hearsay, the report cannot be used to corroborate such inadmissible evidence. I may mention that Sundar Singh, who is stated to have supplied the information upon which the First Information Report was based, was not called as a witness.

A number of other witnesses were produced by the prosecution who testify to statements made by the alleged murderers after the crime had been completed. These witnesses say that the six alleged assailants whose names have been mentioned returned to the village after the crime, and shouted out threats to certain persons saying at the same time that they had already killed Thakar Singh, Pakhar Singh and Sohan Singh. The witnesses do not say which of these six persons made the incriminating statement, but speak as if the six men shouted in chorus. Nobody says that the appellant Sajjan Singh made any statement amounting to an admission of the crime; and even if it were clearly established that one or more of the other five had admitted the murders, such admission could not be used as evidence against the appellant unless and until it had been shown that all six persons had conspired to commit the crime. There is no evidence of any such conspiracy. Moreover, a general statement by a witness that a number of persons admitted having committed a crime, is valueless without some indication as to which of the persons made the admission in question with some particulars of what was actually said.

Apart from the evidence of the medical witness, who has given details of the injuries sustained by the victims of the crime, the only evidence which we can legally consider is that of Mangal Singh, son of Wazir Singh. According to him he not only saw the crime committed but saw the appellant and one Bhan Singh assault Sohan Singh. If this evidence is to be believed the appellant, undoubtedly, took part in the crime and whether he did or did not cause the death of one of the victims, he would be liable under s. 34 of the Indian Penal Code as an abettor, for it is obvious that the common intention of the assailants was to kill the three men in view of the nature of the weapons with which they armed themselves and the circumstances

of the affair. There are, however, certain discrepancies in the evidence of Mangal Singh which throw considerable doubt upon the truth of his narrative of the crime. He purports in his evidence in-chief to have heard Waryam Singh tell his son to go to the village and send men to his assistance, but in cross-examination he admits that after stopping the altercation he went back to his field and, as his field is at a distance of 200 *karams* from the scene, it is obvious that he could not have heard Waryam Singh's orders to his son. It is perfectly clear from the whole of his evidence that after the first altercation was over he went back to his own work and did not come again to the scene of the fight until the assailants arrived. This witness also admits in cross-examination that he did not make any statement to the *thanadar* about the murderers when Thakar Singh's dead body was removed to his house. Nor did he speak to any one about the occurrence which he is alleged to have witnessed. He says that his son saw the fight in the fields, but his son was not produced as a witness.

I do not think it will be safe to convict the appellant on the sole testimony of this witness, and, I would accordingly accept the appeal and set aside the conviction and sentence.

Z. K.

Appeal accepted.

ODDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 375 OF 1925.

August 20, 1925.

Present:—Mr. Simpson, A. J. C.
EMPEROR—PROSECUTOR

versus

BALDEO—PRISONER—APPELLANT.

Penal Code (Act XLV of 1860), ss. 300, 302—Death caused by injury sufficient in course of nature to cause death—Murder.

Where death is caused by an injury which is in fact sufficient in the ordinary course of nature to cause death, the person responsible for having caused the injury is guilty of murder. [p. 148, col. 1.]

Appeal against an order of the Additional Sessions Judge, Kheri, dated the 5th May 1925.

The Government Pleader, for the Crown.
JUDGMENT.—Three persons, Raghu-nandan, Hardwari and Baldeo were tried

under s. 302, Indian Penal Code, for murder and also under s. 392/397, or in the alternative s. 394, Indian Penal Code. Raghunandan was acquitted. Hardwari and Baldeo were convicted under s. 392/397, Indian Penal Code, and were sentenced to rigorous imprisonment for seven years each. All three were acquitted on the charge of murder.

The facts are that on the 10th September 1924, in the evening Tirbeni and his son Ram Bilas were returning to Nighasan from Bamhanpur, where they had gone to sell cloth. They carried the cloth in two bales on a pony which was being ridden by Tirbeni. Ram Bilas was walking on foot. When they reached a grove near Durgapur, the three accused, two of whom were armed with spears and one with a *lathi*, came out of the jungle and beat Tirbeni and got away with the cloth. Ram Bilas ran to Nighasan, and from there some one went to the *thana* and reported the matter, while others went back with Ram Bilas to the spot. They found that Tirbeni had one of his arms broken and had injuries on his head. When the Sub-Inspector reached the spot, he sent Tirbeni to the *thana* where he died shortly after his arrival. The *post-mortem* shows a fracture of the skull which was the cause of death. The two appellants Hardwari and Baldeo are identified by Ram Bilas. There is some other evidence, but I should be quite prepared to uphold the conviction on this identification. There is no reason to doubt the story of Ram Bilas.

The point which has occupied my mind is whether acquittal on the charge of murder ought to be allowed to stand. The learned Judge has said "Tirbeni died in consequence of the fracture of the skull caused by a *lathi* blow. The robbers could have no intention of causing death or of causing such injury which they knew would cause death. Therefore I think the charge under s. 302, Indian Penal Code, cannot be laid against the them."

This is a misapprehension of law. If the robbers intended to cause an injury, which was in fact sufficient in the ordinary course of nature to cause death, they committed murder. If s. 300, meant that the person inflicting the injury must contemplate the death of his victim it would be superfluous and redundant. What is meant is shown by Illustration (c) which is as follows:—

"A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of

a man in the ordinary course of nature. Z died in consequence. Here A is guilty of murder although he may not have intended to cause Z's death."

This is the present case. One of these robbers intentionally gave Tirbeni a club-wound sufficient to cause the death of a man in the ordinary course of nature, and that person was guilty of murder. The reason why I do not propose to refer the matter to a Bench is that there appears to be no evidence which of the robbers it was who committed the murder, and the case is not, in my opinion, one in which all the robbers would be responsible.

The appeals are dismissed.

Z. K.

Appeals dismissed.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1021 of 1923.

December 15, 1923.

Present:—Mr. Justice Scott-Smith
and Mr. Justice Zafar Ali.

NUR MUHAMMAD AND ANOTHER—
APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Evidence Act (I of 1872), s. 25—Confessional statement recorded as First Information Report, admissibility of.

If after committing a murder the murderer proceeds straight to the Police Station and there makes a confessional statement, which is recorded as the First Information Report, the statement is inadmissible in evidence as being a confession made to the Police. [p. 149, col. 1.]

Criminal appeal from an order of the Sessions Judge, Dera Ghazi Khan.

Messrs. Sagar Chand and B. A. Cooper, for the Appellants.

JUDGMENT.—Nur Muhammad and Ali Muhammad have been convicted by the Sessions Judge of Dera Ghazi Khan of the murder of Usman and have been sentenced to death. They have appealed to this Court through Counsel. There has been no appearance on behalf of the Crown. The facts are very clear. Usman was stabbed to death near the *thana* of Dajal at noon on the 3rd June 1923. There is one eye witness Chetan (P. W. No. 2) but having regard to the fact that he has made different statements at different times it would not be safe to rely upon his evidence. The same, however, does not apply to the evidence

of Siya Ram, Kewal Ram and Jamnu Ram (P. W. Nos. 3, 4 and 5) who saw Usman falling after having been stabbed and the two appellants running away with blood-stained clothes on their persons. Kewal Ram did not know the appellants before and there is no evidence to the effect that he picked them out at an identification parade and it would, therefore, be perhaps not safe to put much reliance upon his evidence. Immediately after the murder the appellants went and gave themselves up at the Dajal *thana* which is at quite a short distance from the scene of the murder. When they appeared at the *thana* they had fresh blood on their clothes, shoes and hands see evidence of Ghulam Hassan Khan, Sub-Inspector, P. W. No. 7, and Jiwan Khan Constable, P. W. No. 6. Nur Muhammad made a statement to the Police which has been recorded in the First Information Report. It has been placed on the record as an exhibit, but is obviously inadmissible in evidence as being a confession made to the Police.

In consequence of the statements made by the appellants to the Police they were taken back to Dajal and produced before Diwan Dharam Chand, Tahsildar of Jampur (P. W. No. 15) who recorded their confessions after satisfying himself that they were confessing voluntarily. The Magistrate also noticed that the clothes and shoes of the appellants were bloodstained and that Nur Muhammad had some slight injuries on his person. These confessions are very clear and are to the effect that Ali Muhammad held Usman while Nur Muhammad stabbed him several times. The main motive for the murder was that Usman had married *Musammât* Sairan, the mother of Nur Muhammad without the latter's consent. Ali Muhammad is a near relation of Nur Muhammad. In their confessions the appellants stated that shortly before the murder Usman taunted them in the bazar and that subsequently Ali Muhammad *lambardar* had also told them that they were panders and cowards and had called upon them to vindicate their honour. After these taunts they went to Nur Muhammad's house, sharpened a knife, went back to the bazar, met Usman and murdered him. The appellants before the Committing Magistrate and before the Sessions Judge denied having made any confessions to the Tahsildar and also denied having gone to the Police Station immediately after the

murder. They did not, however, allege any ill-treatment on the part of the Police and, in our opinion, there is absolutely no ground for supposing that there was any such ill-treatment. Counsel for the appellants has urged that they were probably ill-treated but having regard to the circumstances of the case we are quite satisfied that their confessions were spontaneous. It was also urged by Counsel that Ali Muhammad who merely held the murdered man while Nur Muhammad killed him could not be convicted of murder because it was not proved that he along with Nur Muhammad had the common intention of causing death. In our opinion there is no force in this argument. Ali Muhammad though he did not actually inflict any wound upon the deceased took his own part in the murder by holding Usman while his companion stabbed him. If Ali Muhammad had not helped in the way he did the probability is that Usman would not have been murdered at all.

We dismiss the appeal and confirm the sentence of death.

S. D.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 42-B OF 1924.

July 28, 1924.

Present:—Mr. Kinkhede, A. J. C.

DADU—ACCUSED—APPLICANT

versus

EMPEROR—NON-APPLICANT.

Easements Act (V of 1882), s. 28—Right of way, extent of—Method of user—Dominant and servient owners, mutual rights of.

A person entitled to a right of way cannot make an excessive user of the right, much less can he act arbitrarily and in a high handed manner so as to render the beneficial enjoyment by a servient owner of his own premises impossible or fraught with many difficulties. The latter is not on the other hand entitled to use the premises in a manner interfering with the enjoyment by the former of his right of way within reasonable limits. [p. 150, col. 2.]

Criminal revision of an order of the Magistrate, First Class, Amraoti, dated the 22nd January 1924.

Mr. R. R. Jaiwant, for the Applicant.

Mr. D. T. Mangalmurti, for the Crown.

ORDER.—The complainant Hari is the next door neighbour of the 3 accused. He has

got a decree from the Civil Court declaring his right of way over the compound of the accused through a door E. The story is that the accused kept some stones or slabs in or near the door and used them as a washing stand. Hari thought that the putting of the stone-slabs at the place and using them as a washing stand was an obstruction to the free exercise of his right of way. He, therefore, entreated the accused to remove the cause of the obstruction, and caused certain Pancha to intercede on his behalf but the accused are said to have taken no heed of it. The result was that Hari thought himself justified to remove the stones from the place where they were put by the accused. This removal naturally resulted in an altercation and a struggle. The three accused have, therefore, been found guilty of assault under s. 325, Indian Penal Code and each of them has been fined.

Against these sentences each of the three accused has preferred an application for revision. This order will govern all these Applications Nos. 42-B to 44-B of 1924.

The main complaint of the applicants is that the complainant exceeded his right in trying to disturb or remove the stones from the place where they were kept by the accused. Even though the Civil Court granted him a decree declaring his right of way, it did not authorize the complainant to act in a high handed manner towards the owner of the servient tenement. The mere reading of the deposition of Hari shows that he has acted towards the accused in a somewhat high handed way. He has removed the chain and the staple of the door, because he thinks he is justified in going into the compound of the accused 'at any time' he 'likes'. His idea is that Dadu cannot close his door. The silence of Dadu at the time of his removing the chain, etc, had, it appears to me, encouraged Hari to take the bolder step of removing the so-called cause of obstruction which led to the assault. The evidence clearly shows that the accused were provoked into assaulting the complainant by the latter's action of trying to remove the stones. The accused must, therefore, be considered to have acted under provocation on the spur of the movement as soon as they found that the complainant was bent upon taking the law into his own hands and attempting to commit mischief in regard to what was admittedly their property. I am asked to hold that if the accused assaulted they had every justification for so doing for the pro-

tection of their property from the mischief the complainant was attempting to commit. Reliance is placed in the ruling of *Kishen Lal v. Emperor* (1) and on Hallifax, A.J.C.'s decision in the case of *Jaipal Kunbi v. Emperor* (2) in support of the view that a Court can *suo motu* take cognizance of the question of right of private defence though not pleaded. I think the accused's act of assault was by way of resentment against the complainant's unlawful act of removing the stones, and that the matter was so trivial that the accused should not have been convicted. The case devoid of all [the exaggerations in which it was designedly clothed by the complainant disclosed no such grave offence as called for punishment or imposition of such heavy fines. The accused as owner of their own premises were entitled to make any use they chose of the same, provided they did not in any way interfere with the enjoyment by the complainant of his right of way within reasonable limits. The person entitled to the right of way cannot make an excessive user of the right much less can he act arbitrarily and in a high handed manner so as to render the beneficial enjoyment by a servient owner of his own premises impossible or fraught with many difficulties.

On the whole I think the case was not a fit one for conviction. The convictions and sentences passed against the three accused are set aside and the fines are ordered to be refunded if they have in the meantime been realized.

G. R. D.

K. S. D.

Convictions set aside.

(1) 85 Ind. Cas. 245; 22 A. L. J. 501; (1924) A. I. R. (A.) 645; L. R. 5 A. 177 Cr.; 26 Cr. L. J. 501.

(2) 66 Ind. Cas. 665; (1922) A. I. R. (N.) 141; 23 Cr. L. J. 313.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 228 OF 1925.

June 9, 1925.

Present:—Mr. Justice Banerji.

MULA—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 423—Penal Code (Act XLV of 1860), ss. 411, 457—Charge, alteration of—Appellate Court, power of.

A charge cannot be so altered by an Appellate Court as to make it necessary for the accused to

meet an absolutely different case from that with which he was charged in the Trial Court.

Where an accused person is tried for an offence of house-breaking in order to commit theft, under s. 457, Penal Code, together with other accused persons charged with the offence of being in possession of stolen property on different dates, under s. 411, Penal Code, he cannot in the Appellate Court be charged with and convicted for an offence under s. 411, Penal Code.

Criminal revision from an order of the Additional Sessions Judge, Moradabad, dated the 21st March 1925.

Mr. Saila Nath Mukerji, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The petitioner before me, Mula, was put up along with five other persons for trial before a Magistrate of the First Class at Bijnor. The order of the Magistrate at the beginning says: "The accused.....have been sent up for trial for offences under ss. 457/411 of the Indian Penal Code by the Nagina Police." It seems to me that the learned Magistrate while writing the judgment clearly forgot what was the charge he had himself framed against each of the accused, and what was the case he was trying. Different accused were charged with different offences on different dates. Mula the petitioner and his brother Harbansa were charged, according to the charge-sheet which is before me, with having on the 11th of August 1924 "broken open the house of Indra by night in order to commit theft," an offence punishable under s. 457 of the Indian Penal Code. Kanhaiya was charged with the offence of being in possession of stolen property on the 7th of September 1924. Jhuna was charged with being in possession of stolen property on the 8th of September 1924. Two others, Chunwa and Fullu, appear to have been charged under s. 457, but I am unable to find out the actual charge-sheets. Losing sight of what charge had been framed against each of the accused, the Magistrate treated the case as if the accused had been charged under s. 457, or in the alternative s. 411 of the Indian Penal Code. The Magistrate convicted Mula under s. 457. I have not the case of the other before me. Mula appealed to the learned Sessions Judge, and the learned Sessions Judge, holding that the conviction of Mula could not be recorded under s. 457, found him guilty under s. 411 of the Indian Penal Code. He says: "I alter the charge but maintain his conviction."

Now the only charge that Mula was called upon to meet, according to the charge framed against him at the trial, was that he had broken open the house of Indra by night in order to commit theft on the night of the 11th of August 1924. He had to meet the evidence—actual evidence, if any, of his being seen on or about the 11th of August 1924, and although the evidence of being in possession of a portion of the property on the 8th of November 1924 might be used against him along with other evidence, I am clearly of opinion that the charge cannot be so altered by an Appellate Court as to make it necessary for the accused to meet in absolutely different case from that with which he is charged in the Court of the Committing (?) Magistrate. I find, however, that Mula was asked about the *parat*, and his answer was that he had been in possession of the *parat* for 15 years, and that it was a present to him from his father-in-law. Had the charge really been that he was found in possession of a stolen *parat* on the 8th November, he might have made an attempt to meet it. In view of the fact that the other accused were charged with being in possession of stolen property on different dates, I hold that it was not right and proper for the Sessions Judge to frame a new charge and convict him thereof on appeal.

I, therefore, set aside the conviction and sentence of Mula under s. 411 of the Indian Penal Code and I direct that he be forthwith released. The fine if paid will be refunded.

N. H.

Conviction set aside.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 132 of 1924,
July 21, 1924.

Present:—Mr. Hallifax, A. J.C.
BHURA alias TURAH—ACCUSED
—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 239, 545—Articles belonging to two different persons, theft of—Offences, whether distinct—Payment of money as indemnity—Order directing payment, whether legal.

The fact that the articles stolen, happen to belong to two different persons does not make the theft two

offences when it is committed in the course of one transaction.

There is no provision in Ch. XLIII or s. 545 of the Cr. P. C. for ordering the payment of a sum of money to the owner of the article stolen by way of indemnity.

Appeal against the finding and sentence of the District Magistrate, Seoni, dated the 5th June 1924, in Criminal Cases Nos. 7 and 8 of 1924.

JUDGMENT.—The appellant has been convicted of two offences of theft, for stealing two bullocks belonging to different owners. Each bullock failed to return to its home from the grazing ground on a Sunday evening. The two herds were certainly not far from one another and were probably grazing together; there is anyhow nothing in the evidence to indicate the contrary. In the afternoon of the following Friday the appellant was seen skinning the two bullocks that were missing, and each of them had its throat cut. There is much in this to show that the appellant stole the two bullocks at the same time, in one enterprise, and there is certainly no proof or even suggestion that he stole them separately.

That is one theft, and the fact that the bullocks happened to belong to different owners cannot make it two. One of the two sentences of rigorous imprisonment for consecutive periods of five years cannot, therefore, stand. The conviction of the appellant for one of the two offences and the sentence of rigorous imprisonment for five years for that offence are set aside. The conviction for one offence of theft and the sentence of rigorous imprisonment for five years (including solitary confinement for three months) and the order passed under s. 565 of the Cr. P. C. are maintained.

The bullock of which the skin was marked Article A in Court belonged to Pancham Lohar. The skin marked Article B was of a bullock belonging to Roshanlal Kurmi which was under attachment for arrears of *takavi* and in the custody of the Nazir. The axe and the two knives found with the accused were marked C, D and E. The concluding paragraph of the judgment of the lower Court is as follows: "The skin Ex. A be returned to Pancham Lohar. The skin Ex. B and articles C, D and E be forfeited to Government, to be sold after the period of appeal. I further direct that Roshanlal Kurmi the owner of the

second bullock, be indemnified, to the extent of Rs. 25 for the loss of the animal as it occurred while under attachment: the amount to be credited against the *takavi* due by him to Government and the balance, if any, refunded."

Whether the learned Magistrate has, as Deputy Commissioner, some fund from which this sum of Rs. 25 is to be paid I cannot say, though I have never heard of one. There is certainly not one on which the District Magistrate can draw, and there is no provision in Ch. XLIII or s. 545 of the Cr. P. C. for the ordering of any such payment. Then again to indemnify Roshanlal, which comes to indemnifying the Government, and not to indemnify Pancham is to make a very invidious distinction. Further the compensation ordered to be paid to Roshanlal is Rs. 25 minus the value of the skin of his bullock.

The whole of this order is set aside and the following order is passed in its place. The skin of Pancham Lohar's bullock (Article A) will be returned to him. That of Roshanlal Kurmi's bullock (Article B) will be sold and the proceeds will be credited in satisfaction of the debt due by him to Government for *takavi*, and any balance that there may be will be handed over to him. The axe (Article C) and the two knives (Articles D and E) will be confiscated and sold.

G. R. D.

K. S. D.

Order set aside.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 184 OF 1924.

(CRIMINAL REVISION PETITION No. 161 OF 1924).

October 2, 1924.

Present:—Mr. Justice Jackson.

CHAIRMAN, MUNICIPAL COUNCIL,
CHICACOLE—COMPLAINANT—PETITIONER
versus

GAJIREDDI SEETHARAMAYYA

NAIDU—ACCUSED—RESPONDENT.

Madras District Municipalities Act (V of 1920), ss. 219 (1), 313 (c)—Chairman's notice for removal of dangerous tree disobeyed—Offender prosecuted—Duty of Criminal Court.

If the Chairman of a Municipality prosecutes a person for non-compliance with a notice for the removal of a dangerous tree, the Criminal Court has only to see whether the notice was properly served and was disobeyed. It has no business to go into

the question whether the Chairman was right in thinking the tree to be dangerous.

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Chicacole, in Criminal Appeal No. 67 of 1923, preferred against the judgment of the Court of the Stationary Sub-Magistrate, Chicacole, in C. C. No. 147 of 1923.

Mr. P. V. Rangaram, for the Petitioner.

Mr. B. Jagannadhadas, for the Respondent.

Mr. A. S. Sivagaminathan, for the Public Prosecutor, for the Crown.

ORDER.—This is a petition by the Chairman of Chicacole Municipality, seeking to set aside the judgment of the Sub-Divisional Magistrate in Criminal Appeal No. 67 of 1923, reversing the judgment of the Sub-Magistrate of Chicacole, in C. C. No. 147 of 1923.

The Chairman issued a notice to the respondent under s. 219 (1) of the Madras Act V of 1920, calling upon him to remove a dangerous tree. The respondent failed to comply with this notice and was prosecuted under s. 313 (c) of the same Act. The only points for determination in such a case are whether the order under s. 219 (1) is lawful, and whether that order has not been complied with. The Sub-Divisional Magistrate has gone into the question, whether the Chairman was right in thinking the tree to be dangerous. He can at most consider whether the tree never appeared to the Chairman to be dangerous; without considering whether the Chairman was justified in forming such an impression, for instance, if a tree were one foot high, a Court might hold absolutely that it never appeared to be dangerous. But in this case it is proved that the tree is a sloping coconut palm which overhangs a house, and was reported by the Sanitary Inspector to be dangerous. On this evidence, a Court cannot hold that there were no grounds on which the Chairman could form an opinion. Whether he was justified in forming his opinion is not a matter to be decided. The notice on the facts stated by the Sub-Divisional Magistrate was quite lawful and it was clearly disobeyed. The petition is allowed and the order of the Appellate Court is reversed. The appeal should be re-heard in the light of the above remarks. Possibly there is room for compromise.

Most coconut trees can be rendered

safe with stay ropes and a platform under the head of the palm; but the matter is entirely within the discretion of the local authorities.

V. N. V.

S. D.

Case remanded.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1842 OF 1923.

January 3, 1924.

Present:—Mr. Justice Martineau.

HAZARA SINGH AND OTHERS—
APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 231—
Charge amended—Accused's right to re-call and cross-examine witnesses.*

If a charge is amended the accused is entitled to re-call and cross-examine any of the prosecution witnesses and not only those witnesses on the basis of whose evidence the charge was amended.

Case referred by the Sessions Judge, Hoshiarpur.

FACTS.—The applicants were charged in the Court of the Additional District Magistrate under s. 216, Cr. P. C., for harbouring one Karm Singh. In the original charge, it was not stated that Karam Singh was wanted by the Police for an offence under s. 302, Indian Penal Code. The charge was, therefore, amended subsequently so as to bring the case under the first part of s. 216, Indian Penal Code. The Counsel for the applicants wanted to cross-examine the witnesses, but the lower Court refused to grant them opportunity to re-call any witnesses except those on the basis of whose evidence the amendment of the charge was made.

The accused were charged under s. 216, Indian Penal Code and the charge was subsequently amended and further cross-examination of prosecution witnesses was disallowed by Sheikh Mahbub Bakhsh, exercising the powers of an Additional District Magistrate of the First Class in the Hoshiarpur District, by order, dated 20th August and 25th September, 1923.

The accused are on bail.

GROUND.—An application for revision of the above proceedings has been now filed. It is contended that the applicants should not have been charged under s. 216,

Indian Penal Code and that the amendment of the charge at late stage was prejudicial to them. It is also urged that the lower Court has, in any case, erred in not allowing the applicants to re-call such witnesses as they liked for further examination. The first ground has I think, no force. The lower Court had wide powers of amendment under s. 227, Cr. P. C., and there is no justification for interference at this stage. The second contention, however, seems correct. Under s. 231, Cr. P. C., the applicants had the right to "re-call or re-summon and examine with reference to such alteration or addition (in the charge) any witness who may have been examined." The right is thus not restricted to the re-calling of those witnesses only who have deposed to the subject-matter of the alteration or amendment in the charge. The other witnesses also may conceivably be in a position to depose to facts in connection with such alteration or amendment. All that the Court can do is to restrict the examination of the witness to the alteration or amendment in the charge.

I, therefore, submit the records to the Hon'ble High Court with the recommendation that the orders of the Additional Magistrate, dated 15th September 1923 with reference to the re-summoning of the witnesses be set aside.

JUDGMENT.—I agree with the learned Sessions Judge. The Magistrate was wrong in refusing to allow the accused to re-call for cross-examination witnesses other than those on the basis of whose evidence the charge has been amended, and I direct that the accused be allowed in accordance with s. 231 of the Cr. P. C., to re-call and examine with reference to amendment any witness who has been examined.

S. D.

Reference accepted.

PATNA HIGH COURT.

CRIMINAL APPEAL No. 116 OF 1924.

September 9, 1924.

Present:—Mr. Justice Kulwant Sahay.

HARIHAR SINGH AND OTHERS—

APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 34—Criminal act done in furtherance of common intention.

In order to convict a person for an offence with the aid of the provisions of s. 34 of the Penal Code, it is not necessary that that person should actually with his own hand commit the criminal act. If several persons have the common intention of doing a particular criminal act and if in furtherance of that common intention all of them join together and aid or abet each other in the commission of the act, then although one of these persons may not actually with his own hand do the act, if he helps by his presence or by other acts in the commission of the act, he would be held to have done that act within the meaning of s. 34. [p. 156, col. 1.]

Emperor v. Barendra Kumar Ghose, 81 Ind. Cas. 353; 28 C. W. N. 170; 38 C. L. J. 411; (1924) A. I. R. (C.) 257; 25 Cr. L. J. 817, referred to.

Appeal against an order of the Sessions Judge, Shahabad.

Mr. Hyder Imam, for the Appellants.

The Government Pleader, for the Opposite Party.

JUDGMENT.—The appellant Harihar Singh has been convicted by the Sessions Judge of Shahabad under s. 324, Indian Penal Code and sentenced to 18 months' rigorous imprisonment and the appellant Jugal Singh has been convicted under s. 324/34, Indian Penal Code and sentenced to 6 months' rigorous imprisonment. They have been found guilty of voluntarily causing hurt to one Brahamdeo Singh who is distantly related to the appellants. The prosecution story shortly stated is as follows:—

Harihar Singh is the uncle of Jugal Singh. One Charittar Singh who was also charged along with the appellants for an offence under s. 324 read with s. 34, Indian Penal Code but has been acquitted by the learned Sessions Judge is a cousin of Harihar Singh two or three degrees removed. The complainant Brahamdeo Singh is also a distant cousin of Harihar Singh. Harihar Singh had another cousin Kartik Deo Singh who died about ten years ago leaving a young widow Musammatt Piaro Kuer. This Kartik Deo Singh was the first cousin of Harihar Singh. The complainant Brahamdeo Singh had some intrigue with the widow Musammatt Piaro Kuer and about 2 or 2½ years ago he eloped with the widow and went to Calcutta with her. The widow, however, left Brahamdeo Singh at Calcutta and there is no trace of her. The appellant Harihar Singh and the members of his family were highly enraged with Brahamdeo Singh for taking away the widow and for fear of the appellants and his family, Brahamdeo Singh stayed at Calcutta for about 2 or 2½ years and accepted service there as the gateman in the Howrah Railway Station. It is

alleged that Brahamdeo Singh had left three nephews at his house at Brarhi when he went to Calcutta and in his absence the appellants vexed the nephews so much that they had to leave the house and they went to reside with a relative of theirs in a different village. Brahamdeo Singh returned to his village about four months before the occurrence. He first went to the place where his nephews were living and then he came to his house at Brarhi. He found that the doors and shutters of his house had been taken out and everything else had been removed and the two appellants and Charittar Singh were sitting in the courtyard of the house. He enquired from them as to what had become of the doors and shutters upon which the appellants and Charittar Singh chased him with the object of beating him with *lathis*. Brahamdeo Singh fled from the place and went direct to Buxar where he filed a complaint before the Sub-Divisional Magistrate. Upon a report of the Police the Sub-Divisional Magistrate summoned the appellants and Charittar Singh and a case under ss. 447 and 352, Indian Penal Code was started against them. Brahamdeo Singh was living at the place of his relatives or friends at different places and on the 10th February, 1924, a Court peon Abdul Mian went to Brarhi to serve summons upon the witnesses in the case under s. 447 against the appellants. Brahamdeo Singh went to Brarhi to have the summons served and was sitting at the *darwaja* of Bahadur Singh prosecution witness No. 10. The summonses, however, could not be served upon the witnesses inasmuch as none of the witnesses was found at their homes and the Court peon left the place at about 1 P. M. The complainant, however, stayed in the *dhaba* of Bahadur Singh and Nirbhai. Bahadur Singh and Rampalak Singh and others were also sitting in the same *dhaba*. It is alleged that while Brahamdeo Singh was lying down in the *dhaba* with his head supported on the palm of his hand and was talking with Rampalak Singh, witness No. 5 the appellants and Charittar Singh came at the *dhaba* the appellant Harihar Singh being armed with a sword and the appellants Jugal Singh and Charittar Singh being armed with *lathis* and while Charittar Singh and Jugal Singh stood at the entrance of *dhaba* Harihar Singh struck Brahamdeo Singh with a sword twice. The first blow hit him on the left knee cap

upon which Brahamdeo Singh stood up and while he was getting up Harihar Singh aimed a second blow with the sword which Brahamdeo Singh warded off, but in doing so had his two fingers of the left hand injured. The witness Rampalak Singh attempted to seize the sword and he was also slightly injured. The complainant Brahamdeo Singh fled from the place through one of the doors of the *dhaba* and went straight to the Police Station where he lodged his first information at 7 P. M. the occurrence having taken place in the afternoon of the 10th February 1924.

[After discussing the evidence for prosecution and defence his Lordship concluded as follows:—]

I see no reason to differ from the learned Sessions Judge that it was Harihar Singh who inflicted the injuries on the person of Brahamdeo with a sword. The conviction of Brahamdeo Singh under s. 324, Indian Penal Code is, therefore, correct and the sentence appears to be appropriate.

As regards Jugal Singh he has been convicted under s. 324 read with s. 34, Indian Penal Code. The evidence so far as he is concerned is clear that he went to the place of occurrence with Harihar Singh and had a *lathi* in his hand that he stood at the door with the *lathi* while Harihar Singh struck Brahamdeo with the sword. There is evidence that when Brahamdeo Singh wanted to run away Jugal obstructed his passage and prevented him from getting out of the *dhaba*. That he came with Harihar Singh and was standing at the entrance of the *dhaba* with the *lathi* in his hand is deposed to by almost all the prosecution witnesses and there is no reason to differ from the learned Sessions Judge about his presence with the *lathi* at the place of occurrence. The question is, whether he can be convicted under s. 324 read with s. 34, Indian Penal Code. In order to make him liable under s. 324 it is necessary to prove that the criminal act of assaulting Brahamdeo was done by Jugal Singh also. It has been argued by the learned Counsel for the appellants that upon the evidence it is clear that Jugal Singh did not take part in the assault and, therefore, he is not a person by whom the criminal act was done in the present case as provided by s. 34 of the Indian Penal Code. Section 34 provides that when a criminal act is done by several persons in furtherance of the common intention of all each of such persons is liable

for that act in the same manner as if it were done by him alone. The question is whether in the present case the criminal act, namely, the assault upon Brahamdeo Singh was done by Jugal Singh within the meaning of s. 34, Indian Penal Code. The question as regards the proper meaning and effect of s. 34 has been the subject of consideration in a large number of cases. The latest case in which the question was very exhaustively considered by a Full Bench of the Calcutta High Court is the case of *Emperor v. Barendra Kumar Ghose* (1). In that case all the previous cases dealing on the point were very exhaustively considered and it was held that the question whether a particular criminal act may be properly held to have been "done by several persons" within the meaning of the section cannot be answered regardless of the facts of the case. In order to convict a person for an offence with the aid of the provisions of s. 34 of the Penal Code it is not necessary that that person should actually with his own hand commit the criminal act. If several persons have the common intention of doing a particular criminal act and if in furtherance of that common intention all of them join together and aid or abet each other in the commission of the act, then although one of these persons may not actually with his own hand do the act, if he helps by his presence or by other acts in the commission of the act, he would be held to have done that act within the meaning of s. 34.

Reliance has been placed by the learned Counsel for the appellants upon the case of *Strughan Patar v. Emperor* (2). The facts of that case, however, have no application to the present case. It was distinctly found in that case that the appellant Satrugan had no intention to kill Upendra Mahto and that he did not assist the actual murderers in any way to accomplish their object. In the absence of any evidence of common intention there could be no conviction under s. 302 of the appellant Strughan for murder read with s. 34 of the Indian Penal Code. In the present case upon the evidence there can be no doubt that both Jugal and Harihar Singh had the common intention of assaulting Brahamdeo Singh and that Jugal was actually present and actively took part in the commission of the act by Harihar Singh.

Upon the evidence in this case the conviction of Jugal Singh under s. 324 read with s. 34 is a proper conviction and there is no ground to interfere with his conviction or sentence either.

The result is that the conviction and sentence of both the appellants are confirmed and the appeal is dismissed.

S. D.

Appeal dismissed.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 96 OF 1925.

February 27, 1925.

*Present:—*Mr. Justice Zafar Ali.

KARTAR SINGH AND ANOTHER—

APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 366—Abduction—Girl accompanying accused without compulsion—Offence.

A married girl, 16 years of age, accompanied the accused from place to place under circumstances which did not show that she was acting under compulsion:

Held, that the accused could not be convicted of an offence under s. 366 of the Penal Code, inasmuch as the conduct of the girl showed that there was no abduction.

Criminal appeal from an order of the Sub-Divisional Magistrate, Kasur.

Dr. Nand Lal, for the Appellants.

JUDGMENT.—Kartar Singh and Jiwan Singh *Jats* and Manghat Ram *Brahman* have been convicted of abducting *Musammatt Fatima* and raping her, and sentenced under ss. 366 and 376, Indian Penal Code, to rigorous imprisonment for three years for each offence.

Musammatt Fatima is a Mussalman married girl of about 16 years of age. She was living with her brother Siraj Din in the village Luliani, and a complaint under s. 498, Indian Penal Code, lodged by her husband against Kartar Singh (appellant) and her brother Siraj Din and others was pending, and she had to appear before the Magistrate on the 25th of February 1924. The prosecution story is that on the night of the 20th February 1924, at about 11 P.M. the three appellants (as well as Sardara who is absconding) gained access into the house of Siraj Din and took away *Musammatt Fatima* by force. But though the Police Station is only 50 *karams* from the

(1) 81 Ind. Cas. 353; 28 C. W. N. 170; 28 C. L. J. 411 (1924) A. I. R. (C.) 257; 25 Cr. L. J. 817.

(2) 50 Ind. Cas. 337; 20 Cr. L. J. 289.

house of Siraj Din, he did not invoke the assistance of the Police immediately nor did he organise a party of his neighbours and villagers to run after the culprits and to rescue the girl from their hands. He laid information at the Police Station on the 22nd February at 3-30 P. M., and the story of abduction related in this belated report is not corroborated by a single neighbour or independent witness. It is strange that no neighbour came to the rescue of the girl nor could be produced to show that an outcry arose from the house of Siraj Din when the girl was abducted.

Even after the alleged abduction the girl nowhere did or said anything which should indicate that she was accompanying the men from place to place under compulsion. She remained with them for about six months out of which four or five were passed at the village Amonke. She was taken to Lahore also and there kept in a *serai* in the Anarkali Bazar. From Lahore she was brought to Kasur in a taxi-car, but neither to the man in charge of the *serai* nor to the taxi-car driver nor to any inhabitant of the village Amonke did she complain that she had been abducted. If she had been unwilling to remain with these men it is strange that she found no opportunity for seeking assistance and making a disclosure of what had happened to her. In the light of all these circumstances it appears that the case is one of elopement and not of abduction.

I, therefore, accept the appeal, set aside the convictions and sentences and order that the appellants be released from jail forthwith.

Z. K.

*Appeal accepted.***MADRAS HIGH COURT.**

CRIMINAL REVISION CASE No. 576 OF 1924.
(CRIMINAL REVISION PETITION No. 479 OF 1924).

January 8, 1925.

Present:—Mr. Justice Srinivasa Iyengar.

THADIAPPAN *alias* RAMIAH—

COMPLAINANT—PETITIONER

versus

VEERAPERUMAL THEVAN AND ANOTHER

—ACCUSED Nos. 4 AND 5—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 250.

Recording of reasons essential for awarding compensation—Policy underlying s. 250.

Section 250, Cr. P. C., requires, before an order for compensation could be made by a Magistrate, not only that he should be satisfied that the accusation was either frivolous or vexatious but that the Magistrate, directing compensation to be paid, should record his reasons for making such a direction. The recording of the reasons, for ordering compensation to be paid, is almost a condition precedent to the proper exercise of the power and is in addition to the finding of the Magistrate that the accusation was either frivolous or vexatious. [p. 158, col. 1.]

The reasons must go to show, why it is that the Magistrate considers the accusation against the accused, to be frivolous or vexatious and why in his opinion it is a fit case, in which an order for compensation should be made. The policy of the Legislature in requiring that in such a case the reasons should be recorded in writing is to afford an opportunity to an Appellate or Revising Tribunal to consider the sufficiency of the reasons so recorded. [*ibid.*]

"That no case is made out against any of the accused, that some of the accused were added vexatiously, that the complainant has shown no cause why he should not be ordered to pay compensation, and that, therefore, he is directed to pay compensation," is not a proper compliance with the provisions of s. 250, Cr. P. C. [p. 158, cols. 1 & 2.]

Petition, under ss. 435 and 439 of the Cr. P. C., praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional Magistrate, Devakottai, in Criminal Appeal No. 37 of 1923, preferred against the judgment of the Court of the Taluk Second Class Magistrate, Sivaganga, in C. C. No. 61 of 1923.

Mr. V. Ramaswami Iyer, for the Petitioner.

The Public Prosecutor, for the Crown.

ORDER.—The petitioner, in this case, was the complainant and the respondents were accused Nos. 4 and 5. The Sub-Magistrate found that no case had been made out against Nos. 4 and 5 and discharged them. But at the same time, he made an order asking that the complainant should pay accused Nos. 4 and 5 compensation of Rs. 30 each. The portion of the Sub-Magistrate's judgment, that deals with this order, for payment of compensation is in the following terms:—

"As no case is made out against any of the accused, I discharge them under s. 253 (1) of the Cr. P. C. I further find that accused Nos. 4 and 5 have been vexatiously added as accused. The complainant was directed to show cause why he should not be ordered, under s. 250, Cr. P. C., to pay compensation to accused Nos. 4 and 5. The complainant had no sufficient cause to show. I, therefore, further direct that the complainant do pay to each of the

accused, accused No. 4 and accused No. 5, a compensation of Rs. 30."

Section 250, Cr. P. C., requires, before an order for compensation could be made by a Magistrate, not only that he should be satisfied that the accusation was either frivolous or vexatious but that the Magistrate, directing compensation to be paid, should record his reasons for making such a direction. On a proper reading of the section, it seems to me that the recording of the reasons, for ordering compensation to be paid, is almost a condition precedent to the proper exercise of the power. The recording of the reasons is in addition to the finding of the Magistrate that the accusation was either frivolous or vexatious. No doubt there are no words in the section calculated to indicate what the reasons recorded should be. But obviously the reasons must go to show, why it is that the Magistrate considers the accusation against the accused, to be frivolous or vexatious and why in his opinion it was a fit case, in which an order for compensation should be made. The learned Public Prosecutor has contended before me that having regard to the terms of the section, it is not necessary for the Magistrate more than merely to state, that he finds the accusation to be frivolous or vexatious and that such a statement, when recorded in writing would be a sufficient compliance with the provisions of the section. I cannot agree. I am satisfied that, at any rate, the reasons for the Magistrate finding the accusation to be frivolous or vexatious must be set out. Even this is absent in the order under reference. All that the Magistrate says is that no case has been made out, and no reasons are given why the Magistrate considered the accusation against the accused Nos. 4 and 5 to be vexatious. The policy of the Legislature in requiring that in such a case the reasons should be recorded in writing is obviously to afford an opportunity to an Appellate or Revising Tribunal to consider the sufficiency of the reasons so recorded. In the absence, therefore, of any reasons recorded by the Magistrate, as regards the sufficiency of which any Appellate or Revising Tribunal might have an opportunity to judge, I cannot think that there has been a proper compliance with the provisions of the section. The learned Public Prosecutor has adverted to the word "added" in the expression "vexatiously added" as indicating

the reasoning in the mind of the Magistrate that in his opinion accused Nos. 4 and 5 were merely added vexatiously by the complainant. But the expression "added" had obviously reference only to the fact that there were other accused in the case; and I cannot in any case consider that a single word can be regarded as containing a record of the reasons, required by the section, to be given by the Magistrate, in making an order for compensation.

I may also point out that the Appellate Magistrate in this case in para. 3 states the following:—"As none of the prosecution witnesses has said anything implicating accused Nos. 4 and 5 in the lower Court, they have been rightly awarded a compensation, at the cost of the complainant." If this statement of fact were correct, I have no doubt that it might amount to a proper reason for awarding compensation; but unfortunately this is a statement made not by Magistrate, who made the order for compensation, but by the Appellate Magistrate and what is more the statement is obviously incorrect. There was at least one witness, on the prosecution side who directly spoke to the accused Nos. 4 and 5 being present. In these circumstances, I consider that the very wholesome provision of law in s. 250 of the Cr. P. C., requiring the Magistrate to record his reasons, for ordering a compensation to be paid has not been complied with and that, therefore, the order for compensation is wrong and should be set aside. If the compensation ordered has already been paid to the accused Nos. 4 and 5, they will be directed each to re-pay the amount to the complainant.

S. D.

Petition allowed.

PATNA HIGH COURT.

CRIMINAL REVISION No. 397 OF 1924.

September 9, 1924.

Present :—Mr. Justice Kulwant Sahay.

Sri HARNANDAN DAS—APPLICANT

versus

ATUL KUMAR PRASAD AND OTHERS—

OPPOSITE PARTIES.

Criminal Procedure Code (Act V of 1898), s. 203—Complaint dismissed under s. 203—Reasons, whether to be recorded.

It is incumbent upon a Magistrate to record briefly his reasons for dismissing a complaint under s. 203, Cr. P. C. [p. 159, col. 2.]

Criminal revision from an order of the District Magistrate, Bhagalpur.

Mr. Aniruddhaji Burman, for the Applicant.

JUDGMENT.—This is an application against an order passed by the Sub-Divisional Magistrate of Madhipura dismissing the complaint of the petitioner under s. 203 of the Cr. P. C. The order has been upheld by the District Magistrate of Bhagalpur when a petition of revision was filed before him. It appears that on the 27th November 1923 the petitioner lodged a complaint before the Sub-Divisional Magistrate charging the accused persons who are the opposite party in the present application with having uprooted a bamboo *dhwaja* or flag and demolished a platform near the temple of Mahabirji of which the petitioner alleges to be the *shebait*. He further complained that the accused persons had way-laid the petitioner while he was going to the Police station to lodge information about the occurrence and to have assaulted him and snatched away his wrapper and a sum of Rs. 21 which he had about him. The learned Sub-Divisional Magistrate by his order, dated the 27th November, ordered an enquiry to be made by Babu Kali Prasanna Banerji, Tahsildar of the Burdwan Estate, under s. 202, Cr. P. C. There was, however, some delay, in the papers being sent to Babu Kali Prasanna Banerji and before the order could be communicated to him he had left the place for Burdwan. It appears that the *peshkar* was responsible for this delay. Thereupon one Babu Tej Narain Sinha, Honorary Magistrate, was requested to make the enquiry and submit a report. He submitted his report on the 9th February, 1924, in which he stated that the allegation of the complainant about the *dhwaja* being uprooted by the creatures of the *zemindar* was true but that his other allegations about the theft of money and of the wrapper were exaggerations. It further appears from his report that the dispute is going on between the petitioner and Atul Kumar Prasad alias Tulo Kumar, the opposite party in the proceeding who is a *zemindar* of the village and that in a suit brought by the petitioner for declaration of his title and possession of certain land against Tulo Kumar he has obtained a decree for possession and that it was on account of the dispute between the parties, Tulo Babu ordered the *dhwaja* to be uprooted and the platform to be demolished.

Now, on receipt of this report the learned Sub-Divisional Magistrate by his order, dated the 12th February, 1924, dismissed the complaint under s. 203, without giving any reason whatsoever. His order of the 12th February 1924, runs thus:—

“Dismissed s. 203, Cr. P. C., *vide* enquiry report.” Now, under s. 203, Cr. P. C., it was incumbent upon the Sub-Divisional Magistrate to record briefly his reason for dismissing the complaint. No reasons whatsoever are given in his order of the 12th February, 1924. He merely refers to the report of the Honorary Magistrate but on referring to the report of the Honorary Magistrate it appears that the allegations of the petitioner about the uprooting of the *dhwaja* and the demolition of the *chabutra* are correct. If that is so, the matter ought to have been enquired into. The learned Sub-Divisional Magistrate has sent a long explanation in reply to the notice issued by this Court, but he deals with matters which are wholly irrelevant to the present application and no one has appeared on behalf of the accused persons to show cause against the present application. I think the order of the learned Sub-Divisional Magistrate dismissing the complaint under s. 203 is bad in law and ought to be set aside and the case must be sent back to him for disposal according to law.

S. D.

Revision allowed.

ODDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 403 OF 1925.

August 18, 1925.

Present:—Mr. Simpson, A. J. C.

SHEO DARSHAN—PLAINTIFF—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 300 (c)—Loss of temper—Lathi blow causing fracture of skull—Offence.

A person who loses his temper and strikes another person on the head with a lathi causing extensive fracture of the skull resulting in the death of the deceased within a few hours, is *prima facie* guilty of murder under s. 300, cl. (c), Penal Code.

Appeal against an order of the Sessions Judge, Hardoi, dated the 4th June 1924.

Mr. R. F. Bahadurji, for the Appellant.

The Government Pleader, for the Respondent.

JUDGMENT.—Sheo Darshan appeals from a conviction under s. 304, Indian Penal Code of culpable homicide and a sentence of four years' rigorous imprisonment. Sheo Darshan is eighteen to twenty years old. The deceased, Lala Ram, is the maternal grandfather of Sheo Darshan and the Doctor, in his *post mortem* report judged his age to be between sixty and sixty-five. Lala Ram has provided his daughter, the mother of the accused, with a house in his own compound, so that the two houses are close together. A quarrel arose over some miserable matter of whether Sheo Darshan was to pay three rupees or two rupees for the hire of a sugar mill. The accused lost his temper and struck his grandfather on the head with a *lathi*, causing extensive fracture of the skull of which the old man died within a few hours. The facts are quite clear. There is no substance in the plea of self-defence. The suggestion is that the old man was also angry and waved a stick at his grandson. This would furnish no excuse at all. The allegation that the deceased actually struck his grandson is supported by the evidence of one witness only, and he has been disbelieved by the Court of Trial. The appellant has got off lightly. His action is not distinguishable from Illustration (c) of s. 300 and is *prima facie* murder. He ought to have been committed on a charge of murder. If that had been done he might possibly have escaped under sub-s. (4). It is, doubtful, but I do not think it necessary to take up that point in this appeal. The appeal is dismissed.

S. D.

Appeal dismissed.

PATNA HIGH COURT.

CRIMINAL REVISION No. 341 of 1924.

July 22, 1924.

Present:—Mr. Justice Adami and
Mr. Justice Macpherson.

SOBHIT MALLAH—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 250 (3)
—Right of appeal depends on total amount of compensation.

Under s. 250 (3), a complainant's right to appeal depends on the aggregate amount of compensation which he is directed to pay to all the accused. Therefore, an appeal lies where the compensation ordered to be paid to each of the several accused is less than Rs. 50, but the total amount payable to all of them exceeds Rs. 50.

Criminal revision from an order of the Sessions Judge, Muzaffarpur.

Mr. K. N. Moitra, for the Petitioner.

Mr. B. C. De for Mr. T. N. Sahay, for the Crown.

JUDGMENT.—The only question which arises in this case is whether an appeal lies against an order passed by a Magistrate of the First Class under s. 250, Indian Penal Code directing the complainant to pay to each of the several accused as compensation a sum less than Rs. 50 the aggregate sum to be paid to all the accused amounting to more than Rs. 50. In the present case the Deputy Magistrate ordered compensation of Rs. 25 to be paid to each of the eleven accused persons, the aggregate thus amounting to Rs. 275.

The learned Sessions Judge, when the appeal was brought before him against the order of compensation, held that no appeal lies under cl. (3) of s. 250 unless the compensation to be paid to any one accused is over Rs. 50. In support of his finding the learned Sessions Judge states that he holds that sub-s. (3) of s. 250 is controlled by the wording of sub-s. (2) of that section. It is difficult to understand what grounds he has for his finding, for even if sub-s. (2) does control sub-s. (3) there is nothing to show that an appeal will only lie when the compensation directed to be paid to each individual accused is more than Rs. 50. Sub-section (3) states that a complainant who has been ordered by a Magistrate to pay compensation exceeding Rs. 50 has the right of appeal. It is quite evident that it is the total amount of compensation directed to be paid by the complainant which must form the basis of the decision whether an appeal lies or not. The compensation is a fine which the complainant has to pay for instituting a false and frivolous or vexatious case and his right to appeal clearly depends on the total amount of that compensation. It is obvious that the criterion is the amount of compensation directed to be paid in the case. Section 250 begins with the words "If in any case" and in sub-s. (4) we read the words "when an order for payment of compensation to an accused person is made in a case....."

The present case must go back to the learned Sessions Judge in order that he may hear and decide the appeal according to law.

S. D.

Petition accepted;
Case remanded.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2063 OF 1924.

January 20, 1925.

Present:—Mr. Justice Campbell.

KARAM DIN AND ANOTHER—DEFENDANTS—
APPELLANTS

versus

MEHR DIN AND OTHERS—PLAINTIFFS AND
DEFENDANTS—RESPONDENTS.*Custom — Succession — Julahas of Ichhra near Lahore.*

Julahas of Ichhra near Lahore who have held land in the village with a share in the shamilat since a generation before the 1856 Settlement and have lived partly by agricultural and partly by other means, do not follow agricultural custom in matters of succession. [p. 162, col. 2.]

Second appeal from a decree of the District Judge, Lahore, dated the 24th April 1924.

Dr. Nand Lal, for the Appellants.

Mr. Raghunath Rai, for the Respondents.

JUDGMENT.—The pedigree-table of the parties is given in the judgment of the lower Appellate Court. The land with which this suit is concerned was originally the property of Umar Din and perhaps a part of it was once the property of his brother Ghulam Nabi who predeceased him. Umar Din died in 1908 leaving two widows, Musammat Murad Bibi and Musammat Nur Bhari, the latter of whom had been previously married to Ghulam Nabi. When Umar Din died all his estate was mutated in the names of his two widows, although he had a grandson surviving him named Pir Bakhsh, the son of his son Ramzan by Musammat Murad Bibi. In 1909 the two widows mortgaged some of the land to one Muhammad Bakhsh and later on the present plaintiff Mehr Din and Hasan Muhammad, collaterals of Umar Din, purchased the mortgagee rights from Muhammad Bakhsh. Then, in 1914 Musammat Murad Bibi died and her half of the estate was mutated to her grandson Pir Bakhsh. Pir Bakhsh died on the 24th March, 1921, and the land was mutated back to Musammat Nur Bhari. On the 11th June 1921 Musammat Nur Bhari sold the actual land in suit to Karam Din and Fazal Din, and the present suit is by Mehr Din and Hasan Muhammad, for a declaration that the sale is null and void.

The parties are *Julahas* of Ichhra near Lahore. The case of the plaintiffs is that they are governed by Customary Law, that the true heir of Umar Din was Pir Bakhsh, that the mutation to Musammat Murad Bibi and

Musammat Nur Bhari was wrong, that these two females never had any right to Umar Din's land which belonged to Pir Bakhsh and that they, the plaintiffs, are Pir Bakhsh's heirs.

The first issue was "whether the parties are governed by custom?" and both the Courts below concurred in finding this in the affirmative. The lower Appellate Court further held as a result that Musammat Nur Bhari must be taken to have had no right whatsoever to the land, that the sale by her was quite ineffectual, and that it was not necessary to go into the question of necessity for the sale, since it had been established that the plaintiffs were the reversionary heirs of Pir Bakhsh. The plaintiffs were given a decree as prayed for. Karam Din and Fazal Din, vendees from Musammat Nur Bhari, have come to this Court on second appeal supported by the certificate, under s. 41 (3) of the Punjab Courts Act, of the learned District Judge, that there is a question regarding the validity of a custom involved, namely, (1) whether the plaintiffs, who are weavers, are governed by Muhammadan Law or custom in respect of succession, and (2) whether in the community to which the parties belong a widow can lose her husband's estate on re-marriage with her husband's brother. I may remark that in regard to No. 2 the learned District Judge observed that there was nothing to show that the rule propounded applied to the community with which he was concerned. If this were so he had no ground for granting a certificate that this particular custom was of sufficient importance and the evidence regarding it so conflicting and uncertain, etc.

I take the first part of the certificate. The reasons for which the learned District Judge has held that the parties are governed by custom is that the Revenue Records show their ancestors to have been owners of land in the village together with a share of the *shamilat* for a very long time. According to the pedigree-table of 1868 Dhanna, father of Yaru, the common ancestor of Umar Din and plaintiffs, came to Ichhra from the *ilaka* Faridabad and brought land under cultivation. Yaru was alive and held land in the year 1856-57. The plaintiffs still hold land and have produced oral evidence that they derive income from it as well as from other sources. Mehr Din, the plaintiff, is said to be in Government service and not to cultivate land himself but to lease it

to tenants and it is said by two of his own witnesses that his sons are tailors and that he himself works as a tailor. The learned District Judge observes that the fact that the plaintiffs supplement their income from sources other than agriculture does not show that they have abandoned Customary Law. The above facts which are the basis for the finding that the plaintiffs are governed by custom, are, in my judgment, wholly insufficient. No instance has been proved of any actual observance of any of the customary rules regarding inheritance, alienation, etc., either by the plaintiffs' family or by other *Julahas* of Ichhra etc. The mutation of Umar Din's land in favour of his two widows in the presence of his grandson was not in accordance with the ordinary customary rule. It may not have been in accordance with Muhammadan Law, but that fact would not take the plaintiff's case any further. The recognition, by the plaintiffs, of the mortgage transacted by the two widows may not be conclusive either way, but, so far as it goes, it indicates an acquiescence in the claim of the two widows to be full owners, which is also inconsistent with agricultural custom. In *Habib v. Fattu* (1) the *Julahas* of Pajawa in the Ferozepore District were held to have failed to prove that they had adopted agricultural custom, although their position appears to have been stronger than that of the present plaintiffs. They had actually founded the village some 74 years before suit, together with a *Rajput* and a *Chuhra*, and since then had subsisted by tilling the soil. It was held nevertheless that there was no presumption in favour of their contention, and that such a presumption arises only in the case of agricultural tribes, such as *Rajputs*, *Gujars* and *Arains*. Another case is *Khuda Baksh v. Imam Din* (2) which related to *Kashmiris* settled in a village in the Gujrat District whose situation was very much that of the present plaintiffs. They lived largely by agriculture but were else weavers and they were recorded in the 1869 *shajra nasab* as having been among certain persons who, in 1844, had re-settled the village, since which time they and their ancestors had held and cultivated the land in the village. No instance, however, was put forward of any alienation by *Kashmiris* having been restrained by collaterals and

there was a proof of a number of uncontested alienations by members of the community. It was held that the burden lay upon the plaintiff to establish that the Customary Law of the neighbouring tribes obtained among the *Kashmiris* of that village and that he had failed to discharge that onus.

In the present case, therefore, I am unable to agree with the learned District Judge that mere ownership of land with a share in the *shamilat* since a generation before the 1856 Settlement and the living partly by agriculture and partly by other means established a presumption in favour of these *Julahas* that they followed agricultural custom. The reversal of the learned District Judge's finding on this point involves the setting aside of the decree and the return of the appeal for determination of the other points which arise from the remaining issues, notably Issue No. 2.

I accept the appeal accordingly, set aside the lower Appellate Court's decree and remand the case. The costs of this appeal and of the proceedings in the two Courts below will follow the event.

Z. K.

Appeal accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 14 OF 1924.

April 24, 1924.

Present:—Mr. Baker, J. C., and
Mr. Prideaux, A. J. C.

GOPALA—JUDGMENT-DEBTOR—
APPELLANT
versus

LAXMANSINGH AND OTHERS—DECREE-
HOLDERS—RESPONDENTS.

C. P. Tenancy Act (I of 1920), s. 49, applicability of—Mortgage of sir land—Foreclosure before C. P. Tenancy Act of 1898—Compromise after Act—Occupancy rights in sir land, whether revived.

The respondent took a mortgage from the appellant under which some part of the property in dispute was mortgaged by way of conditional sale. He obtained a foreclosure decree on the mortgage which was made absolute before the coming into force of the C. P. Tenancy Act of 1898. Subsequently appellant brought a suit to have the foreclosure decree set aside. This suit ended in a compromise under which one portion of the property was left with the mortgagee as his absolute property and the other portion passed to the mortgagor free from the incumbrance. In the meantime the C. P. Tenancy Act of 1920 had come into

(1) 69 P. R. 1908; 125 P. W. R. 1908.

(2) 1 Ind. Cas. 403; 17 P. R. 1909; 16 P. W. R. 1909;
216 P. L. R. 1908.

force and the mortgagor contended that the mortgagee could not obtain actual possession of the *sir* lands which had been left to him under the compromise as occupancy rights in the land vested in the mortgagor under s. 49 of the C. P. Tenancy Act :

Held, (1) that under the foreclosure decree the mortgagor had lost all interest in the mortgaged property and the mortgagee had become the absolute proprietor thereof and that the effect of the compromise decree was merely to vary the original decree and that it did not operate to revive the rights of the mortgagor regarding the *sir* land which he had already lost; [p. 163, col. 2; p. 164, col. 1.]

(2) that, therefore, s. 49 of the C. P. Tenancy Act had no application to the case. [p. 163, col. 2.]

Narain Ganesh Ghatate v. Baliram, 48 Ind. Cas. 141; 14 N. L. R. 165; 24 M. L. T. 345; 28 C. L. J. 447; (1918) M. W. N. 885; 23 C. W. N. 297; 21 Bom. L. R. 53; 46 C. 76 (P. C.), distinguished.

Appeal against an order in Execution Case No. 17 of 1923 of the Additional District Judge, Nagpur, dated the 22nd January 1924.

Sir B. K. Bose and Mr. D. T. Mangalmoorti, for the Appellant.

Messrs. M. Gupta, D. P. Tiwari and M. R. Indurker, for the Respondents.

JUDGMENT.—The facts of this case are that the predecessor of the respondents took a mortgage from the appellant's father under which some part of the property in dispute was mortgaged by conditional sale, and he obtained a foreclosure decree on the mortgage, which was made absolute in 1897. It is admitted that this decree being prior to the Tenancy Act of 1898, the whole proprietary interest of the mortgagor passed to the mortgagee and his occupancy right would not be saved. Subsequently, the present appellant brought a suit to have the former decree set aside on the ground that the mortgage was entered into by his father when he was a minor and that it was not to his benefit and his interests were not bound, and other pleas such as are usually taken in a case of this character. This suit ended in a compromise, under which the property was divided between the parties, some portion being left to the mortgagee as his absolute property and some passing to the mortgagor free from incumbrance on the mortgage. In the course of the execution proceedings for obtaining possession the mortgagor objected that the mortgagee could not obtain actual possession of the *sir* lands, as the occupancy tenancy rights vested in him under s. 49 of the present Tenancy Act. The date of the compromise is 6th July 1923. This objection was disallowed by the lower

Court and the mortgagor has made this appeal.

It is contended by the learned Advocate on behalf of the appellant that the question is whether the rights of the parties are to be regulated by the compromise decree or is the decree to be construed with reference to the terms of the old decree? He contends that the rights of the parties are to be decided as if the old decree did not exist. He relies on *Narain Ganesh Ghatate v. Baliram* (1), which he contends is on all fours with the present case and argues that it must be considered that the original decree on the mortgage no longer exists and has been altogether superceded by the compromise decree. The compromise decree being subsequent to the passing of the present Tenancy Act is governed by s. 49 of that Act, and the mortgagor cannot be deprived of his occupancy rights in the *sir* lands by any arrangement between himself and the mortgagee. The mortgagee, therefore, is only entitled to the proprietary rights in those *sir* lands but not to actual possession of them which must go to the mortgagor as occupancy tenant.

Under the decree of 1897 the mortgagor lost all his interest in the mortgaged property, and the mortgagee became the proprietor thereof. Whether he got actual possession or not is immaterial. The present appellant then brought a suit to have that decree set aside; that suit was compromised and by the compromise the mortgagor was given one *anna malguzari* share of *Mouza Malegaon* and certain *sir* fields named in the decree free from the mortgage.

As regards the rest of his claim the suit was dismissed and, therefore, this compromise decree does not affect the title of the mortgagee to those *sir* lands which are not given by it to the mortgagor. The mortgagor, therefore, lost his proprietary rights as regards these fields in 1897, and he has never since acquired any title to them and, therefore, he cannot be regarded as the proprietor of them, so as to take the advantage of s. 49 of the Tenancy Act. It is the defendant who is the proprietor of them and has been so ever since 1897, as admittedly no such provision as s. 49 of the present Tenancy

(1) 48 Ind. Cas. 141; 14 N. L. R. 165; 24 M. L. T. 345; 28 C. L. J. 447; (1918) M. W. N. 885; 23 C. W. N. 297; 21 Bom. L. R. 53; 46 C. 76 (P. C.).

Act or s. 45 of the old Act was then in existence. Under the decree of 1897 the defendant got absolute title to the *sir* lands, and the mortgagor cannot claim any occupancy rights in them. The effect of the compromise decree was, in our opinion, merely to vary the original decree, but even if it be taken to have superseded and extinguished the original decree, it does not purport to revive the rights of the mortgagor regarding the *sir* fields now in dispute, and, therefore, he cannot be regarded as proprietor of them.

We are of opinion, therefore, that the view of the lower Court is correct and the appeal is dismissed with costs. The respondents are entitled to their costs in the lower Court also which by an oversight have not been awarded.

S. D.

*Appeal dismissed.***LAHORE HIGH COURT.**

CIVIL REVISION No. 828 OF 1924.

February 3, 1925.

Present:—Sir Shadi Lal, Kt., Chief Justice.

SANSARI AND ANOTHER—DEFENDANTS

—PETITIONERS

versus

Musammat RAHMI—PLAINTIFF—

RESPONDENT.

Vendor and purchaser—Portion of purchase-money left with vendee to redeem mortgages on property other than that sold—Vendee, duty of—Failure to redeem mortgages—Damages, whether can be recovered.

Plaintiff sold certain land to the defendant and a portion of the purchase-money was left in deposit with the defendant for payment to certain mortgagees of land other than that sold to the defendant. Defendant failed to redeem those mortgages and the plaintiff brought a suit against the defendant to recover damages from him on the allegation that his failure to redeem the mortgages had caused loss to the plaintiff:

Held, that inasmuch as the defendant was not himself entitled to sue for redemption of the mortgages, it was the duty of the plaintiff to take steps to redeem the mortgages or to ask the defendant to refund the portion of the purchase-money which had been left with him, and that, not having done so, plaintiff was not entitled to recover any damages from the defendant.

Mr. Mukand Lal Puri, for the Petitioners.

Lala Fakir Chand, for the Respondent.

JUDGMENT.—On the 2nd March 1922, the plaintiff Musammat Rahmi sold two fields, Nos. 140 and 161, to Hako, the father of the defendants, for Rs. 7,765.

The sale-deed shows that Rs. 6,950 (not Rs. 7,850 as wrongly stated by the District Judge), out of the purchase-money, were kept in deposit with the vendee for payment to three prior mortgagees specified in the sale-deed. Now, it is clear that only one of these mortgages comprised the land which was sold to Hako, and that the remaining two mortgages had nothing to do with that land.

The present action was brought by the vendor on the ground that the vendee had failed to carry out his contract to redeem the prior mortgages in *Jeth* 1922 and that his failure had caused loss to the plaintiff. Now, the sale-deed does not contain any stipulation for redemption in *Jeth* 1922, but the learned District Judge holds that it was the duty of the vendee to redeem the property within a reasonable time, and as he failed to do so he was liable for damages to the plaintiff.

It is to be observed that the sale-deed in favour of the defendants' father did not impose upon him any duty to redeem the two mortgages which did not deal with the land sold to him. Indeed, even if he desired to redeem them he was bound to be non-suited on the ground that he was not entitled to sue for redemption. It seems to me that it was the duty of the vendor to take steps to redeem the property or to ask the vendee to refund the money to her. She did not adopt either of these two courses, and it is not clear what she expected the vendee to do. Indeed, the vendee has not gained anything by the transaction; he has already parted with a sum of Rs. 815 and has not got anything in return.

For the aforesaid reasons I hold that the defendants have not committed a breach of any express or implied contract. I accordingly accept the application for revision and dismiss the suit with costs throughout.

Z. K.

Application accepted.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 422 OF 1924.

April 1, 1925.

Present:—Mr. Justice Venkatasubba Rao
and Mr. Justice Madhavan Nair.PALANIVEL RAMASUBRAMANIA
PILLAI, MINOR, AND ANOTHER—DEFENDANTS
—APPELLANTS

versus

SIVAKAMI AMMAL—PLAINTIFF—
RESPONDENT.*Hindu Law—Mesne profits, decree for, against father—Sons' liability to pay such decree—Joint family property, whether liable to pay decree for mesne profits against father—Liability of sons in general for father's debts.*

Under the Hindu Law the sons are bound to discharge a decree for mesne profits passed against their father and the joint family property in their hands is liable to be attached in execution of such decree. [p. 165, col. 2; p. 172, col. 2.]

Per Venkatasubba Rao, J.—The expression "Avyavaharika," means "grossly immoral or flagrantly unjust." [p. 167, col. 1.]

The sons are not liable, where the moneys were originally obtained by the father by the commission of an offence; the son's liability is, on the other hand, recognised where, in its origin, the debt was not immoral, but there was supervening dishonest act of the father. [p. 168, col. 1.]

If the debt is in its inception not immoral, subsequent dishonesty of the father does not exempt the son. [p. 169, col. 1.]

It is not every impropriety or every lapse from the right conduct that stamps the debt as immoral. The son can claim immunity only when the father's conduct is utterly repugnant to good morals, or is grossly unjust or flagrantly dishonest. [ibid.]

The liability for mesne profits is not in the nature of "danda" or fine. [p. 171, col. 1.]

The word "rina" as used in the texts has a much wider application than a mere debt or loan, and the obligation to pay mesne profits is in the nature of a "rina." [ibid.]

The conduct of the father in remaining in unlawful possession of another's property cannot be said to be honest but at the same time it cannot be characterised to be so grossly unjust or immoral, or so flagrantly dishonest as to make the debt "Avyavaharika" within the meaning of the Hindu Law. [p. 171, col. 2.]

Case-law and texts discussed.

Per Madhavan Nair, J.—Under the Hindu Law the liability of a son to pay the father's debt rests upon the well-known pious obligation on the part of the son to relieve his father from punishment in a future state, for the non-discharge of debts. The general rule is that the son should discharge his father's debts unless the debts fall within the well-recognised exceptions. [p. 172, col. 2.]

An examination of the nature of the debt, at its inception, is a necessary condition, for finding out whether a particular debt is an immoral debt. [p. 174, col. 2.]

A debt, which is not immoral at its inception, is binding on the son, though subsequently it may be tainted by dishonesty and immorality. [p. 175, col. 2; p. 176, col. 1.]

Improper, imprudent, unreasonable, or dishonest debts are not necessarily immoral. [p. 176, col. 1.]

The son's liability arising by the commission of offences by the father has been always held to be immoral; and the test of benefit to the estate is not a material question for consideration as "the liability of the son depends upon the nature of the act." [ibid.]

The term "rina", strictly understood, means "what is taken under a promise to re-pay," namely, a debt or a loan. But in view of the judicial decisions, it is impossible to give the term this restricted significance [p. 177, cols. 1 & 2.]

A decree for mesne profits is in the nature of a "debt" as understood in Hindu Law. [p. 177, col. 2.]

Decree for mesne profits is not in the nature of "danda" or fine. [ibid.]

Case-law and texts discussed.

Appeal against the decree and judgment of the Court of the Subordinate Judge, Tuticorin, in E. P. No. 5 of 1923, in O. S. No. 39 of 1904.

Messrs. K. V. Venkatasubramania Iyer, and P. N. Appuswami Iyer, for the Appellants.

Mr. S. Ramaswami Iyer, for the Respondent.

JUDGMENT.

Venkatasubba Rao, J.—The question that is raised by this appeal is, whether in execution of a decree for mesne profits, the shares of the sons of the judgment-debtor in the joint family property are liable to be attached and sold. It is contended for the sons, that the obligation, recognised by the decree, is in respect of a debt, which it is not the pious duty of the sons under the Hindu Law, to discharge.

In regard to the application of the rule enunciated in the ancient Hindu Law Texts, the Courts were confronted from time to time, with great difficulty. The bare statement of the rule is simple enough. But it was found inadequate, when it had to be applied to different and various sets of facts. The result has been want of uniformity in the interpretations, as well as the application of the rule. The large body of case-law on the subject will show that the Judges while theoretically seeming to accept the rule itself, have had to decide each case, on grounds, as far as possible, of equity, justice and good conscience.

A very full, able and careful argument was addressed to us by Mr. Venkatasubramania Iyer, the learned Counsel for the appellants and he strongly contended that the son is not bound to satisfy a decree for mesne profits, passed against the father.

I shall first cite the texts, which have a bearing on this question. (See Ghose's Hindu Law, Third Edition, Vol. I, p. 531, *et. seq.*)

(1) That son alone, on whom he throws his debt and through whom he obtains immortality, is begotten for the fulfilment of the law.

(2) But money due by a surety or idly promised, or lost by play, or due for spirituous liquor, or what remains unpaid of a fine and a tax or duty, the son, (of the party owing it) shall not be obliged to pay.

Manu.

Money due by a surety, a commercial debt, a fee due to the parents of the bride, debts contracted for spirituous liquor, or in gambling, and a fine shall not involve the sons of the debtor.

Gautama.

(1) If a father have gone abroad, or been subdued by calamity, his debt shall be paid by his sons and grandsons; on their denial, the debt must be proved by witnesses.

(2) A son has not to pay, in this world, his father's debts, incurred for spirituous liquor, for gratification of lust, or in gambling, nor a fine or what remains unpaid of a toll; nor (shall be made good) idle gifts.

Yaganavalkya.

A son must pay a debt, contracted by his father, excepting those debts which have been contracted from love, anger, for spirituous liquor, games or bailments.

The words in the text translated as "contracted from love, anger" are "*kama krodha kritam.*"

Narada.

Sons shall not be made to pay (a debt incurred by their father) for spirituous liquor, for idle gifts, for promises made, under the influences of love or wrath or for suretyship; nor balance of a fine or toll (liquidated in part by their father).

(Promises made "under the influence of love or wrath" is the translation of *kama krodha pratisrutham.*

Brihaspati.

The son has not to pay a fine, or the balance of a fine or a tax (or toll) or its balance (due by the father) nor *Avyavaharika* or not *Vyavaharika*) that which is not proper.

(Vyasa according to the Ratnakara but Usanas according to the Mitakshara).

Subject to the following exceptions, the texts mention certain specific debts as those, which the son is not bound to pay.

In this connection, these debts specifically enumerated present no difficulty. The exceptions are the following: Narada and Brihaspati use a general expression, "debts of love or anger". Usanas uses the word "*Avyavaharika*". It is the exact import of these general expressions that requires careful examination. I shall, at once, deal with the expression *Avyavaharika* and postpone the discussion of the words "debts of love or anger" to a later part of my judgment. There has been a conflict of opinion, as regards what this word means.

In *Durbar Khachar v. Khachar Harsur* (1), Knight and Chandavarkar, JJ., say that it means more than illegal and immoral and that under the texts the son is not liable for debts, which the father ought not, as a decent and respectable man, to have incurred, that the son is answerable for the debts legitimately incurred by his father and not for those attributed to his failings, follies or caprices. This decision cannot now be regarded as good law; for, judged by this test, the son must be exempt from many debts for which, he is at the present day, without question, held liable. This interpretation does not seem to have met with the approval of Scott, C. J., and Shaw, J., in two later Bombay cases: *Ramkrishna Trimbak v. Narayan Shivrao Aras* (2) and *Hanmant Kashinath v. Ganesh Annaji* (3). In *Chakouri Mahton v. Ganga Proshad* (4), Mookerjee, J., observes that he is not satisfied that the interpretation adopted in *Durbar Khachar v. Khachar Harsur* (1) is quite accurate (page 868*) and that the decision places too restricted a construction upon the term *Vyavaharika* and excludes debts, for which the son may be held legitimately liable (page 874*). Sadasiva Iyer, J., in *Venugopal Naidu v. Ramanadhan Chetty* (5) also disapproves of the interpretation of Knight and Chandavarkar, JJ., and seems disposed to adopt Colebrooke's translation, namely, "debt incurred for a cause repugnant to good morals."

If *Durbar Khachar v. Khachar Harsur* (1) has, according to Mookerjee, J., placed too restricted a construction on the expression *Avyavaharika*; what is the true im-

(1) 32 B. 348; 10 Bom. L. R. 297.

(2) 31 Ind. Cas. 301; 40 B. 126; 17 Bom. L. R. 955.

(3) 51 Ind. Cas. 612; 43 A. 612; 21 Bom. L. R. 435.

(4) 12 Ind. Cas. 609; 39 C. 862; 16 C. W. N. 519; 15 C. L. J. 228.

(5) 14 Ind. Cas. 703; 37 M. 458; 23 M. L. J. 61; 11 M. L. T. 427.

*Pages of 39 C.—[Ed.]

port of that word? As deduced from the cases, which have refused to recognise the narrow interpretation, the right meaning may be said to be "grossly immoral or flagrantly unjust." No case has said in so many words that this is the true meaning; but this interpretation alone furnishes the key to the proper understanding of the decision. I am prepared to hold that this is the correct construction.

I shall first deal with the group of cases where the question of the pious obligation arose, in connection with the liability of the father, to account for moneys, received by him as agent, trustee, or in any other capacity.

Natasayyan v. Ponnusami (6). In this case, the defendant's father collected sums of money, on account of plaintiff's family, but neither paid them nor accounted for them. The sons were held liable, although the learned Judges expressed the view, that the transaction was a dishonest one, on the defendant's father's part.

In *Venugopal Naidu v. Ramanadhan Chetty* (5), the father was accountable as trustee, for certain sums and the sons were held liable, on the footing of general principles of morality referred to in *Natasayyan v. Ponnusami* (6). The ground of the decision is that it is a sacred obligation to restore to those lawfully entitled, the money unlawfully retained. The learned Judges observe:—

"Upon any intelligible principles of morality, a debt due by the father, by reason of his having retained for himself money which he was bound to pay to another would be a debt of the most sacred obligation, and for the non-discharge of which punishment, in a future state, might be expected to be inflicted, if in any."

With all respect, this statement does not correctly interpret the Hindu Law. Every debt that is justly due is not necessarily a debt, not tainted with illegality or immorality. On this principle, if a father steals money is it not equally incumbent upon the sons to pay it back? It is not, however, disputed that the son is under no such obligation. The question is, did the father contract the debt for an immoral purpose? And the question is not; does not morality demand that the debt should be paid back? The mistake, if I may say so with respect, arises from a confusion of stand-points. There is hardly any debt, of which it can

be said that it is not just that it should be re-paid. But the Hindu Law in dealing with the pious obligation of the son does not look at the question from this point of view.

In *Tirumalaiyappa Mudaliar v. Veerabudra* (7), *Garuda Sanyasayya v. Nerella Muthemma* (8) and *Venkatacharyulu v. Mohana Panda* (9), the sons were held liable for sums misappropriated by the father, as agent or trustee, on the ground that the debt in its inception, was honest and that subsequent dishonesty did not render it illegal or immoral.

In *Kanemar Venkappayya v. Krishna-chariya* (10), *Erasala Gurunatham Chetty v. Addipally Raghavulu Chetty* (11), *Krishna Charan Mohanti v. Radha Kanto Roy* (12) and *Niddha Lal v. Collector of Bulandshahr* (13), the sons were held liable, for sums misappropriated by the father but the judgment proceeded, on the ground that the father's act amounted not to a crime, but only to a breach of civil duty. It is impossible to understand this distinction, as, on the facts stated, the misapplication of funds was clearly criminal and rendered the father amenable to criminal law.

The argument that found favour in *Tirumalaiyappa Mudaliar v. Veerabudra* (7) does not seem to have impressed the learned Judges Mookerjee and Beachcroft, JJ., in *Krishna Charan Mohanti v. Radha Kanto Roy* (12) referred to above; for they refer to the distinction between an initial wrongful taking and a taking not wrongful, at its inception as a refined distinction and the learned Judges also seem more disposed to adopt the ground stated in *Natasayyan v. Ponnusami* (6). In my opinion, the distinction between a crime and a breach of a civil duty in this context is extremely artificial and finds no support in the texts of the Hindu Law.

Mahabir Prasad v. Basdeo Singh (14), *Pareman Dass v. Bhattu Mahton* (15) and *McDowell v. Ragava Chetty* (16) fall under a

(7) 4 Ind. Cas. 1030; 19 M. L. J. 759.

(8) 48 Ind. Cas. 740; 9 L. W. 1; 35 M. L. J. 661; 25 M. L. T. 86.

(9) 61 Ind. Cas. 530; 41 M. 214; 12 L. W. 390; (1920) M. W. N. 650; 39 M. L. J. 586.

(10) 31 M. 161; 17 M. L. J. 613; 3 M. L. T. 353; 2 M. L. T. 529.

(11) 31 M. 472; 3 M. L. T. 394; 8 Cr. L. J. 147.

(12) 16 Ind. Cas. 410.

(13) 35 Ind. Cas. 200; 14 A. L. J. 610.

(14) 6 A. 334; A. W. N. (1884) 47; 3 Ind. Dec. (N. S.) 852.

(15) 24 C. 672; 12 Ind. Dec. (N. S.) 1117.

(16) 27 M. 71.

(6) 16 M. 99; 3 M. L. J. 1; 5 Ind. Dec. (N. S.) 776.

different category. The sons were held liable for moneys received by the father on the ground that the moneys were taken and misappropriated under circumstances, which constitute the taking itself a criminal offence. The debt was not in its origin clearly immoral and the sons were not on that ground held liable.

I have so far dealt with cases, where the debt arose out of a liability of the father to account for moneys. I shall pause here for a moment to see, if any intelligible principle can be deduced from the cases. It cannot be gainsaid that there is absolute want of harmony, so far as the decisions were made to rest upon particular grounds. But if the facts of the cases are examined, the conflict is only apparent and the true principle appears to be that the sons are not liable, where the moneys were originally obtained by the father by the commission of an offence; the son's liability is, on the other hand, recognised where, in its origin, the debt was not immoral, but there was a supervening dishonest act of the father.

In his very learned argument, Mr. Venkatasubramania Iyer, contended that this was the true position. I entirely agree. But I am not prepared to accept the next step in his argument, that the son is not liable, if there is an element of impropriety—however small—in the father's conduct in incurring the liability. If the father's conduct merely deserves blame or censure, the sons will not, according to this contention, be liable. This seems to me an extreme argument and, in my opinion, is not warranted by the texts of the Hindu Law, nor is the weight of modern authority in its favour. If it be borne in mind, that the debts condemned by the Smritis in this connection are debts such as those due for spirituous liquor, or for lust, or for gambling it will be obvious that the ancient lawgivers did not intend the sons to enjoy immunity, merely because the father's conduct was not above reproach, judged by the highest standards, of morality. So far as the decided cases are concerned, I must say, there is a want of uniformity; but, in my opinion, those rulings, which have laid down a contrary rule cannot be accepted as good law.

In *Chakouri Mahton v. Ganga Proshad* (4), the son was held liable, in respect of a decree passed for damages against the father for injury done to the crops of a

third party, by the obstruction of a channel, through which he was entitled to irrigate his lands. In *Chandrika Ram Tiwari v. Narain Prasad Roy* (17), the son was likewise held liable to answer a decree for damages, obtained against the father, for cutting trees and demolishing a house. A different view was taken in *Durbar Khachar v. Khachar Harsur* (1), where a dam was erected by the father, which obstructed the passage of water and the son was held not liable to pay damages adjudged against the father.

This conflict is illustrated by several other cases. In *Ratan Lal v. Birjbhukan Saran* (18), the son was held not liable to satisfy a decree, obtained against the father, for damages for retracting from a bid at an auction. In *Mahabir Prasad v. Siri Narayan* (19), it was held that a son was not liable for money due on a contract of indemnity, by the father, in respect of a property sold. In *Ramiengar v. Secretary of State for India* (20), the Court-fee payable to the Government by a father who brought a suit *in forma pauperis* was held to be an immoral debt. In *Sunder Lal v. Raghunandan Prasad* (21), the son was held not liable for damages, awarded against the father for malicious prosecution.

On the other hand, in *Raghunandan Prasad v. Chem Ram* (22), it was held that it was the pious duty of a son to pay money due under an indemnity clause in a sale-deed, executed by the father and in *Hari Singh v. Sant Prasad Singh* (23), where one of two purchasers wrongly withdrew the whole of the purchase-money and was directed by decree of Court to re-pay the other purchaser's share, the son was held liable, on the ground that the act of the father was not immoral or criminal. In *Sumer Singh v. Chaube Liladhar* (24), it was held that the money borrowed by the father to defend a suit for defamation is a debt, which a Hindu son is liable to pay; from the report, it does not appear whether the

(17) 79 Ind. Cas. 1036; 22 A. L. J. 468; 46 A. 617; (1924) A. I. R. (A.) 745; L. R. 5 A. 378 Civ.

(18) 61 Ind. Cas. 774.

(19) 46 Ind. Cas. 27; 3 Pat. L. J. 396; 4 P. L. W. 437; (1918) Pat. 328.

(20) 4 Ind. Cas. 105; 20 M. L. J. 89; 6 M. L. T. 308.

(21) 83 Ind. Cas. 413; 3 Pat. 250; 5 P. L. T. 135; (1924) A. I. R. (Pat.) 465.

(22) 27 Ind. Cas. 895.

(23) 32 Ind. Cas. 969.

(24) 9 Ind. Cas. 624; 33 A. 472; 8 A. L. J. 306.

father was eventually found guilty of defamation or not. In *Khalilul Rahman v. Gobind Pershad* (25), it was held that the exception under the Mitakshara could not be extended to transactions, however, "unconscientiously imprudent" or "unreasonable" they might be.

Indeed, it is unnecessary to multiply these references. In the application of the rule, there is a great divergence of opinion.

In some of these cases, the father's conduct has been held to be immoral, by too rigid a standard being applied.

I would state the rules thus:—

(1) If the debt is in its inception not immoral, subsequent dishonesty of the father does not exempt the son.

(2) It is not every impropriety or every lapse from right conduct that stamps the debt as immoral. The son can claim immunity only, when the father's conduct is utterly repugnant to good morals, or is grossly unjust or flagrantly dishonest.

The rule as stated is necessarily elastic; but I am not aware that any test has in any case been so far laid down, which is not open to this criticism. The question no doubt becomes one of degree, but the rule of pious obligation, in its very nature, is incapable of more precise definition. Applying the two rules I have just enunciated, the sons cannot claim immunity from liability for mesne profits on the ground that they necessarily and always arise from an immoral transaction.

It is of the utmost importance to remember that it is foreign to any enquiry on this subject to consider, whether the son has really been benefited by the father's act. Untrammelled by the peculiar doctrine of the Hindu Law, or by authority, one would be disposed to think that, if the son was benefited, it would be his duty to pay back the debt; if he is not, there would be no such duty cast on him. But this utterly ethical consideration cannot be a factor at all, in the determination of this question; for, as Mookerjee, J., observes in *Chakouri Mahton v. Ganga Proshad* (4), the liability of the son depends upon the nature of the debt and the test of benefit is immaterial. By an act of theft, on the part of the father, the estate might have benefited, but the son is not liable. By a reckless conduct, short of immorality, the

father might have rendered the family desolate, but the son is liable. Reference, therefore, to abstract principles of morality, ignores this essential feature and is, therefore, apt to mislead.

Next, I pass on to a text, on which great stress was laid, by the learned Counsel and which has not, he contends, received its due share of recognition from Courts. I have referred to the text of Brihaspati, where, in the enumeration of obnoxious debts, he mentions promises made under the influence of lust or wrath, "*kama krodha pratisrutham*."

These words are supposed to have been more clearly and with greater precision defined by a Smriti of Katyayana.

The two following verses are ascribed to him:—

(1) The debt due upon a written bond, or on a promise to a woman, who was another's before (and not married by him,) is called a debt for love.

(2) Having done an injury to another, or destroyed his things, through anger, if anything is promised in satisfaction, it is called a debt for anger.

(Translation of Ghose, See this "Hindu Law, page 546).

Mr. Venkatasubramania Iyer's contention is that liability for mesne profits falls within the second verse above quoted.

The text of Katyayana has been referred to, by various commentators, of great authority, Apararka in his commentary on Yagnavalkya, after giving the text of Narada, which contains the words "*kama krodha kritam*" and then citing the two verses of Katyayana proceeds thus:—

"This is the meaning:—Whatever wealth is promised to another, for his gratification, on account of injury, caused to him due to loss of property, that debt is *krodha krita*, i. e., debt promised "under the influence of anger."

Smriti Chandrika, in the Chapter "Runa Dana Prakarana" gives the text of Brihaspati and interprets the expression "*kama krodha pratisruta*" in the words of Katyayana, who is referred to by name. The subject is dealt with thus:—

"*Kama pratisruta* and *krodha pratisruta* are explained by Katyayana". (Here the two verses are given) and the relevant verse is thus explained: "Where injury, etc.", means this "if, having caused from wrath, injury or loss of property to another,

for its gratification, wealth is promised, that debt is *krodhaja*.

Saraswathi Vilasa's treatment is on lines very much similar to that of Smriti Chandrika and an extensive quotation is unnecessary.

Vivada Ratnakara cites the text of Katyayana. In the section, Runa Dana Taranda, the author quotes the text of Brihaspati and says "*kama krodha pratisruta* will be subsequently dealt with." Then he cites the text of Gautama and comments on it and next Vyasa or Usanas is likewise quoted and commented on and the commentator then gives the verses of Katyayana, without mentioning the authorship. He explains "*kama krodha krita*" thus:—If under the influence of wrath, another's property is destroyed, or injury is caused to him, and to give wealth for its gratification, if a debt is incurred, that debt is called *krodha krita*". The author concludes the discussion with these words:—

"These are just the *kama krodha pratisruta* referred to above.

Viramitrodaya similarly quotes Brihaspati and to explain the import of the words "*kama krodha pratisruta*, Katyayana is called in aid. Vivada Chintamani and Parasara Madhaviya also cite Katyayana and refer to him by name. Their treatment of the subject is more or less similar to that of Viramitrodaya and does not, therefore, require any further detailed notice.

Vivada Bhangarnaya (Jagannadha's Digest) similarly refers to Katyayana and contains a long discussion upon his text. It is unnecessary to extract the passage, as it can be readily found in Colebrooke's translation. The learned translator has, however, failed to understand the second verse of Katyayana, the one with which we are concerned and this mistake has vitiated the whole rendering, in so far as it relates to debts, incurred under the influence of anger. According to Colebrooke, the debt condemned is that incurred for payment to cause injury, in order to gratify anger:

"What is borrowed to give away, for the purpose of destroying another's property, or injuring another man, through resentment, is a debt, incurred under the influence of wrath."

According to this translation, the gratification referred to is the gratification of the debtor's anger, or to put the matter simply:

the debt contemplated is money promised to a ruffian, to gratify the debtor's resentment, by hurting another, or injuring his property. It is clear beyond doubt that Colebrooke is wrong, as not only the text of Katyayana is not susceptible of this interpretation, but the rendering is also opposed to that uniformly adopted, by the large number of commentators, who have expounded the text.

I shall now, in the light of this text of Katyayana, discuss the son's liability for mesne profits. Injury to another, or his property, from wrath, is what is contemplated. Is there any necessary connection between the awarding of mesne profits and destruction of another's property by wrath?

I would understand Katyayana's text to mean that the injury inflicted, or damage caused should be the result of a wanton and flagrant violation of another's right from anger, engendered by malice or revenge, for instance, an act of incendiarism. To such and similar cases only, the text of Katyayana is applicable. Why should it be assumed that Katyayana was laying down a very different rule from what the other Rishis did?

In my opinion, Katyayana gave, by way of illustration, an instance of a grossly immoral debt and I am not prepared to hold that he intended to enlarge and add to the class of debts from the payment of which the son is exempt. My view, therefore, is that in regard to the question of liability for mesne profits, the text of Katyayana does not lead to a different result.

I have so far dealt with the question, on the footing that it is not concluded by authority. The learned Vakil for the respondents relied upon *Nanomi Babuasin v. Modhun Mohun* (26), a decision of the Judicial Committee as laying down that a son is under a pious obligation, to satisfy a decree for mesne profits, obtained against the father. But the appellant's Counsel contended that the case is no authority for this position, as it only decided that the debt in question was a joint family debt, which the son was bound to pay, the other question regarding the son's duty to pay it, as a father's debt not having been decided. I have very carefully gone through the judgment of the Privy Council, the judg-

(26) 13 C. 21; 13 I. A. 1; 10 Ind. Jur. 151; 4 Sar. P. O. J. 632; 6 Ind. Dec. (N. S.) 510.

ment of Cunningham, J., in the High Court and the argument of Counsel, as reported both in the Indian Law Report Volume and in the Indian Appeals Volume and I entertain no doubt that the question really decided is the son's liability under the pious obligation to pay his father's debt. It is pointed out that there is no reference, either to the original texts, or to the ancient writers, in the argument or in the judgment. But I cannot, on that ground alone, hold that the point was not decided.

I may state in the argument of Mr. Doyné, as reported there is a reference to the contention that the origin of the liability for mesne profits is a wrongful ouster: [see *Nanomi Babuasin v. Madhun Mohan* (26).]

In *Karan Singh v. Bhup Singh* (27), a Full Bench of the Allahabad High Court has understood the Privy Council decision in this sense. The Allahabad case just cited is also a direct authority, which favours the respondent's contention.

The observations of Rampini and Mookerjee, JJ., in *Peary Lal Sinha v. Chandi Charan Sinha* (28), though *obiter*, to the effect that a son is under a pious obligation to discharge a decree for mesne profits, obtained against his father, are entitled to great weight and are quoted with approval in many modern treatises on Hindu Law: (See Sircar Sastri's Hindu Law, 1924, Edition, page 347; Mayne, page 405).

I shall now dispose of two minor contentions. First, it was suggested that the liability for mesne profits is in the nature of "*danda*" or fine. I am not prepared to accept this contention.

In *Prayag Sahu v. Kasi Sahu* (29), costs, incurred by a father, in an unsuccessful litigation, were held not to come within the term "*danda*."

In *Natasayyan v. Ponnusami* (6), the sons were held bound to pay the costs of the suit, as awarded against their father.

Secondly, it was contended that the obligation to pay mesne profits is not in the nature of a debt, that it is not in fact, "*rina*" which means strictly "what is taken under a promise to re-pay." I agree with Mookerjee, J. [see *Chakouri Mahton v. Ganga Proshad* (4).] that the word "*rina*" as used in the texts has a much wider application than a mere debt or loan. I am prepared to go further

than merely hold that at any rate a judgment debt comes within the expression "*rina*" for, if this narrow construction be adopted, a son can be held liable, only after a decree is passed against the father; whereas, if he is originally impleaded in the suit for damages, he can resist it, on the ground that there has been no debt, as there has not been a judgment. This would be a clear anomaly. In *Raman Pandithan v. Satha Kudumban* (30), when the sale by the father of the son's interest was set aside, and the vendee brought a suit to recover the price of that share, it was held that what he was seeking to recover was a debt and in *Garuda Sanyasayya v. Nerella Muthemma* (8), the learned Judges observed that the subtle distinction between debt and accountability did not commend itself to them.

Now, let me turn to the facts, which led to a decree for mesne profits. One Subramania died in 1880, leaving two widows and a son by each, Kandasami and Balasubramania. After Subramania's death, there was a partition, the mothers representing their sons and after the latter became majors, they ratified the partition in 1902. Kandasami died in 1903. His widow brought a suit against Balasubramania, for possession of property, on the ground that they fell to Kandasami's share at the partition. The suit was resisted by Balasubramania, who pleaded that there was no completed partition. A decree was passed in favour of the widow of Kandasami, for possession of the property and mesne profits. The suit was filed on the 20th October 1904, and the final decree of the High Court confirming the Subordinate Judge's judgment was made on the 25th July 1912. The mesne profits awarded were for the period between the date of the plaint and September 1912. After the properties were taken in execution and before mesne profits were recovered, Balasubramania died in 1922 and his sons now raise the question that they are not liable to answer the decree for mesne profits passed against their father. I am prepared to concede that the act of Balasubramania was not by any means honest, but at the same time his conduct in being in unlawful possession of the properties is not so grossly unjust or immoral, or so flagrantly dishonest as to make the debt "*Avyavaharika*" within the meaning of the Hindu Law.

(27) 27 A. 161; 1 A. L. J. 310; A. W. N. (1904) 151.

(28) 11 O. W. N. 103; 5 C. L. J. 80.

(29) 6 Ind. Cas. 258; 11 C. L. J. 599; 14 C. W. N. 659.

(30) 33 Ind. Cas. 387; 4 L. W. 366; 31 M. L. J. 502; 20 M. L. T. 320; (1916) 2 M. W. N. 217.

In the result, the appeal fails and is dismissed costs.

Madhavan Nair, J.—This appeal is directed against an order of the Subordinate Judge of Tinnevely, confirming the attachment of the joint family properties in the hands of the sons of one Balasubramania Pillai, in execution of a decree for mesne profits obtained against him. The respondent, a Hindu widow, instituted O.S. No. 39 of 1901, on the file of the Subordinate Judge of Tinnevely against Balasubramania Pillai, the father of the appellants and the half brother of her deceased husband, for the recovery of some specified items of immovable property, for past and future mesne profits and for various other reliefs. Alleging that there was a family partition in which separate items of properties were allotted to her late husband and the defendant, she stated, that after her husband's death the defendant interfered with her separate enjoyment of those and other properties and took possession of them. The defendant contended that there was no completed partition. Overruling this plea, the Subordinate Judge gave the plaintiff a decree for possession of the lands and other properties and also for past and future mesne profits. This decree was confirmed by the High Court with some slight modifications. The decree-holder sought to execute the decree for mesne profits, for the years 1901 (the date of the plaint) to 1912, by attachment and sale of the judgment-debtor's family properties. He having died in the course of the execution proceedings, his sons, who are the present appellants, were brought on record, as his representatives. They contended that the decree-holder is not entitled to proceed against the family properties, which they have taken by survivorship on the grounds; (1) that the decree for mesne profits is in the nature of an immoral and illegal debt, contracted by their father, which they are not bound to discharge, on the ground of pious obligation to pay their father's debts, under the Hindu Law; and (2) that their father sent the income of the properties in his possession on dancing girls and boon companions. The Subordinate Judge overruled both these contentions and passed the order, now appealed against, confirming the attachment of the family properties. The question arising for decision is whether joint family properties, in the hands of the sons can be attached and sold

in execution of a decree for mesne profits, obtained against their father.

Under the Hindu Law, the liability of a son to pay the father's debt rests upon the well-known pious obligation on the part of the son to relieve his father from punishment in a future state, for non-discharge of the debts. The general rule is that the son should discharge his father's debts, unless the debts fall within the well-recognized exceptions. In a very learned judgment, in *Chakouri Mahtan v. Ganga Proshad* (4) Mookerjee, J., after an examination of the various texts, bearing on the question, has thus summarised these exceptions:—

“If the provisions of all these texts are summarised the result appears to be that the debts, which a son is not under any obligation to pay, may be grouped as follows:—(1) debts due for spirituous liquors; (2) debts due for lust; (3) debts due for gambling; (4) unpaid fines; (5) unpaid tolls; (6) useless gifts or promises without consideration or made under the influence of lust or wrath; (7) suretyship debts; (8) commercial debts; and (9) debts that are not Vyavaharika; i. e., debts that are not lawful, usual, or customary, or if we accept the version of Colebrooke, debts for a cause repugnant to good morals.”

Bearing these exceptions in mind, the learned Counsel for the appellants has argued before us; (1) that the decree for mesne profits in this case is in the nature of an Avyavaharika debt; (2) that it is a debt which has originated under the influence of wrath; and (3) that a decree for mesne profits is not in the nature of a ‘debt’ at all.

The first question to be considered is whether the decretal debt in this case is Avyavaharika. The term Vyavaharika appears in the texts of Usanas, cited in the Mitakshara (commentary on Yagnavalkya, Bk. II, verse 47) which runs as follows:—

Dandam va dandasesham va sulkam thathseshmev va na dathavyam thu puthrana yathra na Vyavaharikhum.

“A fine, or the balance of a fine, likewise a bribe or a toll, or the balance of it, are not to be paid by the son, neither shall he discharge a debt, which is not lawful.”

There has been a considerable divergence of opinion, amongst the Judges, as regards the precise significance of this term and this has given rise to conflicting decisions

In the opinion of Mookerjee, J., the term *Vyvaharika* is equivalent to "lawful, usual, or customary." Sadasiva Iyer, J., is inclined to adopt Colebrook's paraphrase of "*Avyavaharika* debt," namely, "debt incurred for a cause repugnant to good morals," as more nearly approaching the true import of the expression, than any of the meanings given by the other authorities. He himself would paraphrase "*Avyavaharika* debt" as a debt, which is not supportable as valid by legal arguments and on which no right can be established in the creditor's favour, in a Court of Justice: [See *Venugopal Naidu v. Ramadhan Chetty* (5).] The term *Avyavaharika* is understood by Knight and Chandavarkar, JJ., in *Durbar Khachar v. Khachar Harsur* (1) as "unusual or not sanctioned by law or custom." According to these learned Judges

"Put into simple English, the text amounts to this: that the son is not to be held liable for debts, which the father ought not, as a decent and respectable man, to have incurred."

The learned Counsel for the appellant argues that according to the decided cases, the real test to discover whether a debt is an immoral debt in the sense in which that term is understood in Hindu Law, is to find out the nature of the debt, at its inception and, if it is found that it has come into existence, under circumstances involving culpability or impropriety, on the father's part, and that it is, therefore, a debt, which a decent and respectable man would not incur, then he urges that it is an immoral, or illegal debt and the son is not at all liable to discharge it. He has sought to elucidate this principle by an examination of reported decisions, in which the son was held liable and also of those in which the son was held not liable, the most important of which are the following:—*Natasayyan v. Ponnusami* (6), *McDowell v. Ragava Chetty* (16), *Kanemar Venkappayya v. Krishnachariya* (10), *Erasala Gurunatham Chetty v. Addipally Raghavalu Chetty* (11), *Venkatacharyulu v. Mohana Panda* (9), *Mahabir Prasad v. Basdeo Singh* (14), *Durbar Khachar v. Khachar Harsur* (1), *Hanmant Kashinath v. Ganesh Annaji* (3), *Krishna Charan Mohanti v. Radha Kanto Roy* (12), *Niddha Lal v. Collector of Bulandshahr* (13), *Chandrika Ram Tiwari v. Narain Prasad Rai* (17), *Gadadhar*

Ramanuj Das v. Ghana Shyam Das (31) and *Gursarandas v. Mohan Lal* (32).

In *Natasayyan v. Ponnusami* (6), it was held that, when a decree was passed against a Hindu father, for money dishonestly retained by him, from the plaintiff's family, to which he was accountable, in respect of it, the debt was not of an illegal or immoral nature, so as to exclude the pious obligation of the son to discharge it. In discussing the question, whether the debt was tainted with immorality and illegality, the learned Judges, after stating the general rule, observe that:

"Upon any intelligible principles of morality, a debt due by the father, by reason of his having detained for himself money which he was bound to pay to another would be a debt of the most sacred obligation, and for the non-discharge of which punishment, in the future state-might be expected to be inflicted, if in any," and then state that "The son is not bound to do anything, to relieve his father from the consequences of his own vicious indulgences, but he is surely bound to do that which his father himself would do were it possible, viz., to restore to those lawfully entitled money he has unlawfully retained."

This case has been distinguished and explained in *McDowell v. Ragava Chetty* (16). In that case, the father had taken money and misappropriated it, under circumstances, "which constituted the taking itself a criminal offence." Following the decisions in *Mahabir Prasad v. Basdeo Singh* (14) and *Pareman Dass v. Bhattu Mahton* (15), it was held that in such circumstances the sons cannot be held liable, under the rule of Hindu Law, to pay the debts so incurred by the father. In *Mahabir Prasad v. Basdeo Singh* (14), the decree debt against the father, for which the son was sought to be made liable, was for money which he had embezzled and for which he was convicted and the son was held not liable to pay such debt, as the debt was an immoral debt. In *Pareman Dass v. Bhattu Mahton* (15), a decree against the father for damages for crops stolen by him was held to be not binding on the sons. The decision in *Natasayyan v. Ponnusami* (6) was distinguished by the learned Judges

(31) 47 Ind. Cas. 212; 3 Pat. L. J. 533.

(32) 76 Ind. Cas. 907; 4 L. 93; (1923) A. I. R. (L) 309.

in *McDowell v. Ragava Chetty* (16), on the ground that "the withholding of the money in *Natasayyan v. Ponnusami* (6) amounted to nothing more than a breach of civil duty." In *Erasala Gurunatham Chetty v. Addipally Raghavalu Chetty* (11) the joint family property in the hands of the son was held liable, for the repayment of moneys misappropriated by the father, which were received by him, for the purpose of being paid to others, in the course of a *kuri* transaction, on the ground that the debt was not an immoral debt. In arriving at that conclusion, the learned Judges thus pointed out the distinction between the decisions in *Natasayyan v. Ponnusami* (6) and *McDowell v. Ragava Chetty* (16).

In *McDowell v. Ragava Chetty* (16), the Court expressly based its decision, on the ground that the money was taken by the father and misappropriated under circumstances, which constituted the taking itself a criminal offence : whereas it was pointed out that the father's acts in *Natasayyan v. Ponnusami* (6), though characterised by the learned Judges as dishonest, amounted to nothing more than a breach of civil duty.

It was then mentioned that in the case before them, it was not shown that the father's act amounted to more than a breach of civil duty. The same distinction between a breach of civil duty and a criminal act was emphasised also in *Erasala Gurunatham Chetty v. Addipally Raghavalu Chetty* (11), *Krishna Charan Mohanti v. Radha Kanto Roy* (12), *Niddha Lal v. Collector of Bulandshahr* (13), *Gadadhar Ramannuj Das v. Ghana Shyam Das* (31), *Gurusarandas v. Mohan Lal* (32) and *Hanmant Kashinath v. Ganesh Annaji* (3), decisions where the sons were held liable for sums misappropriated by the father.

In *Tirumalaiyappa Mudaliar v. Veerabudra* (7), *Garuda Sanyasayya v. Nerella Muthemma* (8) and *Venkatacharyulu v. Panda Mohana* (9), it was held that if a debt was incurred by the father, as an agent or trustee, his son is liable to pay the debt and the liability of the son is not in any way affected by the fact that the father subsequently misappropriated the same, or even made himself criminally liable for it.

This distinction between a breach of civil duty and a criminal act is availed of, by the appellant's learned Counsel, for

drawing the general inference, that, if the debt has come into existence, under circumstances, sufficient to condemn the conduct of the father, though they may not be strong enough to procure his conviction in a Criminal Court, then the son can claim absolute immunity from the payment of such debt. No such general inference is warranted from the decisions that I have examined. While discussing the above cases, in *Chakouri Mahton v. Ganga Proshad* (4), Mookerjee, J., no doubt, points out that this limitation between breach of a civil duty and a criminal act is "real though refined" but as observed in *Sreenivasa Aiyangar v. Kuppuswami Aiyangar* (33), "the distinction between a civil and criminal breach of duty is very thin and it would not be easy, in all cases to say, whether the breach of trust is of such a character, as would not subject a father to a prosecution. Assuming that a son is bound to pay the undischarged debts of the father, for relieving him from the pangs of hell, it is difficult to see, why he should be relieved from paying the debts of his father, incurred by the commission of a criminal act."

However, it is not necessary for the purposes of this case, to decide the question, whether the distinction adverted to is a real one or not, as the debt in this case admittedly has not been incurred by doing a criminal act. In my opinion, these decisions do not enable us, to deduce the general principle, contended for, on behalf of the appellants but they no doubt show by way of inference—and to this extent they support the appellant's argument—that an examination of the nature of the debt, at its inception, is a necessary condition, for finding out whether a particular debt is an immoral debt; viewed in this light, they also serve to illustrate how this necessary condition is to be applied, in different and varying circumstances.

The argument that the son should be exempted from discharging debts, which the father ought not, as a decent and respectable man, to have incurred derives strong support from the decision in *Durbar Khachar v. Khachar Harsur* (1). In that case, the plaintiff obtained a decree against the defendant's father, for damages caused by a dam erected by the latter, which

(33) 64 Ind. Cas. 698; 44 M. 801; 14 L. W. 78; (1921) M. W. N. 630.

obstructed the passage of water to the plaintiff's lands. On the death of the defendant's father, the decree was sought to be executed against the son, the defendant, with respect to the ancestral estate, in his hands. It was held that the son was not liable. The correctness of that decision has been doubted in Bombay: see *Ramkrishna Trimbak v. Narayan Shivrao Aras* (2) and *Hanmant Kashinath v. Ganesh Annaji* (3) and it has not been accepted as good law, in other High Courts also: [see *Sumer Singh v. Chaube Liladhar* (24), *Venugopal Naidu v. Ramadathan Chetty* (5), and *Garuda Sanyasayya v. Nerella Muthemma* (8). In *Chakouri Mahton v. Ganga Proshad* (4), it was held that a decree for damages, obtained against a Hindu father, on account of injury done to the plaintiff's crops, by the obstruction of a channel, through which he was entitled to irrigate his lands, could be executed against the joint family properties, in the hands of the sons. In *Chandrika Ram Tiwari v. Narain Prasad Rai* (17), the son was held liable to pay damages, obtained against a Hindu father, for wrongfully cutting down trees, that did not belong to him, and for demolishing a house. If the test laid down in *Durbar Khachar v. Khachar Harsur* (1) is the correct one, then it seems to me that these decisions as well as those cases of misappropriation of money by the father, which we have examined above, barring those, where the taking itself constituted a criminal offence, must be held to be wrong. The principle laid down in *Durbar Khachar v. Khachar Harsur* (1) seems to have been accepted by Wallis, C. J., in his judgment in *Sreenivasa Aiyangar v. Kuppuswami Aiyangar* (33). In that case one of the questions for consideration was whether, when the father's alienation of joint family property has been set aside, the sons are bound to refund the moneys paid to the father, in consideration of the alienation, on the ground that the sons incurred a pious obligation, to discharge the liability. Wallis, C. J., observed:—

"Any liability which the father may incur to the alienees on such unconditional setting aside of the alienation arises from his own immoral act in making the alienation in the first instance, in breach of the duty which he owed to his sons as manager of the joint family property."

With very great respect, I am not prepared to accept this view of the son's liability.

If the question is to be looked at from the standpoint of the father's duty towards the sons, then the sons will be able to claim exemption from liability in almost all the cases that may be brought against them. Seshagiri Iyer, J., the other learned Judge, who heard the case, though he discusses the question of the pious obligation of the son, to pay the father's debts in the course of his judgment does not record any opinion on this question, but bases his judgment on quite a different ground.

I do not think it is necessary to discuss in detail the various other cases quoted before us, as they do not in any way support the general principles contended for by the appellant's learned Counsel, but only serve to illustrate the conflict of opinion, prevailing in the various High Courts, as regards the application of the rule, regarding the son's liability, to pay the father's debts. To take a few instances: In *Mahabir Prasad v. Siri Narayan* (19), a son was held not liable for money, due on a contract of indemnity, made by the father. In *Ramiengar v. Secretary of State for India* (20), it has held that the son was not liable to pay the Government costs, incurred by a father, who brought a suit *in forma pauperis*, on the ground that the debt was an immoral debt. It was held in *Raghunandan Prasad v. Chem Ram* (22), that the son was bound to pay the money due under an indemnity clause, provided in a sale-deed, executed by the father, on the ground that the debt is not an illegal and immoral one. In *Khalilul Rahman v. Govind Pershad* (25), the son was held liable to pay a debt, contracted by the father, for what was described as a highly needless and imprudent purpose of establishing an adoption by litigation, which ruined a prosperous family. For other instances see *Ratan Lal v. Birjbhukan Saran* (18) and *Hari Singh v. Sant Prosad Singh* (23).

This conflict is probably due to a confusion of the various standpoints, from which the nature of a particular debt may be regarded, viz., the standpoint of the creditor, the standpoint of the son (virtually the debtor) and the detached standpoint of an outsider. In view of the various decisions we have examined, it is obvious that an attempt to lay down a general test or a fresh interpretation of the rule, which would apply to all cases must be absolutely futile. The following conclusions emerge from the decided cases (1) A debt, which

is not immoral, at its inception, is binding on the son, though subsequently it may be tainted by dishonesty and immorality; (2) improper, imprudent, unreasonable, or dishonest debts are not necessarily immoral; (3), their liability arising by the commission of offences by the father has been always held to be immoral; and (4) the test of benefit to the estate is not a material question for consideration, as "the liability of the son depends upon the nature of the act:" see *Chakouri Mahton v. Ganga Proshad* (4). In my view, the interpretation, sought to be put upon the expression "an Aavyavaharika debt" by the learned Counsel for the appellants, is not supported by the texts of Hindu Law, or by the above-mentioned decided cases, to which he has drawn our attention.

The facts of the case and the findings of the Judges were also referred to by the learned Counsel, apparently for the purpose of showing that there was a wanton invasion of property, by the father of the appellants, which would bring his conduct within the "rule of culpability or impropriety," which he wished to enunciate and with which I have already dealt. I am prepared to assume that the conduct of the father has been dishonest. Except the odium and impropriety, attaching to the unlawful taking and retention of another person's property which exist in all cases of this description, no circumstances calling for special condemnation are disclosed in the records. The facts of the case and the findings of the Judges do not, in my opinion, lend any special support to the legal arguments advanced on behalf of the appellants.

The next argument of the appellant's learned Counsel is that a decree for mesne profits must be considered to be in the nature of a "debt due to anger." This is based on the text of Brihaspati, as explained by Katyayana and in this connection, the learned Counsel has referred to Apararka's interpretation of Katyayana's text and also to Smriti Chandrika (Mysore Sanskrit Series, page 396), Saraswati Vilasa (Mss. in Adyar Library), Vivada Ratnakara (Bibliotheca Indica, page 58), Viramitrodaya (Jibanda Vidyasagar's Edition, page 343), Vivada Chintamani page 17, Parasara Madhaviya (Bibliotheca Indica page 198) to show how the expression "debt incurred in anger" (*kama krodha pratisrutam*) occurring in the text of Brihaspati has been explained by Katyayana.

The text of Brihaspati runs as follows:—
Sourakshikam vritha dhanam kama krodha-prathisorutham prathibhavyam danda sulkasesham putrain dāpayath.

"The sons are not compellable to pay sums due by their father, for spirituous liquors, for losses at play, for promises made without consideration, or under the influence of lust or of wrath, or sums for which he was a surety; or a fine, or a toll, or the balance of either"

(Colebrooke's translation).

The following is the text of Katyayana:

Likhitham muktham, vapi dhayam yathu prathisorutham parapurvsthyii thathu vidhyath kamakritham rinam yathra himsam samuthpadhya krodhravyam vinasya vauktham thushtikaram yathnu, vidhyath krodhakritham thu thath.

"The debt due upon a written bond or on a promise to a woman, who was another's wife before and not married by him is called a debt for love".

"Having done an injury to another, or destroyed his things, through anger, if anything is promised in satisfaction it is called a debt for anger".

(Ghose's translation).

The argument of the learned Counsel is that the above text of Katyayana has been wrongly understood by Colebrooke in his Digest and misled by his comment, lawyers and Judges have not correctly appreciated the significance of the expression "debt incurred under the influence of wrath", occurring in Brihaspati and that, if that expression is properly understood, as explained in Katyayana's text, then a decree for mesne profits, comes, within the scope of that explanation and is, therefore, a debt, which falls within the category of debts, which the sons are not bound to pay. Colebrooke's translation runs as follows:

"What a man has promised, with or without a writing, to give to a woman, who had another husband before, let the Judge consider, as a debt under the influence of lust."

(2) But what has been promised to gratify resentment, by hurting another, or by destroying his property, let the Judge consider, as a debt incurred under the influence of wrath."

The second verse is thus explained in Colebrooke's Digest:

"What is borrowed to give away, for the purpose of destroying another's property, or injuring another man, through resent-

ment, is a debt incurred under the influence of wrath."

According to this translation, the debt which the son is not liable to pay, is the money, which has been promised to one employed (a ruffian for instance), to gratify the promisor's resentment, by hurting another, or by destroying property. The interpretation by Colebrooke of Katyayana's text appears to be wrong, as the Sanskrit text does not support it and as it is also opposed to the interpretation, put upon the text, by the various commentators. However, the debt, for which the decree for mesne profits was passed in this case, not being shown in any sense to have been incurred in anger, the argument must be rejected. In this connection, it may be observed that a similar argument, advanced in support of the objections to the attachment of the joint family property, in execution of a money-decree obtained against a Hindu father, for his failure to account, as a trustee, was overruled by the learned Judges, in *Hanmat Kashinath v. Ganesh Annaji* (3).

It has been next argued that the liability of a son to pay a debt, incurred by his father, should be restricted to cases, in which the debt is a contractual obligation and that a decree for mesne profits cannot be considered to be a debt in this sense. The argument receives some support from the observations of Trevelyan and Beverley, JJ., in *Pareman Dass v. Bhattu Mahton* (15). As already pointed out, that was a case, where a decree was passed against the father, for damages for crops stolen by him. In overruling the argument, that there was an antecedent debt, the learned Judges state:—

"The cases cited refer to transactions which had been entered into by way of a contract or something approaching a contract between the father and some other person and the debt which was so contracted it became the pious duty of the son to pay off. But here there was no debt antecedent to the decree. There was merely a right to damages for a wrongful and criminal act; and so those cases would have no application to the present case".

The argument is based upon the meaning of the term "*rina*" as used in the texts. No doubt, the term "*rina*" strictly understood, means "What is taken under a promise to re-pay" (see *Sabda Kalpadruma*, Vol. I), namely, a debt or a loan. But in

view of the judicial decisions, it is impossible to give the term this restricted significance. As observed by Mookerjee, J., in *Chakouri Mahton v. Ganga Proshad* (4):

"There is no substantial difference in principle between a case in which a person is under an obligation to re-pay money which he has actually borrowed and a case in which he is bound to discharge an obligation created by a judgment of Court. It is worthy of note that the dictum on *Pareman Dass v. Bhattu Mahton* (15) is of a very qualified character and fully recognises that a right to damages might be deemed to create a debt even before the suit is brought for its enforcement. In any event after a decree has been made in favour of the successful plaintiff, he is entitled to realise from his defeated opponent a sum of money precisely in the same manner as if he had actually advanced to the latter a sum of money by way of loan".

In *Raman Pandithan v. Satha Kudumban* (30), when a sale by the father of property, including the sons' share, was set aside as regards the son's share and a purchaser consequently brought a suit for recovering a portion of the consideration paid for the sale, it was held that "there was a debt due from the father, when the properties were sold" and that the plaintiff was suing "to recover a portion of the debt". In *Garuda Sanyasayya v. Nerella Muthemma* (8), which held that the son is accountable for the misappropriation of trust funds by his father and grand-father, the subtle distinction drawn between "accountability" and "debt" for the purpose of exempting the son from liability, was not accepted by the Court. For the above reasons, the argument that a decree for mesne profits is not in the nature of a "debt" as understood in Hindu Law, must also be rejected.

Lastly it was suggested that the decree for mesne profits is in the nature of "*danda*" or fine, but no authority has been cited in support of this argument. In *Prayag Sahu v. Kasi Sanu* (29), it was held that costs awarded against a Mitakshara father, who was unsuccessful in a litigation, do not come within the term "*danda*" or fine in the text of Yajnavalkya.

Thus far, the arguments have proceeded on the assumption that the question for decision in this case is not concluded by authority; but as argued by the learned Vakil for the respondent, it seems to me that the point is really concluded by the

decision of the Privy Council in *Nanomi Babuasin v. Modhun Mohun* (26), which is a direct authority on the point, and that decision is really against the appellants' contention. In that case, in an ejectment suit, brought against the father, the plaintiff obtained a decree for mesne profits and joint family property was sold, in execution of that decree. Two questions arose for decision before the Privy Council, namely, (1) whether the sale in execution proceedings conveyed to the purchaser the entire joint family property, or only the father's co-parcenary interest in it; (2) whether if the entire joint family property was conveyed, the sons could object to such a sale. After having held on the first question, that "the purchaser had succeeded in showing that he brought the entirety of the estate, which could be lawfully sold to him, their Lordships proceed to deal with the second question in this way".

"That brings their Lordships to consider the nature of the debt in this case. There was a great deal of discussion, whether the debt originated in the loan of Rs. 45,000, or in Girdhari's receipt of the mesne profits for which the decree was given. It appears to their Lordships that the new debt for which the decree was made is the foundation of the sale. But, whichever it was, they think the High Court are clearly right in holding that it must be taken as a joint family debt. The Subordinate Judge does not give any opinion in this point. If it is a joint family debt, the sale to answer it, effected either by Girdhari or in a suit against him, cannot be successfully impeached."

In what sense did their Lordships of the Privy Council use the expression, "joint family debt", in the paragraph just now extracted? It has been argued by the learned Counsel for the appellants that the debt was held to be a joint family debt, because in the suit in which the decree was passed, the family was represented by the father as *karta*, that he defended the suit in this capacity, as manager of the family and that the question whether the decree "for mesne profits was in the nature of an immoral debt was not considered in that case. It is clear to our minds that the question must have been considered by their Lordships of the Privy Council and that in using the expression "joint family debt" their Lordships must be considered

to have meant, that the debt, for which the joint family property was sold, not being a debt of an immoral nature, or binding on the family, and thus became a joint family debt.

The arguments of the learned Counsel, who appeared before the Privy Council, and the statement of the principle to be applied to the decision of the case, appearing in their Lordships' judgment, conclusively show that their Lordships were called upon to decide, and did decide, the question whether a decree for mesne profits was a debt, tainted with immorality and, therefore, not binding on the sons. It will be observed that the High Court held that the sons could not impeach the sale and this judgment was confirmed by the Privy Council. According to the summary of arguments, as given in the authorised reports. Messrs. Woodroffe and Arathoon, Counsel for the respondents argued:—

"The first and main point is that the whole family estate is liable, because the debt, contracted for no immoral purpose is due by the father of the family, living under the Mithila Law, on this point identical with the Mitakshara. This supports the sale of the family estate in satisfaction of the decree upon the father's debt. It may, however, be taken as a second ground that the father here was the manager of the family estate and represented the sons' interests; the family also profited by the money, and had the temporary benefit of the rents and profits after the ouster."

The arguments of Mr. Doyne, Counsel for the appellants, also show that the question whether the decree debt was in the nature of an immoral debt was put before the Privy Council. Their Lordships in their judgment state the principle thus:—

"Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt; or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority."

Continuing their Lordships state in the next paragraph:

"The circumstances of the present case do not call for any enquiry as to the exact

[90 I. C. 1925]

RAMASUBRAMANIA PILLAI v. SIVAKAMI AMMAL.

extent to which the sons are precluded by a decree and execution proceedings against their father from calling into question the validity of the sale, on the ground that the debt which formed the foundation of it was incurred for immoral purposes, or was merely illusory and fictitious. Their Lordships do not think that the authority of *Deendayal's* case bound the Court to hold that nothing but Girdhari's co-parcenary interest passed by the sale. If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All that the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. Assuming they have such a right, it will avail them nothing, unless they can prove that the debt was not such as to justify the sale".

After thus laying down the principle, that a son cannot, question his father's alienation, unless the debt was tainted with immorality, their Lordships decided that the entire family property was conveyed by the sale and then proceeded to consider the nature of the debt, whether it was tainted with immorality. In these circumstances, it appears to me that when their Lordships used the term "joint family debt", they meant to say that the decree debt for mesne profits, not being a debt of an immoral nature, was binding on the joint family.

The Privy Council judgment has been understood, in the manner indicated above by the learned Judges of the Allahabad High Court, in *Karan Singh v. Bhup Singh* (21). That was also a case, where the joint ancestral property of a Hindu family was attached, in execution of a decree of means profits, obtained against the father of the family. Following the Privy Council decision in *Nanomi Babuasin v. Modhun Mohun* (26), it was held by the Full Bench that the decree in question was not in the nature of a debt tainted with immorality and that the sons were responsible for such a debt. The Privy Council judgment has also been understood in the same way in *Shambhu Bhan Singh v. Chandra Shekhar Bhakhsh Singh* (34).

In *Zenamandra Papiiah v. Lanka Sub-*

basastrulu (35) and *Ramdeo Prosad Singh v. Gopi Koeri* (36) both of which were concerned with the execution of a decree for mesne profits against the joint family property in the hands of the sons, it was assumed without any discussion that such debts were not debts of an immoral nature, which exempted the sons from liability to discharge them.

In *Peary Lal Sinha v. Chandi Charan Singh* (28), Mookerjee, J., has expressly stated that the debt, for the recovery of which a decree for mesne profits has been obtained, was not tainted with immorality and illegality. In that case, the question did not arise directly for decision, as the creditor only sought to sell what he had attached, during the lifetime of the judgment debtor, and the interest of the judgment-debtor, which had been seized in execution and had been ordered to be sold was alone sought to be affected in those proceedings. But the learned Judge says :—

"If the question thus arise, we would without hesitation, answer it against the appellants."

and states the reasons thus :—"The original judgment-debtor became liable to pay a large sum of money because he had kept the respondent out of possession of property which lawfully belonged to the latter, and to the profits of which he was entitled. By unlawful receipt of those profits, the judgment-debtor enriched his own estate which has now by survivorship passed into hands of the appellants. We cannot discover any intelligible principle upon which a debt of this character may be described as immoral and illegal."

The benefit to the judgment debtor's estate, assigned as a reason was subsequently held by the learned Judge to be "possibly open to the criticism, that if the liability of the son depends upon the nature of the estate, the test of benefit to the estate becomes immaterial," but this does not affect the correctness of the decision for, as the learned Judge himself points out, the decision was substantially based upon the intelligible principle of morality, underlying the pious obligation of the sons to discharge the just debts of their father—the grounds mentioned in *Natasayyan v. Pon-nusami* (6): see *Chakouri Mahton v. Ganga*

(34) 80 Ind. Cas. 17; 10 O. & A. L. R. 912; 1 O. W. N. 343; (1925) A. I. R. (O.) 230.

(35) 25 Ind. Cas. 396; 27 M. L. J. 276; (1914) M. W. N. 616.

(36) 13 Ind. Cas. 349; 16 C. W. N. 383; 15 C. L. J. 256.

Prashad (4). This decision is quoted with approval in recognised text books on Hindu Law: [See Sarkar Sastry's Hindu Law page 317, Ed. 1924; Mayne's Hindu Law, page 405; and Trevelyan, page 302] and I am prepared to follow it.

In the result after carefully considering the able and exhaustive arguments advanced before us, I have come to the conclusion that the appellants in this case are bound to discharge a decree for means profits passed against their father and that the joint family properties in their hands may be attached and sold in execution of that decree. The lower Court's order is right and this appeal must be dismissed with costs.

V. N. V.

S. D.

Appeal dismissed.

ALLAHABAD HIGH COURT. FULL BENCH.

CIVIL REVISION No. 20 OF 1925.

July 16, 1925.

Present:—Mr. Justice Lindsay, Mr. Justice Sulaiman and Mr. Justice Daniels.

RAM SARUP—APPLICANT
versus

GAYA PRASAD—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 105, 115, O. IX, r. 13—Ex parte decree, application to set aside—Appeal—Appellate Court setting aside ex parte decree—Sufficient cause, absence of—Revision, whether lies—“Affecting the decision” in s. 105, meaning of.

Per Curiam.—The High Court can interfere in revision with an appellate order directing the setting aside of an *ex parte* decree where the applicant has not shown sufficient cause under r. 13 of O. IX of the C. P. C. [p. 184, col. 1.]

Per Lindsay, J.—Where there is an independent proceeding arising out of a case, such as a proceeding to set aside an *ex parte* decree, for which the Legislature has provided an independent remedy or a different procedure, such proceeding may be a case within the meaning of s. 115 of the C. P. C. [p. 181, col. 2.]

The expression “affecting the decision” in s. 105 of the C. P. C. signifies that there has been at work something which has influenced the Judge in the mental process of arriving at his decision that the error, defect or irregularity in the order, has, so to speak, warped the mind of the Judge so as to lead him to a wrong conclusion. The word “decision” in the section must, therefore, be taken to mean decision upon the merits. [p. 182, col. 1.]

An order setting aside an *ex parte* decree cannot be said to affect the decision of the suit within the meaning of s. 105 of the C. P. C. [p. 182, col. 2.]

Per Daniels, J.—Many things may affect a decision besides the reasons given by the Judge in his judg-

ment. Where a suit has been finally decided but an illegal order is subsequently passed setting aside the decision with the possible result that the case is heard over again and decided in the opposite way, it cannot be said that the error committed in restoring the case has not affected the ultimate decision. An illegal order, and by consequence the illegality committed in passing that order, affects the decision of the case within the meaning of s. 105 of the C. P. C., if the order passed is one but for which the decision might have been other than it was. [p. 183, col. 2.]

Held, by the Division Bench, (Sulaiman and Daniels, JJ.)—An Appellate Court has no jurisdiction to set aside an *ex parte* decree outside the provisions of r. 13 of O. IX of the C. P. C. [p. 184, col. 1.]

Civil revision from an order of the District Judge, Bareilly, dated the 23rd December 1924.

Mr. U. S. Bajpai and Dr. K. N. Katju, for the Applicant.

Mr. B. Malik, for the Opposite Party.

REFERRING ORDER.

Sulaiman and Daniels, JJ.—This is an application in revision from an appellate order setting aside an *ex parte* decree. Both the Courts below agree in finding that the plaintiff's absence on the date on which the case was decided was intentional. The Court below has restored the case for extraneous reasons. It is not seriously disputed that it acted contrary to the provisions of O. IX, r. 13 in doing so. A Bench of this Court in *Kallu v. Nadir Baksh* (1) held that this was a mere interlocutory order from which no revision lay. We are at present inclined to think that this decision was wrong. We may point out that one of the reasons given in that ruling for holding that no revision lay was that the order could be attacked in appeal from the decree ultimately passed under s. 105 of the C. P. C. Under the recent ruling in *Babu Ram v. Banke Behari Lal* (2), this is not the case.

Before dissenting from a recent Bench ruling of this Court we think it proper that the case should come before a Full Bench. We accordingly direct that the record be laid before the Chief Justice with a view to its being laid before a Full Bench for the decision of the question whether a revision lies from an appellate order setting aside an *ex parte* decree when the Appellate Court had no power under the provisions of O. IX, r. 13 to direct the case to be re-heard.

(1) 64 Ind. Cas. 527; 19 A. L. J. 907; (1922) A. I. R. (A.) 441.

(2) 87 Ind. Cas. 211; 23 A. L. J. 444; L. R. 6 A. 297 Civ.; (1925) A. I. R. (A.) 426; 47 A. 555.

JUDGMENT.

Lindsay, J.—The question which has to be determined by the Full Bench is whether this Court can interfere in revision with an appellate order directing the setting aside of an *ex parte* decree when the Appellate Court had no power, under the provisions of O. IX, r. 13 to give such a direction.

There are two grounds upon which it has been urged before us that the Court cannot subject this order to revision:—

(1) because the party against whom the order has been passed is not without another remedy; and

(2) because the order does not fall within the purview of s. 115 of the C. P. C. as there is no case which has been decided.

Dealing with these propositions in inverse order I would say that the second one of them is untenable. In my opinion we have before us a case which has been decided. It cannot with any show of reason be maintained that the order complained of is a mere interlocutory order passed in the course of the trial of the suit, for the suit had been brought to an end by the passing of the *ex parte* decree. At the time this order was made there was no suit pending between the parties. The proceedings in which the order was passed were quite distinct from the proceedings constituting the suit.

The defendant had had an *ex parte* decree given against him and was seeking to have it set aside under the provisions of O. IX, r. 13 which gives him a right to have the decree set aside provided he is able to satisfy the Court which passed it that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. By these proceedings he was endeavouring to enforce a right which did not, and could not come into existence until the suit had been decided. These later proceedings being distinct from those in the suit; no order passed in the course of them could possibly be an interlocutory order in the suit. The application was rejected by the First Court, and the order of rejection was appealed. The order allowing the appeal is a final order not subject to further appeal and has clearly brought to a termination and the proceedings instituted for the setting aside of the *ex parte* decree.

And this being so I have no doubt we have here a "case" which has been decided,

It would be unprofitable to discuss the various rulings concerning the meaning of the word "case" as used in s. 115. No definition of the word is to be found in the C. P. C. and probably no exhaustive definition of the word could be given.

The cognate expression "cause" has been defined in England in the Judicature Act of 1873 as "including any action, suit or other original proceeding between a plaintiff and a defendant, and any criminal proceeding by the Crown;" and it seems to me that when an attempt is made by a defendant under O. IX, r. 13 to assert his right to have the *ex parte* decree set aside there is an "original proceeding" between a plaintiff and a defendant.

The meaning of the word "case" in s. 115 has been well-discussed in *Heranchal Kunwar v. Kanhai Lal* (3) and I would quote the following passage from page 413* of the report:—

"Where there are independent proceedings arising out of a case, such as a proceeding to restore a case dismissed in default, or to set aside a decree *ex parte*, for which the Legislature has provided an independent remedy or a different procedure, such proceeding may be a 'case' within the meaning of the section (i. e., s. 115)".

I agree with this view and hold, therefore, that in the Courts below these proceedings under O. IX, r. 13 were a 'case' and that that "case" has been "decided".

To turn now to the other proposition the argument is that the applicant here has another remedy available—a circumstance which debars this Court from the exercise of its revisional jurisdiction, and reliance is placed upon the provisions of s. 105, sub-s. (1) of the C. P. C. It is said that in the event of the plaintiff's suit being dismissed after fresh trial he will have a right of appeal and that in the prosecution of the appeal he would be entitled to challenge the order now under discussion by setting forth in his memorandum of appeal an objection to it on the ground of error, defect or irregularity "affecting the decision of the case." In reply to this it has been argued that as the appeal against the decree in the event contemplated would lie to the same Court which has passed the order now complained of s. 105 (1) would be of little or no avail to the appellant.

It would, perhaps be inexpedient or indis-

(3) 4 Ind. Cas. 879; 12 O. C. 405.

*Page of 12 O. C.—[Ed.]

oreet to approach the Appellate Court with a plea imputing error in its former order, but if the law allows the plea to be raised, the inconvenience of raising it would be no answer to the argument advanced here on behalf of the opposite party.

But I am definitely of opinion that s. 105 (1) does not provide any remedy for the prospective appellant in a case like the present.

I would observe, in passing, that on the grammatical construction of the latter part of the sub-section just mentioned, it is the "error, defect or irregularity" in the order which may be pleaded by way of objection, not the order—itself and that the ground of objection must be that the error, defect or irregularity is one "affecting the decision of the case." By the words "affecting the decision." I understand that there has been at work something which has influenced the Judge in the mental process of arriving at this decision—that the error, defect or irregularity in the order has, so to speak, warped the mind of the Judge so as to lead him to a wrong conclusion.

If this is the meaning to be attributed to the word "affect" it seems to me that the word "decision" must necessarily be taken to mean the decision upon the merits.

The learned Advocate for the opposite party while admitting that this view of the interpretation of the word "decision" has been taken protests against it as involving the introduction into the text of the sub-section the words "upon the merits" which are not there and he has been able to fortify his argument by reference to a number of rulings which support it. But although these words are not to be found in the sub-section they must be supplied by necessary implication if the context so requires and the use of the word "affect" does, in my opinion, render it necessary that the word "decision" should be taken to mean "decision upon the merits."

I am quite unable to see how any error, defect or irregularity in the order now complained of could in any sense "affect" the decision of the suit which may follow if the order setting aside the *ex parte* decree is maintained.

The error imputed to the Court below is that in spite of its finding that the defendant had no sufficient cause for non-appearance it has directed the *ex parte*

decree to be set aside. The order which is vitiated by this error has, no doubt, provided the occasion for a fresh trial of the suit and has thereby created a possibility that the new trial may result in a decision different from that which was reached on the earlier trial but that to me appears to be a very different thing from saying that the decision in the second trial will be or can be affected by the preceding error of the Appellate Court.

I am satisfied that "decision" in s. 105 (1) means "decision upon the merits." That was the view taken in *Chintamony Dass v. Raghoonath Sahoo* (4). That case has been followed in this Court in *Gulab Kunwar v. Thakur Das* (5) in *Tasaddug Hussoin v. Hyat-un-nissa* (6) and in other cases more recently decided.

I dissent from the contrary view expressed in *Nand Ram v. Bhopal Singh* (7) and in other cases decided in the same sense. My answer to the reference is that it is competent to this Court to exercise its revisional powers in the case now before us.

Sulaiman, J.—I agree that the answer should be in the affirmative. I would like to emphasize the fact that the revision before us is from the order of the District Judge passed on appeal. When the appeal was before the Judge, there was certainly a case pending before him. That case has been finally decided so far as the Judge is concerned. No matter is now pending before him at all. His order cannot, therefore, be called an interlocutory one. We undoubtedly have jurisdiction to interfere under s. 115 of the C. P. C.

As to the contention that we should decline to exercise our discretion because another remedy is open to the applicant, I would say that the supposed remedy would by no means be convenient or expeditious, and could be availed of only after considerable expense has been incurred, and time spent. The remedy would at best be open only in second appeal for the decision by an Appellate Court would be binding on the parties so far at any rate as that Court is concerned. The existence of such remedy accordingly cannot be an insuperable obstacle in the way of our interference.

The question whether the propriety of

(4) 22 C. 981; 11 Ind. Dec. (N. S.) 651.

(5) 24 A. 464; A. W. N. (1902) 136.

(6) 25 A. 280; A. W. N. (1903) 39.

(7) 16 Ind. Cas. 1; 34 A. 592; 10 A. L. J. 130.

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the order setting aside the *ex parte* decree can be challenged at a later stage in the suit does not directly arise in this case. The answer would depend on the interpretation of the words "affecting the decision of the case." Does that expression mean affecting its decision *on the merits*, or affecting its result? I confess that I do not like the idea of introducing new words into the language of a section in order to give it a suitable meaning. On the other hand the preponderance of authority is certainly in favour of the view that it means 'with reference to its merits'. I, however, do not feel that I am called upon in this case to express a definite opinion on the true interpretation of s. 105. Even a Full Bench of the Madras High Court, where apparently the view prevails that a second remedy is open, had no objection to entertain a revision in such a case, *vide Gadi Neelaveni v. Marappareddigari Narayana Reddi* (8).

Daniels, J.—The question referred for our decision is whether a revision lies from an appellate order restoring a case dismissed for default when the Appellate Court had no power under the provisions of O. IX, r. 13 of the C. P. C. to direct the case to be restored. The revision was necessitated by a doubt on the part of the Referring Bench as to the correctness of the decision in *Sheikh Kallu v. Nadir Baksh* (1) which held that no revision lay in such a case. The ground of that decision was that the case was covered by the Full Bench ruling in *Budhoo Lal v. Mewa Ram* (9). The Full Bench case is, however, clearly distinguishable. The order passed there was interlocutory. It was an order deciding separately a preliminary issue as to jurisdiction. Here the original suit had been decided when the order complained of was passed. It had been decreed *ex parte* by the Subordinate Judge, and the Subordinate Judge had rejected an application for restoration. The question is whether the restoration proceedings constituted a separate case within the meaning of s. 115 of the C. P. C. I have no doubt whatever that this question must be answered in the affirmative, and this does not conflict in any way with the interpretation placed on the word "case"

by the majority of the Full Bench in *Budhoo Lal v. Mewa Ram* (9). The original suit had been so far as the Trial Court was concerned finally disposed of. The restoration application was a separate proceeding initiated not by the plaintiff in the suit but by the defendant, and the order passed upon it by the Appellate Court was in no sense an interlocutory order.

The respondent has sought to support his preliminary objection that no revision lies on the further ground that even if a case has been decided, this Court ought not to entertain a revision because the applicant, in the event of the case being ultimately decided against him, can question the validity of the order of restoration under s. 105 of the C. P. C. There is against him on this point the recent decision of a Bench of this Court in *Babu Ram v. Banke Behari Lal* (2). I am personally not satisfied of the correctness of the interpretation placed on s. 105 in that judgment. Where a suit has been finally decided, but an illegal order is subsequently passed setting aside the decision with the possible result that the case is heard over again and decided in the opposite way, it seems to me very difficult to say that the error committed in restoring the case has not affected the ultimate decision. Many things may affect the decision besides the reasons given by the Judge in his judgment. I am disposed to agree with the view taken by Piggott, J., in *Budhu Lal v. Mewa Ram* (9) that an illegal order, and by consequence the illegality committed in passing that order, has affected the decision of the case if the order passed by the Trial Court is one "but for which the decision might have been other than it was".

In this case the question does not really arise, because the order was one passed by the Appellate Court. Supposing the case is ultimately decided against the applicant, it would be very difficult for him to go to the District Judge and contend in appeal that the order passed by the District Judge himself at an earlier stage of the case was illegal. Indeed, the District Judge might very properly refuse to entertain an appeal at all on the ground that the order previously passed by him was a final order so far as his Court was concerned which was passed after contest and could not be challenged by the applicant at any subsequent stage of the

(8) 53 Ind. Cas. 817; 43 M. 94; 37 M. L. J. 599; 26 M. L. T. 377; 10 L. W. 676; (1920) M. W. N. 19.

(9) 63 Ind. Cas. 15; 43 A. 564; 19 A. L. J. 558.

litigation. This objection has, therefore, no force. I accordingly concur in answering the reference in the affirmative.

By the Court.—The case is now returned to the Bench concerned for disposal in accordance with the answer to the reference.

JUDGMENT.

Sulaiman and Daniels, JJ.—The answer of the Full Bench to the question referred is in the affirmative. We, therefore, have jurisdiction to entertain this revision.

The lower Appellate Court had itself found that there was no sufficient cause for the defendant for not appearing when the suit was called on for hearing, and that his absence was intentional. The case accordingly did not fall under O. IX, r. 13. It is urged before us that apart from O. IX, r. 13, the Court had inherent jurisdiction to set aside an *ex parte* decree. It is to be borne in mind that the order setting aside the decree was passed by the Appellate Court to which an appeal had been preferred from an order under that rule. In our opinion it had no jurisdiction outside the provisions of that rule. This was the view clearly expressed by a Bench of this Court in the case of *Sheik Kallu v. Nadir Baksh* (1). A Full Bench of the Madras High Court in the case of *Gadi Neelaveni v. Marappareddigari Narayana Reddi* (8) has come to the same conclusion. The learned Advocate for the respondent relies on the case of *Abdul Karim Abu Ahmad Khan Ghuznavi v. Allahabad Bank, Ltd.* (10) which, however, is distinguishable inasmuch as there it was not an *ex parte* decree which had been set aside, but the case itself had been remanded by the Appellate Court.

In our opinion the Court below had no jurisdiction to set aside the *ex parte* decree.

We accordingly allow this revision and setting aside the order of the lower Appellate Court restore that of the Court of first instance. We allow costs to the plaintiff in all Courts.

Z. K.

Revision allowed.

(10) 41 Ind. Cas. 598; 44 C. 929; 21 C. W. N. 877; 26 C. L. J. 49.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 321 OF 1925.

July 22, 1925.

Present:—Mr. Wazir Hasan, A. J. C.

Musammam KANIZ FIZZA BIBI—

DEFENDANT—APPELLANT

versus

DATA DIN AND OTHERS—PLAINTIFFS—
RESPONDENTS

Limitation Act (IX of 1908), Sch. I, Art. 126—Hindu Law—Mortgage by manager—Suit for redemption—Term fixing period of redemption challenged—Article 126, applicability of—Redemption fixed after 40 years—Necessity, proof of—Suit to set aside mortgage by father—Major and minor sons—Cause of action, accrual of—Mortgage—Redemption suit—Accounts filed by mortgagee, proof of—Mortgagor failing to object, effect of.

Where in a suit for redemption of a mortgage executed by the manager of a Hindu joint family any term embodied in the mortgage-deed, such as the period fixed for redemption, or the interest stipulated, is challenged, it does not change the character of the suit for redemption into one for setting aside the mortgage. The object of such a suit is to obtain relief under the mortgage and not in spite of the mortgage, and Art. 126 of Sch. I to the Limitation Act cannot be invoked in bar of the relief claimed. [p. 186, col. 1.]

Jafri Begam v. Syed Ali Raza, 23 A. 383; 28 I. A. 111; 5 C. W. N. 585; 11 M. L. J. 149; 3 Bom. L. R. 311; 8 Sar. P. C. J. 27 (P. C.), followed.

A term of 40 years fixed for redemption of a usufructuary mortgage executed by the manager of a Hindu joint family is one that on the face of it calls for proof of necessity. [p. 186, col. 2.]

In a redemption suit the omission of the plaintiff to expressly deny the accuracy of the accounts filed by the mortgagee does not justify the inference that the accounts are admitted. It is the mortgagee's duty to support his accounts by evidence. [p. 187, col. 2.]

Obiter.—In a suit by Hindu sons to challenge an alienation by their father of ancestral property, the cause of action arises in favour of the major son and the minor sons can only take advantage of the same cause of action. [p. 186, col. 1.]

Ranodip Singh v. Parmeshwar Pershad, 86 Ind. Cas. 249; 2 O. W. N. 1; (1925) A. I. R. (P. C.) 33; 48 M. L. J. 29; 21 L. W. 236; 23 A. L. J. 176; 27 Bom. L. R. 175; 12 O. L. J. 74; 26 P. L. R. 113; L. R. 6 A. (P. C.) 47; (1925) M. W. N. 262; 27 O. C. 343; 29 C. W. N. 666; 47 A. 165 (P. C.), relied on.

Appeal against a decree of the District Judge, Fyzabad, dated the 22nd April 1924, reversing that of the Additional Sub-Judge, Fyzabad, dated the 22nd December 1923.

Mr. Haider Husain, for the Appellant.

Messrs. S. N. Roy and Bhawani Shankar, for the Respondents.

JUDGMENT.—This is the defendant's appeal in a suit for redemption of a mortgage, dated the 18th October 1889 (Ex. B-1) executed by one Beni Madho in favour of the predecessor-in-interest of the defend-

ant-appellant for a sum of Rs. 4,000. The mortgage was a usufructuary one and in pursuance of the conditions of the mortgage the mortgagee entered into possession of the mortgaged property. The profits of the property exceeded the interest to which the mortgagee was entitled under the terms of the mortgage by a sum of Rs. 20 per annum. Under the deed this sum was to be re-paid annually by the mortgagee to the mortgagor. The claim as disclosed in the plaint was simply for the redemption of the mortgage just now mentioned. In defence, however, the appellant put forward two more mortgages executed by Beni Madho in relation to the same property which was the subject of the mortgage of the 18th October 1889. The first of these is dated the 20th February 1897 (Ex. B 2) and the second is dated 22nd May 1900 (Ex. B-3). Exhibit B-2 is a mortgage in consideration of a further loan of Rs. 658 8 0 and Ex. B 3 evidences a mortgage for an additional advance of a sum of Rs. 1,603-9 0. We have already seen that the property had passed into the possession of the mortgagee in its entirety under the deed of the 18th October 1889. Under the mortgage of the 20th February 1897, the sum of Rs. 20 due annually by way of *paramasana* to the mortgagor was thenceforward to be credited towards the part payment of the interest due on that deed. The rate of interest was fixed at 1 per cent. per mensem with compound interest to be calculated on the basis of monthly rests. Under the mortgage of the 22nd May 1900, the principal amount borrowed thereby was to carry the same rate of interest as was stipulated for in the mortgage of the 20th February 1897. The term of 5 years allowed for redemption in the first mortgage had expired and by the mortgage of the 22nd May 1900, the earliest mortgage was renewed for a term of 40 years certain at the end of which the mortgagor was given the right to redeem and in default of the exercise of that right the mortgagee was entitled to foreclose the mortgage. The defendant claimed besides the amount due under the mortgage of the 18th October 1889, the principal and interest at the rate agreed due under the mortgages of the 20th February 1897 and the 22nd May 1900.

It will now be convenient to state the array of the plaintiffs in the present suit. Beni Madho, the original mortgagor was succeeded on his death, in the right of

survivorship, by his son, Datadin, Datadin's son, Chhatarpal Singh, and also by Danpal Singh, who is the son of another deceased son of Beni Madho, Datadin, Chhatarpal Singh and Danpal Singh are the plaintiffs Nos. 1, 2 and 3 respectively. It is common ground that the subject-matter of the mortgages in question was the joint ancestral property of the family of Beni Madho and his co-parceners.

In answer to the claim made by the defendant on the basis of the mortgages of the 20th February 1897 and the 22nd May 1900 the plaintiffs challenged the validity of the term postponing redemption for forty years and also of the agreement relating to the rate of interest. In other respects they accepted their liability for the sums advanced to their predecessor-in-interest under those mortgages. To this challenge the reply of the defendant was that it could not be entertained because the relief arising thereunder was barred by limitation. The Article relied upon is Art. 126 of the First Schedule of the Indian Limitation Act. This defence prevailed in the Court of the first instance and the result was that that Court held that the term of 40 years was binding and the suit brought within that period was premature. The suit was accordingly dismissed.

The plaintiffs appealed to the Court of the District Judge of Fyzabad from the decree of the Trial Court which was that of the Additional Subordinate Judge of Fyzabad. The learned District Judge accepted the appeal and decreed the suit for redemption. He held that the mortgagee defendant had failed to prove that there existed any legal necessity to justify the contract postponing the redemption of the mortgage for a period of 40 years and incurring interest at the rate of 1 per cent. per mensem compoundable on the basis of monthly rests. He has reduced interest to 12 per cent. simple. There are other minor points arising out of the judgment of the learned District Judge which will appear as this judgment proceeds.

In second appeal the first argument advanced by the learned Counsel for the defendant-appellant is that the plaintiffs' challenge of the terms of the mortgages of the 20th February 1897 and the 20th May 1900 is barred by limitation. In support of the argument reliance is placed upon Art. 126 of the First Schedule of the Limitation Act. It may here be mentioned that

the plaintiff No. 1 Datadin is major. The other two plaintiffs Chhatarpal Singh and Danpal Singh, are minors. It is agreed that the fact that the last two plaintiffs are minors does not affect the question of limitation. The cause of action for a suit of the nature contemplated by Art. 126 of the First Schedule of the Limitation Act arose in favour of Datadin and the minor plaintiffs can only take advantage of the same cause of action. The view thus agreed to is supported by the recent decision of their Lordships of the Privy Council on appeal from a judgment of this Court in the case of *Ranodip Singh v. Parmeshwar Pershad* (1). I am, however, of opinion that the argument fails on merits. The present suit is not a suit to set aside any of the alienations made by Beni Madho. Indeed the object of this suit is to obtain relief under those alienations and not in spite of them. That any term embodied in one or the other of those alienations was *ultra vires* of the manager of the joint family will not change the character of the present suit for redemption into one for setting aside any of those alienations. The opinion which I have just now expressed is supported by a decision of their Lordships of the Privy Council in the case of *Jafri Begam v. Syed Ali Raza* (2). That was a case which fell to be decided with reference to Art. 91 of the First Schedule of the Limitation Act. So far as the nature of the suit contemplated by that Article is concerned it is described in the following words:—"To cancel or set aside an instrument not otherwise provided for." This language is almost identical with the description of a suit contemplated by Art. 126 of the same Schedule of the Limitation Act. It is as follows:—"By a Hindu governed by the Law of the Mitakshara to set aside his father's alienation of ancestral property." Of course the objectives of the two suits are different but the nature of the relief is the same. Now the case of *Jafri Begam v. Syed Ali Raza* (2) was one in which a claim was made to enforce an award with a prayer that a certain portion of it was void. The defence raised was that

the suit was barred by Art. 91 of the Limitation Act. The Privy Council decided that it was not so barred. I, therefore, hold that there is no question of the application of Art. 126 of the Limitation Act in this case.

The next ground taken in support of the appeal is that the term postponing redemption for a period of 40 years was reasonable in the circumstances of the case and should have been held by the lower Appellate Court as binding on the plaintiffs-respondents. I am unable to accept this contention. On the face of it the term is of such a nature that it calls for proof of a necessity for it. No such proof is forthcoming. Reliance is placed upon certain circumstances. What are the circumstances then? In my judgment they all point to the absence of any such necessity. The property had all along been in the possession of the mortgagee since the mortgage of the 18th October 1889. This term of 40 years came to be embodied in the mortgage of the 22nd May 1900, that is to say, about 11 years after the mortgagee had come into the possession of the mortgaged property. At the inception the profits were in excess of the interest. Under the mortgage of the 20th February 1897, the excess profits were utilized towards the reduction of the interest which became due to the mortgagee under the deed of that date. When mortgage of the 22nd May 1900 came to be executed the mortgagee was still in possession of the entire property and was in the enjoyment of the entire profits in lieu of interest. Further interest was secured by a covenant in the mortgage of the 22nd May 1900. In these circumstances I see no justification for accepting the contract postponing the redemption for 40 years on the part of the manager of the family property. This argument, therefore, fails.

It is next urged that the learned District Judge should not have reduced the rate of interest to 12 per cent. simple. I have heard nothing in arguments to induce me to disagree with the learned Judge on this point. The original mortgage under which the defendant entered into possession being a usufructuary one and the mortgaged property having all along been admittedly of sufficient value to bear the burden of the entire debt which the manager of the family incurred I see no reason why he should have agreed to pay interest at the rate of 12 per cent. per annum compound-

(1) 83 Ind. Cas. 249; 2 O. W. N. 1; (1925) A. I. R. (P. C.) 33; 48 M. L. J. 39; 21 L. W. 236; 23 A. L. J. 176; 27 Bom. L. R. 175; 12 O. L. J. 74; 26 P. L. R. 113; I. R. 6 A (P. C.) 47; (1925) M. W. N. 262; 27 O. C. 313; 29 O. W. N. 666; 47 A. 165 (P. C.).

(2) 23 A. 383; 28 I. A. 111; 5 C. W. N. 585; 11 M. L. J. 149; 3 Bom. L. R. 311; 8 Sar. P. C. J. 27 (P. C.).

able on the basis of monthly rests. The learned Judge of the Court below is of opinion that no legal necessity for a contract of that nature has been established. It is not contended that there is any independent proof in respect of such a necessity. That the burden lay on the mortgagee to prove it is not disputed and there is no proof. The argument, therefore, fails and is rejected.

Another ground taken against the decree of the lower Appellate Court is that that Court has wrongly omitted to award interest to the appellant on such sums of money as she paid in respect of the Government revenue payable on account of the mortgaged property in excess of the amount which was payable on the date of the original mortgage. That an enhancement in the Government revenue has taken place by a sum of Rs. 54-9-0 for the year 1302 *Fasli* and this sum has varied in the years following is not disputed. It is also not disputed that under a contract contained in the original mortgage of the 18th October 1889, the liability for the excess rested with the mortgagor. The lower Appellate Court has given a decree for that excess but has omitted to award any interest in respect of it. I am of opinion that the defendant-appellant is entitled to interest. Her claim is covered by the terms of s. 72 of the Transfer of Property Act and there is no proof of any contract to the contrary. The section provides rate of interest also and that is 9 per cent. per annum. In the present case the rate of interest as disclosed by the terms of the mortgage of the 18th October 1889 was about 6 per cent. per annum. I am of opinion that the defendant-appellant is entitled to interest at that rate. The decree of the Court below will be modified in this respect.

Another ground taken against the decree of the Court below is that it has wrongly disallowed the mortgagee's claim for arrears of rent due from the tenant. The mortgagee says that under the terms of the mortgage she is entitled to demand from the plaintiffs any arrears of rent that remain unrealized from the tenants on the date of redemption. Under this head she claimed a sum of Rs. 534-2-3. It is admitted that there is such a contract contained in the mortgages in question. The learned Judge has refused to accept this claim of the mortgagee on the ground that there is

no proof on the record of any such arrears. In appeal before me no proof is pointed out. What is argued is that the claim was included in the accounts filed by the defendant and that the plaintiffs did not expressly deny those accounts. From the fact that the record does not contain any express and specified denial of the accuracy of the accounts filed by the plaintiffs I am unable to infer that they admitted them. It was the mortgagee's duty to support her accounts by evidence. She did not discharge that duty. The learned District Judge was, therefore, right in rejecting this claim of the mortgagee.

The last ground taken was that the learned Judge has wrongly directed that the exclusion of the interest on a sum of Rs. 500 for the period between the 22nd May 1900 and the 16th April 1918. The learned Pleader for the respondents frankly admits that the learned Judge in the Court below has made an error in this respect. This sum of Rs. 500 is part consideration of the loan advanced under Ex. B-3 and the mortgagee was under an obligation to pay it to a previous creditor of the mortgagor. She did not pay it until the 16th April 1918 (Ex. B-5). But when she paid it she paid Rs. 1,088-12-0 instead of Rs. 500 as is shown by Ex. 5. The mortgagee does not claim the former amount from the mortgagors. She only asks for interest on the sum of Rs. 500 as stipulated for in the mortgage (Ex. B-2). This she is entitled to. The decree of the lower Appellate Court will, therefore, be modified to this extent also.

The above were all the points urged in support of the appeal which is hereby dismissed except in so far as is indicated in this judgment. As regards costs the appellant will be entitled to costs in this Court in relation to the items which I have allowed in her favour in this judgment. For the rest of the appeal she will pay the costs of the respondents. The order of the lower Appellate Court as to costs is maintained.

N. H.

Decree modified.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 109 of 1923.

November 24, 1924.

Present:—Mr. Victor Murray Coutts-Trotter, Chief Justice, and Mr. Justice Srinivasa Iyengar.

KRISHNADOSS VITTALDOSS—
DEFENDANT—APPELLANT

versus

GHANSHAMDOSS AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Letters Patent (Mad.), cl. 12—"Suit for land", what is—Suit for management of trust, whether suit for land.

A suit for the accounts of the management of a trust and for its administration is not a "suit for land" within the meaning of cl. 12 of the Letters Patent of the Madras High Court, though the whole of the immoveable property belonging to the trust may be outside the local limits of the jurisdiction of the High Court in its Original Side. [p. 188, col. 2.]

Srinivasa Moorthy v. Venkatavarada Iyengar, 11 Ind. Cas. 447; 34 M. 257; 15 C. W. N. 741; 8 A. L. J. 774; 13 Bom. L. R. 520; (1911) 2 M. W. N. 375; 14 C. L. J. 64; 21 M. L. J. 669; 10 M. L. T. 263 (P. C.), relied on.

Per Srinivasa Iyengar, J.—The expression "suit for land" must be construed as an action the primary object of which is to establish claims regarding title to property or possession of property and no suit can be described as a "suit for land" as the result of the decision in which the title to, or possession of, immoveable property will not in any manner or measure be directly affected. [*ibid.*]

Appeal from the judgment of Mr. Justice Devadoss, dated the 16th November 1923, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, in C. S. No. 721 of 1923.

The Advocate-General, for the Appellant.
 Mr. Nugent Grant, for the Respondents.

JUDGMENT.

Coutts-Trotter, C. J.—No one, it seems to me, using language in its natural sense would ever think of describing this plaint (after the excision of two prayers which Mr. Grant gave up) as being a suit for land. But it is said that there are decisions of this and other Courts which compel such a construction to be put upon those words as would bring the present suit within them. It is sufficient for me to say that I do not think that any of the authorities cited has that effect. I only desire to say one thing, and that is chiefly in reference to the case of *Srinivasa Aiyangar v. Kannappa Chetti* (1). If that case is to be supposed to say that you are entitled to look at the amended C. P. C. for the purpose of construing the words of the earlier Statute, namely, the Letters Patent with

which we are concerned, I do not agree with it. But I am by no means convinced that that case is an authority for the pure position for which it was cited. The appeal must be dismissed. The appellant will pay plaintiffs-respondents' costs. The memorandum of objections is dismissed, no order as to costs.

Srinivasa Iyengar, J.—The expression "suit for land" it seems to me must be construed as an action, the primary object of which is to establish claims regarding the title to property or possession of property and no suit can be described as a 'suit for land' as the result of the decision in which the title to, or possession of, immoveable property will not in any manner or measure be directly affected. Further, the proposition "for" in the expression "suit for land" would seem to indicate that the title to or possession of, immoveable property must be the primary object of the action. A suit for an office or for the removal of a person from an office is a well known form of action. This is a suit merely for the accounts of the management of a trust and for the administration of a trust. The decision of this Court, confirmed by the Privy Council in the case of *Srinivasa Moorthy v. Venkatavarada Iyengar* (2) is that an action for administration of an estate is not a suit for land, even though the whole of the immoveable property belonging to the estate may be outside the local limits of the Court. I do not see how on principle the present suit differs from an administration action. This being a suit for an account of the management of a trust by the first and second defendants and really a suit for the administration of a trust referred to in the plaint, it seems to me that the same principle applies and it cannot possibly be described as a "suit for land," and, therefore, excluded from the jurisdiction of this Court. The learned Judge was right in that decision; I may also add that the original application made on behalf of the first defendant to the learned Judge was to revoke the leave to sue granted by the Court. Leave to sue could not possibly have been granted in a case in which the whole of the property, the subject-matter of the suit, was outside the jurisdiction if the suit was a suit for land. Leave to sue

(2) 11 Ind. Cas. 447; 34 M. 257; 15 C. W. N. 741; 8 A. L. J. 774; 13 Bom. L. R. 520; (1911) 2 M. W. N. 375; 14 C. L. J. 64; 21 M. L. J. 669; 10 M. L. T. 263 (P. C.).

(1) 33 Ind. Cas. 906; 30 M. L. J. 120.

was applied for and obtained in this case, because all the defendants did not reside within the jurisdiction and part of the cause of action may be said to have arisen beyond the jurisdiction of this Court. That leave to sue was granted in the first instance *ex parte*. To revoke that leave would not be to confer or take away any jurisdiction possessed by the Court in respect of the suit if it was a suit for land. Even if the order of the learned Judge refusing to revoke the leave to sue be set aside, the question would still remain, whether this Court had jurisdiction in respect of the suit. But Mr. Grant on behalf of the respondent, intimated that this appeal might be dealt with, as though it was an appeal from a decision on a preliminary question whether the Court had jurisdiction to try the action; and, by consent of both the appellant and the respondents, the appeal was so treated. The result of our decision, therefore, is that the Court has jurisdiction in this particular case having regard to the nature of the suit. I agree that the appeal should be dismissed with costs.

V. N. V.
Z. K.

Appeal dismissed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL

No. 14 OF 1924.

July 29, 1924.

Present:—Sir Lallubhai Shah, Kt.,
Acting Chief Justice, and Mr. Justice
Kincaid.

MEGHJI MOORJI—PLAINTIFF—

APPELLANT

versus

TYEBALLI KAMRUDDIN—

DEFENDANT—RESPONDENT.

Vendor and purchaser—Agreement to sell—Part-payment of purchase-money—Marketable title, stipulation as to—Waiver—Transfer of possession—Vendor, duty of.

In order that there may be an effectual waiver of any stipulation in an agreement, it must be intentional and based upon full knowledge of the circumstances. [p. 191, col. 2.]

If the purchaser enters into possession or pays the whole or part of the purchase-money, or does other acts, which a purchaser is not bound to do until a good title has been made, he may be deemed to have waived objections to the title. [p. 193, col. 1.]

The question as to whether the objection as to title is waived, is one of fact, and it may be that under

certain circumstances the payment of purchase-money may indicate a waiver on the purchaser's part. [p. 193, col. 1.]

Where there is an agreement for sale, and where there has been transfer of possession in pursuance of that agreement to the purchaser and the contract price has been received by the vendor, the vendor cannot recover back the possession, but must be prepared to fulfil the contract by executing a conveyance. [p. 194, col. 1.]

Bapu Apaji v. Kashinath Sadoba, 39 Ind. Cas. 103; 41 B. 438; 19 Bom. L. R. 100, referred to.

Appeal from the judgment of Mr. Justice Fawcett.

FACTS.—The cause of action in the present suit arose out of a series of sale transactions with respect to a house situate in Bombay. In the first place the land on which the buildings were located was leased by its owners in 1861 for a period of 99 years with a freedom to the lessees, their heirs and assigns, to have a renewal of the lease from time to time, for like number of years in perpetuity, and under the same yearly rent. In 1901, the land was sublet under the same conditions of perpetual lease, the lessor agreeing to renew the lease, "if and when, he gets a renewal from his lessors."

The first sale transaction of the house was effected on November 29, 1919, in which one P. D. Lelinwala agreed to sell the lease hold property to Tyeballi Kamruddin, the present defendant, for Rs. 1,28,000 and received Rs. 12,000 as earnest money and undertook to complete the sale within two months. The seller undertook to convey a marketable title free from all reasonable doubts subject to the above mentioned lease of the provisions of which the purchaser was considered to have full knowledge. Messrs. Mulla and Mulla were engaged by the purchaser to complete this transaction.

The second sale transaction of the same property took place on January 20, 1920, and the property was re-sold by its new owner (the defendant) to the plaintiff for Rs. 1,72,000 who advanced Rs. 10,000 as earnest money in pursuance of the contract. The vendor agreed to duly make out a marketable title. The same Solicitors were engaged in this transaction as well.

On February 21, 1920, a third sale transaction was made. The plaintiff sold the property to Simon and Moti Lal at a profit of Rs. 18,000 and bound himself to give or sell the same to the purchasers on the same conditions subject to which he had purchased from his vendor, namely, the defendant. The Attorneys for the pur-

chasers in the transaction were Messrs. Judah and Solomon.

The plaintiff paid a sum of Rs. 1,20,000 to Mulla and Mulla, the Attorneys of the defendant, as part-payment of the price. Out of this amount Rs. 1,16,000 was paid to the vendor in the first transaction who had received Rs. 12,000 already as earnest money and who was thus fully paid. The defendant to whom the title was now passed demanded Rs. 46,000 which remained due from the plaintiff before he was ready to execute the sale-deed in favour of the plaintiff.

In the meantime the purchasers in the third transaction raised an objection that the plaintiff had not made out a marketable title and that the clause about the renewal of the lease dated March 7, 1901, did not make out the tenure of the property to be a perpetual lease, because it only provided that the lessor shall renew the lease in favour of the lessee "if and when" he obtained a renewal from the landlord, but the lessor was not bound to obtain that renewal.

The plaintiff on the one hand being pressed by the defendant for the payment of the balance of the sale-price, and on the other, by his purchasers being confronted by the plea of having failed to pass a marketable title took out an originating summons in which he put the differences between him and sub-purchasers for the consideration of the Court. The answer went against him as it decided that the marketable title was not made out as stipulated between the plaintiff and his purchasers.

The plaintiff, therefore, put an end to his contract with the defendant, and demanded Rs. 1,20,000 plus Rs. 10,000, the money advanced by him. The defendant alleged that the contract was completed and made a counter-claim of Rs. 46,000. The plaintiff, therefore, brought the suit against the defendant for the amount claimed by him.

Mr. Judah (with him Mr. Coltman), for the Appellant.

Mr. Engineer (with him Mr. Desai), for the Respondent.

JUDGMENT.

Shah, Ag. C. J.—[After stating the facts of the case His Lordship proceeded:—] In the appeal before us on these facts, it has been contended that there was no waiver on the part of the plaintiff to insist upon the stipulation as to the market-

able title being deduced by the defendant, that there was no estoppel, and that in fact as the title was not marketable, no decree for specific performance could be, and should be, passed under the circumstances of the case. On the other hand, it is urged that the plaintiff really authorised Messrs. Mulla and Mulla to complete the sale on April 20, 1920, and as a result of that authority which Messrs. Mulla and Mulla had, the assignment, Ex. 1, was prepared, and as part-payment of purchase-money was paid by the plaintiff, he could not now call upon the defendant to make out a marketable title. In substance the argument is that he effectively waived his right to the marketable title being made out by the defendant, when he accepted the title through his Solicitors on April 20.

Before dealing with these points, it may be mentioned that it is not suggested before us that the plaintiff knew at the date of his contract with the defendant, or thereafter, of the express terms upon which the defendant had agreed to buy from Lelinwala. The finding on Issue No. 2 by the learned Trial Judge is not challenged before us, nor is the finding on Issue No. 1 questioned, and it is to be taken as found by the learned Trial Judge, that the plaintiff did not know that he was only obtaining a leasehold title for a limited term. Though the learned Judge does not consider it necessary to record any finding on Issue No. 6, which is whether the defendant has made out such title as he had agreed to make out, it is clear that for the purposes of this appeal it must be taken that in fact the title which the defendant was able to make out was not marketable. Though the learned Counsel for the defendant-respondent has made a somewhat faint attempt to suggest that it may be treated as an open question in this appeal, it seems to me that after the decision of the Court of Appeal between the plaintiff and the sub-purchaser, it cannot be treated as an open question. It may be mentioned that though the parties to this litigation may have known generally that it was a leasehold property, and not a freehold, it has been assumed by the parties throughout in this case that they at least expected, and were entitled to expect, to get a right to the renewal of the lease in perpetuity. The evidence of Mr. Dastur, who acted as a member of the firm of Messrs. Mulla and Mulla in connection with this contract both

for the defendant and the plaintiff, says at the end of his evidence:—

"We didn't quite notice the point regarding the difficulty as to renewal, which was subsequently raised. But I believe I contended with Judah and Solomon that the plaintiff had never agreed to sell perpetual lease hold. When we examined the documents we took the title to be one of perpetual leasehold, I accepted the title on behalf of both, viz., defendant and plaintiff."

There is no doubt from the correspondence, and also from the evidence recorded at the trial, that at least the plaintiff and his sub-purchasers to whom the property was sold on the same terms on which the plaintiff had bought from the defendant, were under the clear impression that at least title to a perpetual leasehold was to be made out. That is the basis upon which the questions raised on the originating summons were considered; and that is the basis upon which the decision in that case proceeds.

In this view it is clear that for the purpose of determining whether marketable title was made out, it must be taken that, though it was known to be a lease-hold property, it was necessary to make out a title to a perpetual lease-hold or at least to the right to get such a lease-hold. From this point of view it has been definitely held that as between the plaintiff and his sub-purchasers the title was not marketable on the ground that Bai Avabai under the lease of 1901 did not bind herself to take out a lease at the end of 99 years' period fixed in the head-lease, but agreed that if and when the lease was renewed she and her heirs and assigns would pass on the benefit of that renewal to their lessee. That was not considered sufficient to give to the subsequent lessees the right to the renewal of the lease in perpetuity, and, therefore, the title was held to be defective. It is difficult to hold that as between the defendant and the plaintiff, if it is necessary for the defendant to make out a marketable title, that the defect does not exist. Taking it, therefore, for the purposes of this appeal that if it is essential for the defendant to make out a marketable title to this lease-hold property in the sense of the lessee getting the right to it as a permanent lease-hold, the defendant is not in a position to make out that title, according to the view taken in the proceedings, to which I have referred.

The main point, however, upon which the decision of the lower Court is based, and which has been argued before us, is the point of waiver as to the stipulation to make out a marketable title. Now it is clear that in order that there may be an effectual waiver of any stipulation in an agreement, it must be intentional and based upon full knowledge of the circumstances, then the question is whether the plaintiff in this case is proved to have waived his right to the benefit of this stipulation as to marketable title being made out by the defendant. In connection with this point, it is important to remember that Messrs. Mulla and Mulla had already investigated the title on behalf of the defendant with reference to his contract between the defendant and Lelinwala, and on this point the evidence of Mr Dastur is important:—

"Q. Did you tell him what he was purchasing under his agreement?

A. Yes, I did. That he was practically purchasing the interest of Tyeballi under his agreement. That is he was purchasing the property on the same terms that Tyeballi had agreed to purchase from Lelinwala. The completion of the matter proceeded on that basis. I remember plaintiff's agreement to sell to Simon and Motilal. I wrote to Judah and Solomon, who represented Simon and Motilal, that this assignment would be direct to them. I must have received a letter from Judah and Solomon dated March 11, 1920, as per this press copy. They refused to complete before May 31. It was then decided to take an assignment in plaintiff's favour as Shroff and Vachha were pressing to complete the matter on behalf of Lelinwala."

Then further on in cross-examination he says:—

"Mr. S. Mulla was only attending to the preparation of the agreement for sale between Lelinwala and Tyeballi. After that I was attending to the matter. The title was practically investigated before the agreement was prepared. I had gone through the title-deed; so also had Mr. S. Mulla. After the agreement was executed, we had gone through the title-deeds again and taken search in the Sub-Registrar's office. We hadn't taken search in that office (of head-lease of 1869; his records begin only from 1867). We began only with a title-deed of a certain date. I don't remember the year. A clerk took the search, not I. I can't say it was completed."

before plaintiff became our client. The notes of search are in the missing file. I don't know what took place between plaintiff and S. Mulla, before plaintiff was sent to me. There was not necessity to re-investigate the title after plaintiff became our client and I don't think I did. The agreement between plaintiff and defendant was executed outside our office. Our advice was sought and in regard to that agreement by plaintiff after it had been executed."

This evidence clearly shows that practically the title was investigated by Messrs. Mulla and Mulla as regards the contract between Lelinwala and Tyeballi, and they made no further effort when they were engaged by the plaintiff to investigate the title so far as the plaintiff was concerned. They were apparently satisfied that a title to a perpetual lease-hold was sufficiently made out, and as they did not realize the defect which came to be subsequently discovered, they thought that there was no need to investigate the title further. But it must be remembered that all the knowledge that Messrs. Mulla and Mulla had before the plaintiff engaged them for the purposes of the contract in question, was acquired by them on behalf of Tyeballi, and all the knowledge that they had acquired as regards the terms of the contract between Lelinwala and Tyeballi as regards the lease could not be attributed to the plaintiff. In fact the learned Judge has not attributed that knowledge to the plaintiff, and quite rightly, under the circumstances. The fact appears to be that Messrs. Mulla and Mulla being satisfied as to the marketable nature of the title, they naturally advised the defendant and the plaintiff accordingly, and they accepted that advice. The plaintiff paid Rs. 1,24,000 on April 16, 1920, a substantial part of which was used by Messrs. Mulla and Mulla for the purpose of getting the assignment, which is Ex. 1 in the case. On April 20, 1920, it was signed only by Lelinwala who got the balance of his money. The defendant beyond paying Rs. 12,000 as earnest money to Lelinwala had not paid anything to him, and Rs. 1,16,000 paid on April 20 to Lelinwala was part of the money received by Messrs. Mulla and Mulla from the plaintiff. The plaintiff was not present at the time, and he never agreed in terms to accept the conveyance or assignment. It is true that thereafter two letters were

written by Messrs. Mulla and Mulla to the plaintiff, one on May 5, 1920, and the other on June 1, 1920. In the letter of May 5 it was distinctly stated that arrangement was made that defendant was to have possession of the property in the sense that he was to receive rents till the balance of the consideration money was not paid by the plaintiff to the defendant and Ex. 1 not completed, as it was intended to be completed. On June 1, again, there was a demand made for Rs. 46,000 and for the completion of the document; but the plaintiff did not reply. Thereafter there was practically silence for a long time until we come to September and October when at the request of Messrs. Merwanji, Kola and Co., Messrs. Mulla and Mulla informed the plaintiff of what the defendant was demanding. As I have already indicated in the statement of facts, that in December 1920, the plaintiff's Solicitors Messrs. Captain and Vaidya took practically the same view as to the marketable nature of the title as Messrs. Mulla and Mulla, and on behalf of the plaintiff they did their best to make out a marketable title. Unfortunately, however, with the best of efforts on the part of the plaintiff to make out that position he failed, and on this time the silence of both parties, namely, of the defendant and the plaintiff, appears to me to be attributable to the fact that they were waiting to see the result of the proceedings taken by the plaintiff to make out a marketable title. As soon as the plaintiff found that he failed in his efforts to make out a marketable title, and that it was definitely held by the Court of Appeal that a marketable title was not made out, he at once wrote to the defendant's Solicitors saying that he did not complete the contract, and that the contract was to be treated as rescinded.

Taking the conduct of the plaintiff as a whole, it seems to me that he was first acting according to the advice of Messrs. Mulla and Mulla, and thereafter, according to the advice of Messrs. Captain and Vaidya, and he was as anxious as the defendant to see that the contract was put through. That was natural under the circumstances as he stood to gain by making out that position, if not as much as the defendant, at least to a certain extent, and the defendant was also interested in the same sense. Therefore, both the defendant and the plaintiff really were waiting to see the result of

the proceedings which the plaintiff took in this matter.

I am not prepared to hold on these facts that there was an intentional waiver of the stipulation as to marketable title, for the simple reason that at the time he had no knowledge of all the circumstances. In fact there had been no independent investigation of title on his behalf. Messrs. Mulla and Mulla who had already investigated the title thought that was sufficient, and under those circumstances it seems to me that it would not be right to hold that the plaintiff was consciously waiving his right to the benefit of the stipulation of marketable title in his agreement. As soon as Messrs. Judah and Solomon found the defect in the title, the plaintiff remained silent and waited to see the result of that dispute. He did his best to see that the dispute was settled in a manner he wished it to be settled. But he failed, and he at once put an end to the contract. Under the circumstances I am not satisfied that there was any waiver on the part of the plaintiff. Equally I am not satisfied that there was any estoppel in virtue of what happened on April 20, 1920, in connection with the assignment, Ex. 1. It is true that the plaintiff paid a part of the purchase-money, and the best part of it was used for the purpose of paying off Lelinwala on behalf of the defendant by Messrs. Mulla and Mulla. It is also true, as pointed out by the learned Trial Judge, that if the purchaser enters into possession or pays the whole or part of the purchase-money, or does other acts, which a purchaser is not bound to do until a good title has been made, he may be deemed to have waived objections to the title. The question as to whether the objection as to title is waived, is one of fact, and it may be that under certain circumstances the payment of purchase-money may indicate a waiver on his part. But here it seems to me that the whole thing proceeded upon what may be described as an honest error of judgment on the part of Messrs. Mulla and Mulla in advising that marketable title was made out, and so far as the parties are concerned, it must be taken to be a case of proceeding on a common mistake induced by the advice of the Solicitors.

With reference to this aspect of the case, it seems to me that the case of *Jones v. Clifford* (1), which the learned Judge had

(1) (1876) 3 Ch. D. 779; 45 L. J. Ch. 800; 35 L. T. 937; 24 W. R. 979.

referred to, is somewhat similar to the present case, and it is in favour of the plaintiff, and not against him. In that case it was distinctly agreed that it was to be assumed that a person who died in 1841 was seized in fee of the freeholds, and that the defendant should not "require the production of or investigate or make any objection in respect of the prior title" thereto. The sub-purchaser happened to discover a defect after the title was accepted by the defendant and it was held that the defendant was not precluded by the condition or the acceptance of title from taking objection, and the Court could not decree specific performance. Although there was no fraud, there being a common mistake, the defendant there was held to be entitled to an inquiry as to the title to the freeholds at the date of the contract.

Similarly here, though the matter proceeded so far as the preparation of the assignment, Ex. 1, it seems to me that when the defect was discovered subsequently at the instance of the sub-purchasers from the plaintiff, the plaintiff is equally entitled to the benefit of the stipulation that marketable title was to be made out, even though he had in a sense accepted the title on April 20, 1920. Under the circumstances of this case it cannot be inferred that he waived his right to the stipulation or that he was estopped. In fact the basis for the plea of estoppel appears to me to be weaker even than the plea as to waiver. Beyond the conduct as indicated by what happened on April 20, 1920, there is nothing in the conduct of the plaintiff to show that he ever represented to the defendant, or that the defendant was in any sense influenced by the representation, that the title was good. In fact both of them were advised by the common Solicitors Messrs. Mulla and Mulla, and whatever the mistake underlying that advice may be, it was a case of a common mistake. It cannot be said in this case that the defendant acted on any belief induced by the representation of the plaintiff.

The learned Judge has referred to the doctrine of part-performance as accepted in *Bapu Apaji v. Kashinath Sadoba* (2). After a careful consideration of the facts of this case, I do not see how that doctrine could apply to this case. There was no

(2) 39 Ind. Cas. 103; 41 B. 438; 19 Bom. L. R. 100.

question of any defect in the title of the vendor at all. Where there is an agreement for sale, and where there has been transfer of possession in pursuance of that agreement to the purchaser and the contract price has been received by the vendor, the vendor, cannot recover back the possession, but must be prepared to fulfil the contract by executing a conveyance. That really is the result of that judgment. It is not at all clear, and it is not necessary for the purpose of this case to decide, as to whether in a given case where there is admittedly a defect in the title of the vendor, the purchaser could not, even if these things had happened, get the benefit of the plea that he was not bound to complete the contract. That must depend upon the circumstances of the case. That point did not arise for consideration in *Bapu Appaji v. Kashinath Sadoba* (2), nor does it appear to have arisen for decision in any of the cases to which reference has been made in that judgment. For instance, in the case of *Karalia Nanubhai v. Mansukhram* (3) to which the learned Trial Judge has referred, there was no question of any defect in the title of the vendor at all. No doubt if a stage has been reached in a given case where practically the property has passed, though the legal ownership may not have, the question would arise as to whether the purchaser could repudiate the contract on the ground that no marketable title has been made out. The facts of the present case do not appear to me to invite the application of the principle underlying the decision in *Bapu Appaji v. Kashinath Sadoba* (2). In the first place, the possession such as there could be of this property, has been with the defendant, and has never been with the plaintiff. It is quite true that as a result of the arrangement it was intended to be given to the plaintiff, if he acted in a particular way. But he never did act in that way and he never took possession. The purchase-money was paid in part, and that fact does not appear to me to negative the possibility of a dispute as to marketable title arising between the parties. The dispute did arise in fact, and I have already referred to the way in which that dispute was ultimately disposed of as between the plaintiff and his sub-purchasers. The mere fact that Messrs.

Mulla and Mulla came to the conclusion that the title was marketable and advised both the parties to act on that basis and that both parties acted on that basis up to a certain point, does not preclude the plaintiff from taking up the position, if he is otherwise able to make out that the title is not marketable. The decision in *M'Culloch v. Gregory* (4) appears to be in point. It is not necessary to refer to the observations of the Vice-Chancellor in that case in detail. But the principle underlying that decision applies to the fact of this case. If we were to hold that the plaintiff is estopped from making out the plea that the title is not marketable, or that he has waived his right to the benefit of the stipulation about a marketable title, we would practically be holding that he was bound by the advice of Messrs. Mulla and Mulla which both parties accepted for the time being.

On the whole, therefore, we are satisfied that the view taken by the learned Judge in this case is wrong. We allow this appeal, set aside the decree of the Trial Court and pass a decree in favour of the plaintiff for Rs. 1,26,000 with interest at six per cent. from this date until payment, with costs of the appeal and of the suit. The defendant's counter-claim is dismissed. The decretal amount to be a charge on the property in question. We further direct that the amount paid by the defendant to Messrs. Merwanji Kola & Co., under the order of this Court dated November 18, 1921, as representing the net rents of the property recovered by the defendant should be paid over to the plaintiff in part satisfaction of this decree.

K. S. D.

Appeal allowed.

(4) (1855) 1 K. & J. 286; 3 Eq. R. 495; 24 L. J. Ch. 246; 3 W. R. 231.

PATNA HIGH COURT.

CIVIL REVISION No. 93 OF 1925.

May 25, 1925.

Present :—Mr. Justice Sen.

KAWLESHWAR LAL—PETITIONER

versus

SATYA BRATA BANERJEE AND ANOTHER

—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 17
—Ex parte decree, application to set aside—Deposit

(3) 21 B. 400; 2 Bom. L. R. 220; 12 Ind. Dec. (N. S.) 799.

or security, absence of—Procedure—Dismissal of application.

Defendant made an application to set aside an *ex parte* decree passed against him by a Small Cause Court. The Court directed the defendant to file security under s. 17 of the Provincial Small Cause Courts Act by a certain date. One day before that date defendant filed a draft security bond for approval by the Court undertaking to register it after such approval. On the date fixed the Court passed an order dismissing the application on the ground that it was not accompanied by a deposit or security. No further application was made by the defendant within limitation to set aside the decree.

Held, that inasmuch as the application was not accompanied by a deposit or security as required by s. 17 of the Provincial Small Cause Courts Act and no further application supported by a deposit or by a proper security was made within limitation, the Court had no option but to dismiss the application.

Revision from an order of the Subordinate Judge, Arrah, dated the 19th December 1924.

Mr. Bhagwan Prasad, for the Petitioner.

Mr. Benoy Bhusan Mukherji, for the Opposite Party.

JUDGMENT.—The petitioner is defendant No. 2 in a suit instituted before the Small Cause Court Judge of Arrah for recovery of a sum of Rs. 459 principal with interest.

On the 15th of December 1924 the petitioner filed his written statement stating that he had no concern whatsoever with the transaction referred to in the plaint and denying all liability on that account. On the same day the case was decreed *ex parte*.

On the 16th December 1924 the petitioner made an application under O. IX, r. 13 of the C. P. C. for setting aside the *ex parte* decree purporting to show sufficient cause for his non-appearance at the time when the suit came on for hearing. On the 17th December 1924 the learned Subordinate Judge directed the petitioner to file security to the extent of the decretal amount by the 20th December 1924.

It appears that on the 19th December 1924 the petitioner filed a draft security bond for approval by the Court undertaking to register it after such approval. On the 20th the Court passed an order dismissing the application on the ground that the petition was not, as it should have been accompanied by a deposit or security.

Now the dismissal of the application under O. IX, r. 13 was obviously in accordance with s. 17 of the Provincial Small Cause Courts Act which lays down the procedure for a cheap and expeditious disposal of petty claims. It provides that "An application

for an order to set aside a decree passed *ex parte* or for a review of judgment shall at the time of presenting his application either deposit in the Court the amount due from him under the decree or in pursuance of the judgment, or give security to the satisfaction of the Court for the performance of the decree or compliance with the judgment as the Court might direct". In other words such an application would be deemed incompetent unless accompanied by a deposit of the decretal amount in Court or by security sufficient to the satisfaction of the Court for the performance of the decree.

It is contended by the learned Vakil appearing for the petitioner that inasmuch as the period of limitation for presenting such application had not as yet expired it was open to him to present his application supported by proper security at any time prior to the 14th of January, the date when such period would have expired. This view is supported by the decision in the case of *Jeun Muchi v. Budhram Muchi* (1) and *Assan Mahomed v. Rahim Sahib* (2). Both these cases lay down that "Although an application made without compliance with the provisions of s. 17 of the Provincial Small Cause Courts Act is to be deemed incompetent yet a subsequent application made within the period of limitation with proper observance of the provisions of that section would be competent and should be entertained."

Now, in this case what happened was that no such application was made afterwards. The application in this case whether deemed to have been filed on the 16th December, or the 20th of December, was obviously not competent, as there was no security before the Court but only a draft security and, unfortunately, no attempt was made subsequently to make an application supported by a deposit of the decretal amount or by a proper security.

The facts of the present case are, therefore, clearly distinguishable from those of the cases above-mentioned in which an application with proper security was made within the statutory period of limitation.

In the circumstances this application must be dismissed with costs.

Z. K.

Application dismissed.

(1) 32 Ind. Cas. 330; 1 C. L. J. 43.

(2) 55 Ind. Cas. 977; 43 M. 579; 11 L. W. 543; 38 M. L. J. 539; 28 M. L. T. 17; (1920) M. W. N. 375; 27 M. L. T. 273.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 19-B OF 1923.

February 11, 1924.

Present:—Mr. Kinkhede, A. J. C.

DAULAT—PLAINTIFF—APPELLANT

versus

RAMAPPA—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Berar Land Revenue Code, 1896, s. 96-I—Evidence Act (I of 1872), ss. 110—Execution of decree—Claim proceedings—Procedure—Title suit—Burden of proof—Entry in Record of Rights—Possession—Presumption.

The policy of the Legislature is to secure the speedy settlement of questions of title raised in claim proceedings and the finding of a Court in such a proceeding is a summary decision from which the suit allowed by r. 63, O. XXI of the C. P. C., is simply a form of appeal. The object of the Legislature in prescribing a suit by way of appeal is to give the parties an opportunity of placing their respective cases before a Court, because a summary investigation might not have furnished sufficient material for a decision by an Appellate Court. [p. 197, col. 1]

Sardhari Lal v. Ambika Pershad, 15 C. 521; 15 I. A. 123; 5 Sar. P. C. J. 172; 12 Ind. Jur. 210; 7 Ind. Dec. (N. S.) 931 (P. C.), *Phul Kumari v. Ghanshyam Misra*, 35 C. 202; 7 C. L. J. 36; 12 C. W. N. 169; 10 Bom. L. R. 1; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 506; 14 Bur. L. R. 41; 35 I. A. 22 (P. C.), *Vedalingam Pillai v. Veerathal*, 54 Ind. Cas. 530; 37 M. L. J. 517 at pp. 553, 554; 26 M. L. T. 513; (1920) M. W. N. 77, relied on.

Under the provisions of s. 96-I of the Berar Land Revenue Code an entry in the Record of Rights carries with it a presumption of correctness and would support the title, or, at any rate, the possession, of the recorded holder of a survey number. The absence of any plea that the plaintiff is out of possession would also entitle him to the presumption under s. 110 of the Evidence Act that he is in possession as an owner, and where the question of possession has not been investigated in claim proceedings these statutory presumptions would entitle the plaintiff to succeed in his title suit in the absence of any evidence of rebuttal. [p. 197, cols. 1 & 2.]

Case-law discussed.

Appeal against a decree of the District Judge, Amraoti, in Civil Appeal No. 68 of 1922, dated the 11th October 1922.

Mr. G. V. Deshmukh, for the Appellant.

Mr. D. T. Mangalmurti, for the Respondent.

JUDGMENT.—The defendant-respondent attached entire filed Survey No. 19 subdivision No. 1 area 8 acres 19 gunthas rent Rs. 21-5-6 at Mouza Bhilapur taluq moashi in execution of his decree in Civil Suit No. 1354 of 1920 as if it is the property of his judgment-debtor Panjabrao Manikrao. The attachment was made on 25th September 1921 from plaintiff's possession. It gave rise to an objection by the plaintiff-appellant on the basis of his registered sale-deed dated 6th April 1914 for Rs. 1,940-10 out of which

Rs. 1,800 formed the consideration of a mortgage which the vendee executed in favour of the vendor under the same date and Rs. 140-10 were paid in cash before the Sub-Registrar. The objection was summarily rejected on 16th November 1921 on the ground of its being unnecessarily delayed. Hence this suit for declaration that the field belongs solely to plaintiff and is in his possession, and that the same is not liable to attachment and sale in execution of the defendant's decree as the property of his judgment-debtor. This suit was filed on 22nd February 1922. The defence which was recorded by Mr. Y. S. Jamdar, Munsif, was very short. It may be reproduced here :

"Plaintiff's purchase is denied. It is denied, bogus, fraudulent, and also void under s. 53 of Transfer of Property Act being made to defeat and delay the defendant's and other creditors' claims. The judgment debtor and plaintiff are *mauvas bhau* and they are colluding against the defendant. The claim is denied."

In these meagre pleadings there is no denial of the plaintiff's express allegation that he was and is in possession of the property.

The issues framed are :—

1. Is plaintiff a *bona fide* purchaser for value?
2. Is plaintiff's purchase void under s. 53 of Transfer of Property Act?
3. Is plaintiff entitled to the relief claimed?

The case, however, came before another Judge at the stage of evidence. He held on Issue No. 1 that because Rs. 1,800 were covered by a mortgage and only Rs. 140-10 were paid in cash the transaction was bogus and that the vendee was in possession were consequently considered unreliable. Issue No. 2 was found against the defendant for want of evidence. In the end the claim was dismissed on the ground that the sale in plaintiff's favour was bogus.

The District Judge has simply confirmed the finding on Issue No. 1 and dismissed the plaintiff's appeal. The plaintiff comes up in second appeal and contends that for want of a denial on the defendant's part of his express allegation of possession the defendant must under O. VIII, r. 5, C. P. C., be treated to have admitted it, that in any case the absence of an issue on that point has prejudiced him in the matter of production of documentary evidence for corroborating the oral testimony of his

witnesses as to possession. That the only question which the Executing Court is authorized to enquire into is question of bare possession. But in the objection case that question even was not considered, because, the Court preferred to follow the other course allowed by law not to make the enquiry under O. XXI, r. 58, C. P. C., which is termed an "investigation" and "not a trial of issues between the parties." The policy of the Legislature is to secure the speedy settlement of questions of title raised at execution sales: *Sardhari Lal v. Ambika Pershad* (1) and the finding of a Court is a summary decision from which the suit allowed by r. 63 is simply a form of appeal; *Phul Kumari v. Ghanshyam Misra* (2). The object of the Legislature in prescribing a suit by way of appeal appears to be to give the parties an opportunity of placing their respective cases before a Court, because summary investigation might not have furnished sufficient material for a decision by an Appellate Court: see *Vedalingam Pillai v. Veerathal* (3).

It will thus be seen that the question of title under the sale-deed was not and could not be within the scope of the enquiry even if the same had been made under O. XXI, r. 58, C. P. C., and consequently the burden of proof is on the plaintiff as in other cases and not in any special sense. The burden, therefore, of introducing the evidence only is on him. This he has sufficiently done in this case. The plaintiff had it appears filed with the plaint a true copy of an entry in the Record of Rights showing that the field was entered in his name. This is marked Ex. P-1. I find no reference to this document. Under the provisions of s. 93-I of the Berar Land Revenue Code such an entry carries with it a presumption of correctness, and would support the title of the recorded holder of the survey number or at any rate his possession. The absence of any plea that the apparent purchaser was out of possession would also entitle plaintiff to the law's presumption under s. 110, Indian Evidence Act, that he was in possession as an owner. There was no investigation in the summary proceedings, and it could not, therefore, be

said that even plaintiff's bare possession was negatived by virtue of the order rejecting his objection petition, much less could it negative plaintiff's possession of title: cf. *Vedalingam Pillai v. Veerathal* (3). The nature of the enquiry is a summary one. Rights relating to property far beyond the pecuniary jurisdiction of a tribunal in regard to suits cannot be disposed of on the claim petition. Can the Legislature have contemplated such far reaching consequences to an order made under such circumstances as to conclude the right and title of the parties for all time to come, (page 550*)? An order passed without any jurisdiction, could much less have such an effect. Of course, if there had been an investigation, the matter would have been slightly different because the order negating the plaintiff's possession would have added to the burden, and the Court would have demanded greater degree of convincing proof on that point; no doubt the establishment of his title under the sale-deed must necessarily come to his aid in proving his possession in the regular suit.

Here we have absolutely nothing in the pleadings to go upon, or even to raise, a *prima facie* case against the plaintiff, beyond a bare denial of the sale transaction and a collection of certain vague pet phrases in the defence. No attempt has at all been made to state any indicia or badges of fraud or unreality or other relevant facts in the pleadings tending to throw suspicion on the genuineness or *bona fides* of the transaction of sale, and so to cast a heavier onus on plaintiff, beyond a mere assertion that plaintiff was a *mawas bhanu* of the judgment-debtor. But of this relationship there is absolutely no proof on record. This weak defence which is really no challenge of the plaintiff's *bona fides*, coupled with an omission to deny the fact of plaintiff's possession over the field, enabled the plaintiff easily to shift the onus of proof on to the defendant to show that what was apparently a sale was not a real sale, but that the transaction was *mala fide* and for no consideration. The express recital under such circumstances be treated rather as a sign of its genuineness followed as the sale was by transfer of possession, which is not disputed before me. The Court was, therefore, bound to give to the plaintiff the benefit of the statutory presumption that attached to the entry in the Record of

(1) 15 O. 521; 15 I. A. 123; 5 Sar. P. C. J. 172; 12 Ind. Jur. 210; 7 Ind. Dec. (N. S.) 931 (P. C.).

(2) 35 C. 202; 7 C. L. J. 36; 12 C. W. N. 169; 10 Bom. L. R. 1; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 505; 14 Bur. L. R. 41; 35 I. A. 22 (P. C.).

(3) 54 Ind. Cas. 530; 37 M. L. J. 547 at pp. 553, 554; 26 M. L. T. 513; (1920) M. W. N. 77.

Rights, and also, of the one provided for by s. 110 of the Indian Evidence Act; the Court ought to have, therefore, held that in the absence of any evidence to the contrary the transaction of sale was a real transaction. No attempt has been made to show that the sale was in respect of the entire property, or that the plaintiff's possession was not as owner, but merely in trust for the judgment-debtor, nor do I find any evidence on record to show that there were several creditors of the judgment-debtor, whose claims were awaiting settlement in 1914 so as to raise any presumption of an intention on the part of the debtor to enter into an unreal or fraudulent transfer. Much less is there any proof to show that plaintiff was a party to and shared in such an intention, even if such an intention on the part of the judgment-debtor be presumed for a moment. The First Court has decided Issue No. 2 against the defendant. This all the more strengthens my view that the sale transaction is real.

On the whole, I am not satisfied with the correctness of the view of law taken by the lower Courts and necessarily, therefore, the view of the facts is not such as binds me in second appeal. After carefully considering the evidence on both sides, I come to the conclusion that there is preponderance of evidence on plaintiff's side, and that he has established the reality and *bona fides* of the sale, and that the defendant has failed to show the contrary, and further that the plaintiff was entitled to a decree as prayed for. The decree appealed against is set aside and the plaintiff's claim decreed with costs in all the three Courts. The defendant will bear his own costs throughout.

S. D.

Appeal accepted.

PRIVY COUNCIL.

APPEAL FROM THE LOWER BURMA CHIEF COURT.

June 30, 1925.

Present:—Lord Atkinson, Lord Shaw and Lord Darling.

MAUNG BYA AND ANOTHER—

APPELLANTS

versus

MAUNG KYI NYO AND OTHERS—

RESPONDENTS.

Riparian owners, rights of—Artificial and natural

water-courses—Law in Burma same as in England—Lower owner damming channel—Damage caused to higher owner's property—Liability of lower owner.

In the case of a natural stream or water-course, each of the riparian owners is entitled to the unimpeded flow of water in its natural course and to its reasonable enjoyment as it passes through his land as a natural incident of the ownership of his land; while in the case of an artificial water-course, any right of the owner to the flow of water-course must rest on prescription or grant from or contract with the owner of the land from which the water is artificially brought. [p. 203, col. 1.]

Menzies v. Breadalbane, (1828) 3 Bligh (N. S.) 414; 4 E. R. 1387; 32 R. R. 103 and *Orr-Ewing v. Colquhoun*, (1877) 2 App. Cas. 839 at p. 846, referred to.

A water-course originally artificial may have been made under such circumstances, and have been used in such a way, that an owner of land situate on its bank will have all the rights over it that a riparian owner would have if it had been a natural stream. [*ibid.*]

Abdul Hakim v. Gonesh Dutt, 12 C. 323; 6 Ind. Dec. (N. S.) 220 and *Bickett v. Morris*, (1866) 1 H. L. (Sc.) 47; 12 Jur. (N. S.) 803; 14 L. T. 835, referred to.

The law applicable in lower Burma to the flow of and flooding by fresh-water rivers or water-courses, whether they be natural or artificial, or trespasses on the bed or soil of such rivers and streams, is not different from the law as applied to similar subjects in England. [p. 199, col. 1.]

Abdul Hakim v. Gonesh Dutt, 12 C. 323; 6 Ind. Dec. (N. S.) 220 and *Sankarappa Naicker v. Pari Naicker*, 21 Ind. Cas. 62; 38 M. 149; (1913) M. W. 640; 25 M. L. J. 276, referred to.

A raised road or *bund* ran transversely across a depressed ground through which flowed a channel of water, and was properly provided with a gap for the flow and a bridge over the channel. The *bund* thus provided with an eye and a bridge to permit the inflow and out-flow of water, was interfered with by the owner of the land lower down who filled up the eye and channel course thereat and converted an innocuous *bund* into a dam, which dammed back the water on to the owner of the land higher up:

Held, (1) that the owner of the land lower down was responsible for the damage thus caused to the property of the higher owner; [p. 206, col. 1.]

(2) that it was wholly irrelevant who the body or person was which or who had actually formed the channel. [*ibid.*]

Appeal from a judgment of the Chief Court of Lower Burma (Maung Kin and Duckworth, JJ.), dated the 31st May 1921, reversing that of the District Judge, Pyapon, dated the 27th September 1919.

Messrs. G. Lawrence, K. C., and Besley, for the Appellants.

Messrs. Harney, K. C., and Leach, for the Respondents.

JUDGMENT.

Lord Atkinson.—This is an appeal from a judgment of the Chief Court of Lower Burma (Maung Kin and Duckworth JJ.), dated 31st May, 1921, allowing the appeal of the respondents against a decree of the District Court of Pyapon (Po Bye, District Judge) dated 27th September 1919

by which the said District Judge ordered the respondents to pay the appellants the sum of Rs. 8,821-4-8 by way of damages and the costs of the suit.

The appellants in the second paragraph of their case allege that "the question raised is whether in Burma a lower agricultural owner is liable to compensate a higher agricultural owner for damage to crops by inundation caused by the blocking of a canal running through the lands of the lower owner by which the water would otherwise have been drained from the land of the higher owner."

In a sense, but only in a limited sense, is that statement accurate. Save in the second and third of the reasons for their appeal it is put forward that the law applicable in Lower Burma to the flow of and flooding by fresh-water rivers or water-courses, whether they be natural or artificial, or trespasses on the bed and soil of such rivers and streams, is different from the law as applied to similar subjects in England. A little consideration of the two cases cited, *Abdul Hakim v. Gonesh Dutt* (1), *Sankarappa Naicker v. Pari Naicker* (2), will show that there is no conflict between the two systems of law, and it was not contended in argument on the hearing of the appeal that the general principles of the laws of England touching the matters above-mentioned did not apply to Lower Burma.

The action out of which the appeal has arisen was brought by the two appellants (who are husband and wife) in the District Court of Pyapon, Lower Burma, to recover damages amounting to Rs. 13,445 for the wrongful flooding by the acts and procurement of the respondents of a large tract of paddy lands 68,541 acres in extent, belonging to the appellants, whereby the productivity of these lands was, in the season in which the acts were done, so reduced that they only yielded 3,867 baskets of paddy instead of their normal yield of about 17,300. The District Judge decided in favour of the appellants and awarded them Rs. 8,821-4-8 damages. The Chief Court on appeal reversed the decree of the District Judge, and on grounds which appear to the Board strange, and are indeed unsound, decided in the respondents' favour.

Several maps of the locality were given in evidence; the two most intelligible and useful were the first, a map marked Ex. A, and the second, dated in the year 1906-7, described as Ex. 2A. With almost perverted ingenuity the draftsman of these and, indeed, of many other maps, has omitted to place upon the face of them any indication of the points of the compass, so that in dealing with them one is obliged to use the words left and right, and top and bottom of the maps in order to endeavour to fix any point or object. A study of these two maps, however, enables one to get an idea of the terrain, especially as the map of 1906 represents what was the nature of the tract of country with which the case is conversant before any of the works were executed, the misuse of which is alleged to have caused the flooding, and as the second map, Ex. A, shows what were the features of that tract after these works had been executed. The map of 1906-7 purports to be a plan 126 of Sakangyi circle, Bogale township. It corresponded closely with the map Ex. A.

Many rivulets or water-courses are depicted upon it. They correspond with those depicted upon Ex. A. The main difference between them is that on the latter a prolongation of the water-course from Singu Chaung is to be found which is absent from 2A of 1906-7.

The water-course, styled extravagantly the canal, represented on A, and lettered A, B, C, D, G, H, emptying into the sea creek at A is precisely the same water-course as is represented on the map of 1906-7 coming from Singu Chaung and debouching into the same sea creek at the same place. No doubt the so-called canal is represented as being something broader than the corresponding stretch of water-course on the map of 1906, but the fact of vital importance is that all the rivulets or watercourses are depicted as of the same width and kind, and resemble each other in all respects. There could be no object in depicting on this map a water-course, as existing where none, in fact, existed when the map was made. The map, therefore, absolutely refutes the contention put forward with some hardihood on behalf of the respondents, that before the canal was made its site was a mere depression in the earth surface through which no stream ran; but in which, after heavy rain, stagnant water for a time accumulated. Now

(1) 12 C. 323; 6 Ind. Dec. (N. S.) 220.

(2) 21 Ind. Cas. 62; 38 M. 149; (1913) M. W. N. 640; 25 M. L. J. 276.

what was done in 1913-14 was, in their Lordships' view, the widening a little, and deepening a little, possibly trimming the banks a little, of an existing ancient fresh-water natural water-course, not in their view the making by excavation and such work of a watercourse, styled a canal, where none such theretofore existed.

The lands of the first respondent lie to the left-hand side of the map, between the lands of the appellant and the sea creek Kyonkan Chaung. On the map Ex. A they are numbered 17, 18, 30, 31, 32. The other respondents are merely cultivators in the village of Kamakalu. The lands of the appellants are comprised in three kwin's lands and named respectively Kasung Ngotto (both marked on Ex. A), and Sakangyi South and Casaung Ngotto (both marked on map B). They are numbered separately 1-14 on map marked B. In addition to the refutation of the respondents' suggestion as to there never having been formerly a rivulet or water-course where the canal exists now, one finds that several witnesses depose to there having been a small Yo where the bridge was afterwards erected, that a jungle log was placed across the Yo before the bridge was built, which certainly suggests to their Lordships that this log was designed to fulfil the function of stepping stones to enable people to cross the stream, possibly dry-shodded and in safety.

In the present case the early history of this *locus in quo*, this large tract of paddy land intersected with rivulets of water, large or small, is very vague. The evidence as to what were the rights and obligations which the inhabitants owed to each other in reference to these water-courses, the local law as to their regulation, their enjoyment and protection, is so confused and contradictory that it has occurred to the Board that it would possibly be better to reverse the usual order of procedure and, before dealing with the evidence of the witnesses, the facts proved, and the rulings of the Judges, to demonstrate, by reference to four or five well-known English cases, what the well-established law is touching the flow of and flooding by rivers and water-courses, the diminution of their currents or the diversion of their course, the trespass upon their beds, the incursion of the sea upon one's land, and the measures the owner may take to protect himself, and then by applying a coherent

and consistent body of principles to the facts proved, thus endeavouring to solve in harmony with English Law the issues raised, considering any local law which may modify the English Law.

The first of these cases is *Bickett v. Morris* (3). It deals with trespass on the alveus or bed of a fresh water water-course.

The appellant obtained, in consideration of £10 paid by him, permission from a riparian owner on the river Kilmarnock, in Ayrshire, to extend a certain wall then standing on the respondents' premises on to the alveus of the river as far as was indicated by a red line drawn on an identified ordnance map. The appellant proceeded to build the wall, but, as the respondents alleged, not in the direction indicated. The respondents accordingly applied for an interdict against him, and brought an action for a declaration that the appellant had no right to erect buildings on the solum of the river beyond the red line aforesaid. Lord Cranworth, in delivering judgment, dealt at length with the legal points raised in the discussion. At page 58* of the report he said:—

"By the law of Scotland, as by the law of England, when the lands of two conterminous proprietors are separated from each other by a running stream of water, each proprietor is *prima facie* owner of the soil of the alveus or bed of the river *ad medium filum aquæ*. The soil of the alveus is not the common property of the two proprietors, but the share of each belongs to him in severalty, so that if from any cause, the course of the stream should be permanently diverted, the proprietors on either side of the old channel would have a right to use the soil of the alveus, each of them up to what was the *medium filum aquæ*, in the same way as they were entitled to the adjoining land. The appellant contended that, as a consequence of this right, every riparian proprietor is at liberty at his pleasure to erect buildings on his share of the alveus, so long as other proprietors cannot show that damage is thereby occasioned or likely to be occasioned to them. I do not think that is a true exposition of the law."

Lord Cranworth then dealt with the difficulty, almost the impossibility, of determining in anticipation what damage may

(3) (1866) 1 H. L. (Sc.) 47; 12 Jur. (N. S.) 803; 14 L. T. 835.

*Page of (1866) 1 H. L. (Sc.)—[Ed.]

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result in flood time by the erection of buildings on the alveus of a stream and speaking of the riparian proprietors, put their case succinctly in these words.

"They are allowed to say, 'We have all a common interest in the unrestricted flow of the water, and we forbid any interference with it.' This is a plain, intelligible rule, easily understood, and easily followed, and from which I think your Lordships ought not to allow any departure."

Lord Westbury, at page 61* of the report, thus expresses himself:—

"When, however, it is said, that proprietors of the bank of a running stream are entitled to the bed of the stream as their property *usque ad medium filum*, it does not, by any means, follow, that that property is capable of being used in the ordinary way, in which so much land uncovered with water might be used; but it must be used in such a manner as not to affect the interest of riparian proprietors in the stream. Now, the interest of a riparian proprietor in the stream is not only to the extent of preventing its being diverted or diminished, but it would extend also to prevent the course being so interfered with or affected as to direct the current in any different way that might possibly be attended with damage at a future period to another proprietor."

So much as to interference with the alveus which is stated in the head note of this case to be *sacred*.

In *Menzies v. Breadalbane* (4) it was held that a proprietor on the bank of a river, having commenced the building of a mound, which, according to the opinion and report of an engineer, would if completed, in times of ordinary flood throw the waters of the river on to the grounds of a proprietor on the opposite bank so as to overflow and injure them, should be restrained by perpetual interdict from the further erection of any bulwark or other work which might have the effect of diverting the stream of the river in time of floods, i. e., ordinary flood, from its accustomed course and throwing the same upon the lands of the appellant. Lord Eldon, in delivering the judgment of the House (at page 418†) said:—

"It is...unnecessary to trouble your Lordships with any observations on the law of England.....because it is clear beyond

(4) (1828) 3 Bligh (N. S.) 414; 4 E. R. 1387; 32 R. R. 103.

*Page of (1866) 1 H. L. (Sc.)—[Ed.]

†Pages of (1828) 3 Bligh (N. S.)—[Ed.]

the possibility of doubt, that by the Law of England, such an operation (i. e., as that complained of) could not be carried on..."

At p. 419† he then said:—

"But let us see what is said on this subject by the institutional writers on the law of Scotland."

He then quotes with approval the following passage from Erskine's Institutes:

"When a river threatens an alteration of the present channel, by which damage may arise to the proprietor of the adjacent or opposite ground, it is lawful for him to build a bulwark *ripae muniendae causa* to prevent the loss of ground that is threatened by that encroachment."

Lord Eldon then proceeds:—"so that the proprietor whose lands are threatened to be washed away, may, for the purpose of protecting his own property in a case of that description, raise a bank for his own security; but this bulwark must be so executed, as to prejudice neither the navigation, nor the grounds on the opposite of the river."

This right of navigation, however, is not a right of property. It is simply a right of way which must not be interfered with: *Orr-Ewing v. Colquhoun* (5).

In *Nield v. London & North Western Ry.* (6), the defendants owned a canal which was threatened with an overflow into it of flood water from a neighbouring river, and, fearing damages to their premises situated on the banks of the canal, placed across the canal some planks rising up higher than the level of the water in the canal, which, being obstructed when the flood increased, rose till it flooded the plaintiff's premises. In an action brought by the plaintiff to recover damages for this injury, it was held that the defendants were not liable on the ground that they had not brought on to the plaintiff's premises the water which did the injury, and that there was no duty on the owners of a canal analogous to that resting on the owners of a natural watercourse not to impede the flow of the water down it.

So much as regards fresh water streams. As regards the right of an owner of land whose land is exposed to the inroads of the sea, the case of *Rex v. Commissioners of Sewers for Pagham* (7), many times approved

(5) (1877) 2 App. Cas. 839 at p. 846.

(6) (1874) 10 Ex. 4; 44 L. J. Ex. 15; 23 W. R. 60.

(7) (1828) 8 B. & C. 355; 2 Man & Ry. 468; 6 L. J. K. B. (O. S.) 338; 108 E. R. 1075.

of, is a distinct authority. In delivering his judgment that most able and learned Judge, Bayley, J., stated the rule of law in these words:—

"Every land owner exposed to the inroad of the sea has a right to protect himself, and is justified in making and erecting such works as are necessary for that purpose, and the Commissioners (*i. e.*, the defendants) may erect such defences as are necessary for the land entrusted to their superintendence. If, indeed, they made unnecessary or improper works, not with a view to the protection of the level, but with a malevolent intention, to injure the owner of other lands, they would be amenable to punishment by criminal information or indictment, for an abuse of the powers vested in them. But if they act *bona fide*, doing no more than they honestly think necessary for the protection of the level, (*i. e.*, the land they superintend) their acts are justifiable, and those who sustain damage therefrom must protect themselves."

The last English case necessary to refer to on this subject is that of *Whalley v. Lancashire & Yorkshire Ry. Co.* (8). It is somewhat peculiar in its features. The defendants were proprietors of a railway which ran along from east to west over a flat country on a low embankment. A ditch ran along on each side of this embankment for the purpose of draining the railway. The surrounding land sloped from south-east to north-west, so that the land on the north west side of the railway embankment, where the damage occurred, was at a lower level than on the south-east side of the embankment. The plaintiff was a farmer occupying lands on the north-west side, the lower side of the railway, but separated from it by other lands belonging to other persons. By reason of an unprecedented rainfall a quantity of water which accumulated on the south-eastern side of the embankment, was dammed up against it, and ultimately rose to such a height as to expose the embankment to danger. This water, it was apparently considered, might possibly have percolated through the embankment, and in no sense did the Company, as did the defendant in *Rylands v. Fletcher* (9), bring the water upon or up to

the Company's lands, but when the water had risen to such a height that the defendants thought it was necessary for the protection of their embankment, they caused trenches to be cut in the embankment, through which the water was enabled to escape to the north-west side of the railway and from thence to flow into the adjoining lands and ultimately to the plaintiff's land, damaging his crops. The case was tried before Mr. Justice Day and a Jury. The Jury found that the cutting of the trenches through which the water flowed was reasonably necessary for the protection of the defendants' property, that it was not done negligently, and that the plaintiff was injured by the water that so came through the trenches to the extent of £138 beyond what it would have been if the trenches had not been cut. On these findings the learned Judge gave judgment for the plaintiff for £130. Brett, M. R., deals in his judgment with the facts of the case and the principles applicable to it. At page 137* he said:—

"But then it is suggested that if a person has not brought the danger on his land it makes a difference. So it does. If he has not brought the danger there, and without any act of his it breaks through his land on to his neighbour's land, I take it he is not liable. In that case both have suffered from a common extraordinary danger, but one has suffered before the other; that is all.....In this case the water endangered the embankment, and moreover it would have gone on to the plaintiff's land in any event, but then if it had been left alone and allowed simply to percolate through the embankment, even though all of it would have gone on the plaintiff's land, it would have gone without doing the injury which was done by reason of its passing through the cuttings which the defendants made. The defendants did something for the preservation of their own property which transferred the misfortune from their land to that of the plaintiff, and, therefore, it seems to me that they are liable."

Lord Justice Lindley, at page 140* of the report says: "It appears to methis case is more analogous to the Scotch case of *Menzies v. Breadalbane* (4) *Nield v. London & North Western Ry.* (6) "It seems to me established by those cases that if an extraordinary flood is seen to be coming upon land the owner of such land

(8) (1884) 13 Q. B. D. 131; 53 L. J. Q. B. 285; 50 L. T. 472; 32 W. R. 711; 48 J. P. 500.

(9) (1868) 3 H. L. 330; 37 L. J. Ex. 161; 19 L. T. 220.

*Page of (1884) 13 Q. B. D.—[Ed.]

may fence off and protect his land from it, and so turn it away, without being responsible for the consequences, although his neighbour may be injured by it.

"*Rex v. Commissioner of Sewers for Pagham* (7) is another step in the same direction We must look at the broad question which is, whether a land owner on whose land there is a sudden accumulation of water, brought there without any fault or act of his, is at liberty actively to let it off on to the land of his neighbour without making that neighbour any compensation for damages, because the landowner, by doing so, has been able to save his own property from injury? I can see no authority for that, and it appears to me the general rights and duties of landowners are decidedly against it."

Some point was made in this case to the effect that the stream alleged to have been stopped up was at best merely an artificial water-course and not a natural one. In the latter case the successive riparian owners have been each entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land as a natural incident of the ownership of his land. In the former case, however, any right of the owner to the flow of the water must rest on prescription or grant from or contract with the owner of the land from which the water is artificially brought: *Rameshur Pershad Narain Singh v. Koonj Behari Pathuk* (10), *Kensit v. Great Eastern Ry. Co.* (11).

There is, however, a well-established principle of law directly bearing upon this case and vitally affecting it, namely, that a water-course originally artificial may have been made under such circumstances, and have been used in such a way that an owner of land situate on its bank will have all the rights over it that a riparian owner would have if it had been a natural stream: *Sutcliffe v. Booth* (12), *Holker v. Porrit* (13),

(10) (1879) 4 A. C. 121; 4 Q. 633; 6 I. A. 3rd; 3 Sar P. C. J. 856; 3 Ind. Jur. 179; 2 Shome L. R. 194; 2 Ind. Dec. (N. S.) 402 (P. C.).

(11) (1881) 27 Ch. D. 122 at p. 134; 54 L. J. Ch. 19; 51 L. T. 862; 32 W. R. 885.

(12) (1863) 32 L. J. Q. B. 136; 9 Jur. (N. S.) 1037; 139 R. R. 744.

(13) (1873) 8 Ex. 107; 42 L. J. Ex. 85; 21 W. R. 414.

Bailey & Co. v. Clarks Son & Morland (14).

It is not necessary in order to apply the principles of these decisions to analyse the evidence in detail. It was proved by a Public Officer, the Superintendent of Land Records, and not contradicted, that this so-called canal went right up to the boundary of the appellants' land; while on the following five paragraphs of the written statement of the respondents they practically admitted the facts founding the charge against them, though at the same time they misrepresent the conduct and action of the appellants. These paragraphs run thus:—

6. The said channel became wider and longer through erosion, with the result that the salt-water from Kyonkan Chaung overflowed, on the lands of this defendant and of adjoining cultivators and caused damage thereto.

7. In order to prevent such damage in or before the year 1914 the first defendant admits there was a *bund* erected across the said channel at a point where it flows through the land of this defendant and others. Such erection was said to be by the permission of Maung Thi Hla, the then Township Officer of Bogale.

8. The said *bund* gave way in or about the year 1916-17, and this defendant with his assistants repaired the *bund* formerly erected at the same place where the original *bund* was erected without any objection on the part of the plaintiffs or any one else.

9. On the 1st July 1917 the first plaintiff and other illegally trespassed on the first defendant's lands originally acquired and land purchased afterwards and opened the said *bund*, but the *bund* was erected again as there was no legal order and report that effect was made to Thugyi Maung Shwe Loon.

10. On or about the 25th August, 1917, in pursuance of an order of the Deputy Commissioner of Pyapon, the said *bund* was opened, and after such date it has not been closed.

The evidence and findings of the Judges upon these statement establish, as will presently be shown, that the defendants themselves erected the *bund* referred to in the second as well as in the third of these paragraphs. To effect this work they must have gone in upon the alveus of the

(14) (1902) 1 Ch. 619 at pp. 661, 669, 673; 71 L. J. Ch. 396; 50 W. R. 511; 86 L. T. 309; 18 T. L. R. 364.

canal closed up with this *bund* the eye of the bridge what was the outfall of the canal into the sea, and thus have offended against the law as laid down in the English cases. The District Judge framed for himself certain issues and answered them thus: To the second issue he gave the answer that the canal was not a Government constructed work, but was for a long time before 1906-1907 a naturally-formed channel. The third issue so framed ran, "Did this canal facilitate the free out-flow of rain-water from the plaintiffs' (appellants') paddy lands?" His answer ran thus: "There cannot be any doubt that as all the parties admitted the canal takes the water into the Kwin from the Kyonkan Creek at flood tide, and takes the water out from the Kwin into the creek at ebb tide, therefore, a certain extent of rain water must find its way into the Kyonkan Creek as a natural consequence." And, again, "there cannot be any doubt as to the motive of the defendants that they erected the *bund* and closed the canal to protect their own fields from salt-water; but there cannot also be any doubt that the stoppage of the out-flow at ebb tide caused the excess water to remain in the fields of both the parties." He answers the fifth issue in the following words: the "weight of evidence is clearly in favour of the plaintiffs," and I would [thus] answer the fifth issue.

He further finds that Map 2A makes it clear that the channel had been in existence before the year 1906-1907, and that there was no canal construction by any one. He ultimately gave a decree in favour of the appellants for Rs. 8,821-4-8. No case has been made that these damages were excessive in amount if the legal wrong complained of had been actually committed. There was ample evidence in the case to sustain the findings of the District Judge if he believed the witnesses who gave it, as apparently he did, having seen and heard them. It appears to their Lordships plain that the access of some salt water from the creek through the eye of the bridge into the canal twice in the twenty-four hours in flood tide does not resemble in any way those incursions of the sea dealt with in *Rex v. Commissioners of Sewers for Pagham* (7) and still less did the closing up of the eye of the bridge, by this *bund*, and in seasons of heavy rain the ponding up of the fresh water in the canal, so that lands higher up the stream were flooded resemble

those necessary precautions which a landowner whose land is at the mercy of these incursions of the sea is entitled to take to protect his property. If the stopping up of the outfall of the canal was justifiable by reason of this access of some salt water at flood then every fresh-water tributary to a tidal river could be closed up at its mouth to prevent the like consequences.

Both the cases *Abdul Hakim v. Gonesh Dutt* (1) and *Sankarappa Naicker v. Pari Naicker* (2) referred to in the third reason for the appellants' appeal deal with surface water, the rain which falls on agricultural land not with water-courses of any kind. They are irrelevant, therefore, to the questions in controversy in this case, and are not in conflict, it appears to their Lordships, with any of the English cases cited.

The respondents appealed, and on the appeal the learned Judges of the Chief Court of Appeal seem to have taken a course as unwise as it was extraordinary. The appellants had undoubtedly in para. 4 of their plaint stated that the Government had in the year 1913 dug this canal, shown by letters A, B, C, D, on Ex. "A." That was no doubt found to be untrue, but no evidence whatever was given to show that the Government had any jurisdiction or authority to do such a thing, and what is much more important that if they had such authority an action could not be brought for any injurious consequence resulting to individuals from its execution.

That paragraph of the plaint is followed by two others, Nos. 5 and 9

5. The said canal thus facilitated the free out-flow of the rain water from the plaintiff's paddy lands aforesaid into the said Kyonkan Chaung and rendered cultivable all the lands situate in Kasaung Ngotto West Kwin and Sakangyi South (A) and (B) Kwins, which adjoin the said Kamakalu Kwin.

9. The plaintiffs have been informed and verily believe that during the month of *Kason* or *Nayon*, 1279 B. E., the first defendant's tenants and servants by order of the first defendant and the defendants Nos. 2 to 8 closed the said canal at the point B shown in red ink in the plan Ex. A.

The alleged wrong for which the plaintiffs claim damages was the stopping up by a *bund* of the out-fall of the canal, by which means the water of the canal, having been denied escape at the proper place, was

ponded up, flowed back, and flooded their lands. The identity of the body or person which or who actually formed the canal was a matter wholly irrelevant to the matters in issue. It did not form even an ingredient in the cause of action, and there is not an averment in the plaint to show that the plaintiffs did not rely upon the canal being an old natural water-course enlarged, but new or artificial. The plaint is entirely consistent with their relying upon the one thing or the other, as suited them best.

Yet strange to say, one of the learned Judges in the Chief Court (Mr. Justice Duckworth) considered that this statement as to the digging of the canal by the Government was a matter of such vital importance, that the judgment of the District Judge should be reversed, and his decision in the plaintiff's favour be overruled because this allegation had not been proved.

In justice to Mr. Justice Duckworth, the following passages from his judgment should be quoted:—

"I have only to add a few remarks. It appears to me that the plaintiff-respondent Maung Bya set up a certain case in his pleadings, by which he must either stand or fall. It is clear, from his plaint, that his case was that, until Government made a canal, the lands which belong to him were unworkable, but that, after Government made a canal connecting the Fishery creeks with the Kyonkan Chaung, his fields became culturable. Further, he contended that owing to the appellant Maung Tet closing this canal, at the Kyonkan Chaung end, by a *bund*, in 1917 he suffered certain damage through his fields becoming inundated."

It does not appear to their Lordships that this is at all an accurate or fair construction of the plaint of the appellants.

The learned Judge then proceeds:—

"In fact treating this channel, as I think we must, as a natural watercourse [see *Maung Kaw La v. Maung Ke* (15)] we find that appellant is a riparian proprietor, whereas the respondent is not.

"This is only view of the case which can be inferred from the evidence.

"This would go to show that the map of 1906 was right, and that what was done in 1913 was to clean up flooded areas and

(15) 35 Ind. Cas. 356; 8 L. B. R. 556; 9 Bur. L. T. 83.

deepen a natural watercourse, and not to create a new one, involving the forfeiture of the riparian owners' rights."

The last paragraph, the different portions of which seem scarcely consistent with each other, runs thus:—

"It is quite unnecessary to consider any other points. The respondent set up a case, which he failed to prove, and obtained a decree before the District Court on a case which he had not pleaded. It is settled law that a plaintiff must not be permitted to succeed on a case which he has not put forward directly or indirectly in his plaint. Further, it is apparent that the learned Judge of the District Court took a mistaken view of the facts, his chief error being his overlooking the fact that respondent's lands drew no advantage whatever from this channel until it had opened a way through the road *bund* into the Kyonkan Chaung, and that only some four years prior to any cause of action having arisen.

"I concur with my learned brother in allowing the appeal with costs, and in the decree passed by him, including special costs to Messrs Leach and Lentaigne Junior."

The passage appears to suggest that a defendant who diverts or stops the flow of a natural water-course and thereby floods the lands of a riparian owner is not to be held responsible in damages for the wrong unless he, the defendant, has made a profit by it. In their Lordships' opinion such a doctrine is unsound.

The other learned Judge, Mr. Justice Maung Kin, deals with this point somewhat differently. He says:—

"The finding that the canal was not one made by the Government is not contested before us. It is, however, contended that plaintiff had the right to the undisturbed flow of water from his land through the canal into the Kyonkan Chaung on the ground that the canal is a natural water-way.

"It is doubtful whether the learned District Judge was right in giving a decree upon a case not set up by plaintiff in his plaint. The basis of the suit as described in the plaint is that the canal was dug by the Government for the benefit of the cultivator, and that it, in fact benefited them, because it drained the surplus rain water from plaintiff's land."

This, as has been already pointed out, is not a true construction of the appellants' case and contention.

The learned Judge then proceeds to add:—

"I may add that there is no equity in favour of plaintiff. He had not derived any benefit before the depression became sufficiently wide and deep to allow of its carrying water coming from the direction of his land, and when the *bund* was built by Government, there was no reason for thinking that that water would flow in the direction of the *bund*. But the defendants have all along enjoyed the benefit of the existence of the *bund*, because it has prevented blackish water coming to defendant's land from the Kyonkan Chaung. I do not see any justice in allowing plaintiff's claim to remove the *bund* for the benefit of his land, unless he has a natural or prescriptive right to make it. I have held that he has no natural right, and sufficient time has not elapsed for a prescriptive right to ripen.

"For the above reasons I would allow the appeals Nos. 183 and 188 of 1919, with costs."

It appears to their Lordships difficult to understand what the learned Judge meant by the first of these paragraphs.

Their Lordships are quite unable to concur with the learned Judges of the Chief Court in the views they have taken of the rights and liabilities of the parties litigant in this case. They think these views are conflicting *inter se*, unsound and misleading. To gather together the points fully dealt with above it may be said that in their Lordships' view it is clearly established (I) that a raised road or *bund* ran transversely across the depressed ground through which flowed the channel of water, and was properly provided with a gap for the flow and a bridge over the channel, (II) that the *bund* thus provided with an eye and a bridge to permit the inflow and out-flow of water was interfered with by the respondent who filled up the eye and channel course thereat and converted an innocuous *bund* into a dam, which dammed back the water on to the appellant's land, and that in law (III) the respondents are responsible for the damage thus caused to the appellant's property. They think the judgment appealed from was erroneous and ought to be set aside, that the decision of the District Judge was right and should be restored, and will humbly advise His Majesty accordingly. The respondents must pay the costs of the appel-

lants in the hearing of the Chief Court and of this appeal.

S. D. *Appeal allowed.*

Solicitors for the Appellants:—Messrs. Light & Fulton.

Solicitors for the Respondents:—Messrs. H. Hilberry & Son.

MADRAS HIGH COURT.

CIVIL APPEAL No. 223 OF 1923.

December 11, 1924.

Present:—Mr. Justice Phillips and Mr. Justice Krishnan.

I. L. LAKSHMANA AND OTHERS
—DEFENDANTS NOS. 1 TO 6—APPELLANTS
versus

V. V. C. RAMALINGA MUDALIAR
AND SONS FIRM THROUGH THEIR PARTNER
CHINNAPPA MUDALIAR—DEFENDANTS
—RESPONDENTS.

Vendor and purchaser—Vendor agreeing to purchase goods from third persons—Tender—Goods not in vendor's physical possession, effect of—Repudiation of contract, effect of—Advance, whether can be recovered—Damages.

Plaintiffs agreed to purchase 50 bales of yarn of a particular brand from the defendants from out of a lot which the latter had agreed to buy from L & Sons who in their turn had agreed to buy from S & Sons. Defendants gave intimation to the plaintiffs of the arrival of "two bales out of the bales mentioned in the contract letter," but the latter ignored the intimation. Reminders were sent by the defendants stating that L & Sons had intimated to them that the terms of the contract would be enforced and that the defendants were giving intimation to the plaintiffs accordingly. In a suit by the plaintiffs to recover from the defendants the amount of the advance paid by the former in respect of the contract:

Held, (1) that the description of the goods mentioned in the letter of intimation sent by the plaintiffs was sufficiently definite and must be presumed to correspond to that in the contract; [p. 207, col. 2.]

(2) that it was not a condition precedent to delivery by defendants to plaintiffs that there should have been actual delivery to each of the prior purchasers in turn, and that the tender by the defendants was, therefore, good and valid and plaintiffs committed a breach of the contract by failing to take delivery; [p. 208, col. 1.]

(3) that the plaintiffs' breach of contract as to the lots tendered amounted to a repudiation of the whole contract and the defendants were not bound to tender the rest of the goods under the contract; [p. 209, col. 1.]

(4) that the plaintiffs' suit must fail inasmuch as the amount of damages which the defendants could have claimed was in excess of the amount of the advance claimed by the plaintiff. [p. 209, col. 2.]

Bowes v. Shand, (1877) 2 A. C. 455; 46 L. J. Q. B. 561; 36 L. T. 857; 25 W. R. 730, referred to.

A. S. No. 150 of 1922, followed.

Ramier v. Runa Cheena Mana Navanna Ona and Bros., 78 Ind. Cas. 326; 19 L. W. 654, dissented from.

Appeal against a decree of the Court of the Second Additional Subordinate Judge.

Madura, in O. S. No. 78 of 1922 (Original Suit No. 81 of 1924 on the file of the Court of the Subordinate Judge, Madura.)

Mr. C. V. Anantakrishna Iyer, for the Appellants.

Mr. N. Chandrasekara Iyer, for the Respondents.

JUDGMENT.

Phillips, J.—In this case the plaintiffs have brought the suit to recover the advance of money paid in respect of a contract for yarn. The contract is evidenced by Ex. A and was entered into on the 19th August 1918. The plaintiffs agreed to purchase 50 bales of Madura Meenakshi Brand Yarn No. 40 at Rs. 14-7-0 per bundle. On the 23rd of September, the defendants sent intimation to the plaintiffs that two bales according to the contract had arrived and on the 1st of October they gave intimation of arrival of another bale. Plaintiffs sent no answer to this intimation and consequently on 11th October 1918, defendants wrote a reminder in which they said that their vendors Lakshmana Iyer and Sons had intimated that the terms of the contract would be enforced and added "we too give intimation to you accordingly" In this letter they asked the plaintiffs to pay for and take delivery of the bales at once. A similar request was again made on 16th October 1918 and finally a third letter was written on 30th November 1918 asking the plaintiffs to pay the money with interest on receipt of the letter and take delivery of the said bales. After that there was no further correspondence in the matter and what happened has to be inferred from the conduct of the parties. Plaintiffs sent no reply at all to any one of these letters either orally or in writing but ignored them completely.

The first question we have to determine is whether there was a proper tender of the goods by the defendants. Exhibit B informs the plaintiffs that "two bales out of the bales mentioned in our *varthamanam* letter of 19th August 1918 have arrived." An objection to this was taken that it does not give any description of the bales so as to enable plaintiff to ascertain what the bales were. But inasmuch as it refers to the contract of the 19th August under which the bales were tendered, it is quite clear that it amounts to a tender of contract goods and it was open to the plaintiffs, if they suspected the truth of that assertion,

to ask for an inspection or for an opportunity of verifying the facts. As it stands, it is an unconditional assertion by the defendants that the goods tendered were of the description mentioned in the contract, and unless there is anything to show the contrary, we must take it that they were of the description in the contract.

A second objection is taken that the contract provides "for the receipt of bales through the said persons, namely, the purchasing merchants in the chain of contracts, namely Lakshmana Iyer and Sons, the defendants' vendors, and K. M. Subbier and Sons, the vendors of Lakshmana Iyer and Sons, and it is argued that unless each of these merchants actually took delivery of the bales and had physical possession thereof, there would be a breach of the contract in delivering those bales. Reliance is placed on *Bowes v. Shand* (1) a case in which goods had to be sent by shipments on a particular date and it was held that when they were shipped on a later date, they did not answer the description of the contract. Another case relied on is *Ramier v. Runa Cheena Mana Naranna Ona & Bros* (2) to which I was a party and it was there held on the recitals in the contract note that it was one of the conditions precedent that there should have been actual delivery to each of the purchasers in turn. The contract in that case is somewhat more particularised than in this and I held that the language of the contract was such that it was capable of bearing this interpretation of a condition precedent as held by the other Judge in the case, and consequently did not dissent from his view. After hearing arguments in this case, I now feel that perhaps I should have given effect to my doubt in the matter, but in this case I am clearly of the opinion that there is no condition precedent as to delivery. The goods ordered were the goods which came from the Mill and those very goods were tendered by the defendants. There can, therefore, be no mistake in the description as was the case in *Bowes v. Shand* (1) and also in another case in this Court, i.e., *Sivarama Aiyar v. Subbiah & Sons* (3). Here the goods were the same and the only argument that could be put

(1) (1877) 2 A. C. 455; 46 L. J. Q. B. 561; 36 L. T. 857; 25 W. R. 730.

(2) 78 Ind. Cas. 326; 19 L. W. 654.

(3) 70 Ind. Cas. 346; 15 L. W. 9; (1922) A. I. R. (M.) 28.

forward is that there was a condition precedent, namely, that those goods should be carted from warehouse before they were actually delivered to the plaintiffs. I do not think it can be contended that that was an essential condition of the contract and that simply because goods had not been put into a cart and taken out again two or three times, these goods could be refused as not answering to the description on the contract. A similar case has recently been decided by another Bench of this Court, Appeal No. 150 of 1922, and there the view was taken dissenting from *Ramier v. Rana Cheena Mana Navanna Gona & Brothers* (2) that physical delivery to each merchant in turn was unnecessary. With that view I agree. The tender, therefore, was good and by refusing to accept the goods, plaintiffs have committed a breach of the contract.

The next question arises whether by this breach they have repudiated the whole contract. We see that a tender was made on two occasions of separate lots of yarn and that, on three subsequent occasions, the defendants wrote reminders, in effect fresh tenders, to the plaintiffs and received no reply at all. What inference could the defendants draw except that the plaintiffs did not intend to carry out the contract? The market was falling and plaintiffs had good reason for refusing to carry out the contract and, consequently, this was a very legitimate inference. Defendants consequently never tendered any more goods and this fact is sufficient to show that they accepted this repudiation when coupled with the fact that they retained the advance given by the plaintiffs. It is thus clear that they treated the contract as at an end as they were justified in doing. This does not necessarily forfeit the advance paid by the plaintiffs at the time of the contract, but it appears from the finding of the Subordinate Judge that, if defendants had claimed damages they would have been enabled to make good their claim for a very much larger amount than the advance they received; consequently plaintiffs are not entitled to any refund of this advance.

The appeal is allowed and the plaintiffs' suit dismissed with costs throughout.

Krishnan, J.—I agree with my learned brother that this appeal succeeds and that the suit should be dismissed with costs as ordered by him. My learned brother has dealt with the points raised by the learned Vakil before us on the

question whether the tender was a proper tender or not. But the learned Subordinate Judge has taken two other objections which may also be noticed; he says because Exs. B and C, documents under which the intimation of arrival of goods was given to the plaintiffs, did not mention exactly where the goods were and also because they did not show that the defendants had not the bales in their disposal or control, the two letters, Exs. B and C, could not be treated as proper letters of tender. I am unable to agree with the view taken by the Subordinate Judge. It was not necessary for the defendants to have intimated to the plaintiffs exactly where the goods were to be found. If the plaintiffs wanted to know where those goods were, it could have been easily done by their asking as to where the goods were and they could have then gone and inspected the goods. As a matter of fact, they took no steps whatever. They ignored all the letters from the defendants.

As regards the second point there is nothing to show that, if the plaintiffs wanted the delivery of the goods and were prepared to pay for the goods, there would have been any difficulty in giving them delivery. The bales were evidently with Subbier because they were afterwards sold by Subbier and he was under a contract to supply to Lakshman Iyer and Sons and Lakshman Iyer to the plaintiffs. This objection could not, therefore, be said to be well-founded. The other objections to the tender have already been dealt with by my learned brother. I may add that for the disposal of this case it is sufficient for us to rely upon the recent ruling of the learned Chief Justice and Srinivasa Iyengar, J., in Appeal No. 150 of 1922. They held that it was not necessary for the defendants to have actually got physical possession of the bales. The view to the contrary taken by Venkatasubba Rao, J., in *Ramir v. Rana Cheena Mana Navanna Gona and Brother* (2), has not been followed in that case and with all respect to the learned Judge, I do not think it is right, if he meant to lay down generally that in all cases of this kind of contract it is necessary for the person selling to get actual possession of the goods before he could make a proper tender. It may be on the facts of that particular case the ruling can be supported; but it is not necessary for me to express an opinion on that point.

Then as regards the tender of the 47 bales which the Sub-Judge thinks should have been tendered, I am in agreement with my learned brother that it was not necessary as the repudiation of the contract by the plaintiffs in not having taken delivery of the three bales shows that they were not going to accept any goods at all. Their conduct was not peculiar to the particular three bales, but indicated generally that they were not going to be bound by the contract; and that, for a very good reason, because the market was going down very rapidly and it was in their interests to get out of the contract. It was not necessary on the part of the defendants to have actually sent a notice to the plaintiffs that they were treating the failure to accept delivery of the goods tendered by the plaintiffs as amounting to a repudiation of the whole contract. If they were keeping alive the contract they should have under s. 39 of the Contract Act sent an intimation to that effect, but to accept the breach as putting an end to the contract, further intimation is not necessary. The contract of the defendants shows that they did accept the breach by failure to accept delivery of the goods as a breach of the whole contract and they subsequently did not treat the contract at all as subsisting. The letter of the 30th November on which much reliance has been placed by the learned Vakil for the plaintiffs as showing that the contract was kept alive up to that date does not seem to have such effect. It was a conditional offer which the defendants made to the plaintiffs to waive the breach committed by the plaintiffs. If the money was paid and delivery taken at once as proposed, no doubt, the breach would have been waived, but as the plaintiffs failed to accept the offer it fell through and the original breach of contract remained. In these circumstances I agree with my learned brother that the contract was broken by the plaintiffs by not taking delivery when the three bales were tendered and their failure showed that they were treating the contract as broken and it was not thereafter necessary for the defendants to tender any goods in pursuance of the contract. The question, therefore, whether goods were available to make such a tender or not is quite irrelevant.

As regards damages, it is clear that, if the defendants were entitled to damages, the same would be much more than the money

in their hands as advance paid by plaintiffs. I agree that the suit must be dismissed and the appeal allowed with costs.

V. N. V.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 479 OF 1923.

June 19, 1924.

Present:—Mr. Kinkhede, A. J. C.

E. I. RAILWAY COMPANY—DEFENDANT
—APPELLANT

versus

BADRILAL—PLAINTIFF—RESPONDENT.

Second appeal—Finding of fact, whether can be impeached—Evidence, consideration of—First Appellate Court, position of.

The mere fact that upon the documents and evidence placed before the learned District Judge the High Court would have come to a different conclusion is no ground for second appeal, it is precisely this revision of evidence which is excluded by the limited character of a second appeal [*ibid.*]

Nafar Chandra Pal v. Shukur Sheikh, 51 Ind. Cas. 760; 45 I. A. 183 at p. 189; 46 C. 189; 23 C. W. N. 305; 9 L. W. 552 (P. C.), relied on.

If there is evidence to be considered the decision of the second Court, however unsatisfactory it might be when examined, must stand final. [p. 210, col. 1.]

East Indian Railway Company v. Changa Khan, 28 Ind. Cas. 215; 42 C. 888; 19 C. W. N. 1034; 22 C. L. J. 212, followed.

Given certain set of facts, from which two inferences are possible it is open to the first Appellate Court to draw any one of them. [*ibid.*]

Rajaram v. Ganesh Hari Karkhanis, 21 B. 91; 11 Ind. Dec. (N. S.) 63, followed.

Appeal against a decree of the District Judge, Saugor, in Civil Appeal No. 48 of 1923, dated the 28th July 1923.

Mr. P. Lobo, for the Appellant.

Sir B. K. Bose and Mr. V. Bose, for the Respondent.

JUDGMENT.—This second appeal is filed by the East Indian Railway Company against a decree passed by the District Judge, Saugor, confirming in material particulars the decree passed by the Sub-Judge for the amount of loss sustained by plaintiff for short delivery of 122 tins of ghee out of 356 tins entrusted for carriage to Howrah. It is contended that the findings arrived at by the lower Appellate Court are based on conjectures and cannot, therefore, be accepted as correct, or bind this Court of second appeal.

The whole of the argument addressed by the learned Pleader for the Company was aimed at showing that the theft of the 122 tins of ghee which occurred according to the findings of the District Judge, at Kulharia, must have taken place while the train was in motion and running between Arrah and Kulharia. Whether the train was in motion or stationary when the theft took place is, therefore, the point which requires a decision in this second appeal.

Given certain set of facts, from which two inferences are possible it is open to the first Appellate Court to draw any one of them, *vide Rajaram v. Ganesh Hari Kar-khanis* (1) and his decision will not be open to challenge in second appeal. Their Lordships of the Privy Council discountenanced the practice of undue interference in second appeal with findings of facts duly supported by evidence proper for consideration. They have expressed their disapprobation in the following passage of their judgment in *Nafar Chandra Pal v. Shakur Shaikh* (2). The mere fact "that upon the documents and evidence placed before the learned District Judge the High Court would have come to a different conclusion" is no ground for second appeal, "it is precisely this revision of evidence which is excluded by the limited character of a second appeal."

In *East Indian Railway Company v. Changa Khan* (3) it was held that after there has been a decision of fact in the two Courts of original and first appellate jurisdiction the High Court cannot entertain a second appeal upon any question as to the soundness of findings of fact by the lower Appellate Court. If there is evidence to be considered the decision of the second Court, however unsatisfactory it might be when examined, must stand final.

In view of this state of the law regarding second appeals, I think, I am precluded from considering the soundness of the findings arrived at by the First Appellate Court on the ground that they were based on conjectures which is not the case.

The District Judge has held that a theft by the Railway servants while the train was stationary at Kulharia was more probable than while it was running

between Arrah and Kulharia and in view of the several circumstances discussed by him, I think this conclusion is perfectly correct and is not liable to challenge in second appeal.

Certain new points were sought to be urged for the first time in second appeal but I do not think I will be justified in allowing them to be pressed.

On the whole the case has been rightly decreed and the decision must stand. The appeal fails and is dismissed with costs. Costs in the lower Courts will be paid as already ordered.

K. S. D.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 498-B of 1922.

March 19, 1924.

Present:—Mr Kotval, A. J. C.

CHOTURAM BHIKRAJ—PLAINTIFF—
APPELLANT
versus

NARAYAN AND OTHERS—DEFENDANTS—
RESPONDENTS.

Hindu Law—Alienation—Debt previously secured on joint family property, whether antecedent—Practice—Decree correct according to Privy Council ruling—Appeal—Subsequent change—Decree, whether should be confirmed.

A debt previously borrowed on the security of the joint family property is an antecedent debt for which the joint family property is liable. [p. 211, col. 1.]

Brij Narain Rai v. Mangla Prasad Rai, 77 Ind. Cas. 689; 21 A. L. J. 934; 46 M. L. J. 23; 5 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 68; 19 L. W. 72; 2 Pat. L. R. 41; 10 O. & A. L. R. 82; (1924) A. I. R. (P. C.) 50; 33 M. L. T. 457; 46 A. 95; 26 Bom. L. R. 500; 11 O. L. J. 107; 51 I. A. 129; 1 O. W. N. 48; 41 C. L. J. 232 (P. C.), followed.

Sahu Ram Chandra v. Bhup Singh, 39 Ind. Cas. 280; 39 A. 437; 44 I. A. 126; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213 (P. C.), not followed.

Whenever the Privy Council lays down a principle, in theory it only declares what is and has always been the law, any previous declaration not in consonance with its present declaration not having been the law at all [*ibid.*]

Therefore, a decision of the lower Appellate Court which was right according to the view of the law then prevailing is liable to be set aside in second appeal if a subsequent ruling of the Privy Council takes a contrary view. [*ibid.*]

Appeal against a decision of the District Judge, Amroati, in Civil Appeal No. 15 of 1922, dated the 5th of August 1922.

(1) 21 B. 91; 11 Ind. Dec. (N. S.) 63.

(2) 51 Ind. Cas. 760; 45 I. A. 183 at p. 189; 46 C. 189; 23 C. W. N. 345; 9 L. W. 552 (P. C.).

(3) 28 Ind. Cas. 245; 42 C. 888; 19 C. W. N. 1034; 22 C. L. J. 212.

Mr. W. R. Puranik, for the Appellant.
Mr. M. R. Bobde, for the Respondents.

JUDGMENT.—According to the interpretation put upon *Sahu Ram Chandra v. Bhup Singh* (1) the decision of the lower Appellate Court that the debt previously borrowed on the security of the joint family property is not an antecedent debt for which the joint family property is liable is correct, but in view of the recent decision of their Lordships of the Privy Council in *Brij Narain Rai v. Mangala Prasad Rai* (2) in which *Sahu Ram Chandra's case* (1) is reviewed, it must now be held that the debt is such.

The facts of the present case so far as the question of the antecedency of the debt is concerned are materially the same as in *Brij Narain Rai v. Mangal Prasad Rai* (2).

It is contended by the respondents' learned Pleader that the decision of the lower Appellate Court which was right according to the view of the law then prevailing in this Court should not be set aside because of the subsequent ruling of the Privy Council. But the question is not whether the decision would have been considered right when it was given but whether it should be now confirmed by this Court as right. The contention is based on the notion that the Privy Council has altered the law, and the alteration does not affect the decision which is correct under the law as it was before its alteration. This notion is not correct. Whenever the Privy Council lays down a principle in theory it only declares what is and has always been the law, any previous declaration not in consonance with its present declaration not having been the law at all.

The appeal succeeds. The plaintiffs' suit will be decreed for the amount claimed with the exception of Rs. 38 against the whole of the joint family property mortgaged with costs in the First Court. I fix the 19th September 1924 as

(1) 39 Ind. Cas. 280; 39 A. 437; 44 I. A. 126; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213 (P. C.).

(2) 77 Ind. Cas. 689; 21 A. L. J. 934; 46 M. L. J. 23; 6 P. L. T. 1; 28 C. W. N. 253; (1924) M. W. N. 68; 19 L. W. 72; 2 Pat. L. R. 41; 10 O. & A. L. R. 82; (1924) A. I. R. (P. C.) 50; 33 M. L. T. 457; 46 A. 95; 26 Bom. L. R. 503; 11 O. L. J. 107; 51 I. A. 129; 1 O. W. N. 48; 41 C. L. J. 232 (P. C.).

the date by which the amount should be paid to the plaintiff by the defendants. Under the circumstances of the case I direct that the costs in this and the lower Appellate Court be borne by the parties as incurred.

K. S. D.

Appeal accepted.

CALCUTTA HIGH COURT. FULL BENCH.

FULL BENCH REFERENCE No. 1 OF 1925

IN

APPEAL FROM APPELLATE DECREE No. 586
OF 1923.

July 22, 1925.

Present:—Justice Sir Hugh Walmsley, Kt.,

Justice Sir Ewart Greaves, Kt.,

Mr. Justice C. C. Ghose, Mr. Justice

B. B. Ghose and Mr. Justice Mukerji.

KAILASH CHANDRA MITRA—

DEFENDANT—APPELLANT

versus

BROJENDRA KUMAR CHAKRAVARTI

AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Rent suit, whether maintainable against some heirs of deceased tenant—Liability to pay rent—Tenants-in-common, rights and liabilities of—Joint and several liability—Contract Act (IX of 1872), s. 43, applicability of—Civil Procedure Code (Act V of 1908), O. I, rr. 6, 9, 10 (2)—Court's duty—Amendment—Dismissal.

By the Full Bench (C. C. Ghose and Mukerji, JJ. dissenting):—A suit for rent is maintainable against some of the heirs or successors-in-interest of a deceased tenant without bringing all the heirs and successors-in-interest on the record. [p. 213, col. 1; p. 214, col. 1.]

The liability of a tenant to pay rent arises from the fact of possession of the land as a tenant, where there is no express contract, and all persons in possession of land as tenants are under an implied obligation to pay the rent for the land to the landlord, whether they get into possession by right of succession or assignment. [p. 213, col. 2.]

The heirs of a deceased tenant do not take the tenancy as an entire body forming as it were a partnership or a corporation, the individual members of which have no definite interest. They take as tenants-in-common, each having a definite share in the whole. [ibid.]

A tenant-in-common is entitled to possession of every part of the estate and there is a privity of estate between him and the landlord in the whole of the leasehold. Again, as, on the basis of the privity of estate a tenant-in-common is liable for all covenants running with the land and as his estate is an estate in the whole of the leasehold, he is liable for the entire rent. [ibid.]

Whether a contract is implied for payment of rent by all tenants-in-common in possession of a leasehold, or whether the law be held to impose the liability for payment of rent by reason of privity of estate, any one of such tenants may be sued for entire rent due to the landlord. This may be either in accordance with the provisions of s. 43 of the Contract Act, or under general law based on privity of estate. [p. 213, col. 2; p. 214, col. 1.]

A decree in such a suit will not have the effect of a decree for rent under Ch. XIV of the Bengal Tenancy Act. [p. 214, col. 1.]

Per Mukerji, J.—Section 43 of the Contract Act has no application except in the case of original lessees or persons who were party to the contract and it makes, as far as the liability under a contract is concerned, all joint contracts joint and several. [p. 216, col. 1.]

Persons who are under a joint liability to pay rent are necessary parties in a suit for rent. But a decree obtained in the absence of some of the co-tenants is not necessarily a nullity. It is a valid decree but is effective only as a decree for money. If, however, objection is taken at the right moment to the maintainability of the suit, the Court must proceed under O. I, r. 10 (2), C. P. C., to make an order for the addition of such of the persons as are not already on the record as defendants and it is only in the event of the necessary amendments not being made that the suit is liable to be dismissed. [p. 216, cols. 1 & 2.]

ORDER OF REFERENCE TO A FULL BENCH.

Greaves and Mukerji, JJ.—This appeal arises out of a suit wherein the plaintiffs as four-annas co-sharers of a certain *talug* sought to recover arrears of rent from the defendants who, they alleged, were holding under them as tenure-holders. The defence of the defendants, in substance, was that they were not tenure-holders but co-proprietors of the estate and further that the suit was not maintainable as all the persons who are successors-in-interest of the original transferee Gour Sunder Singh and whose names are recorded as such in the finally published Record of Rights were not made defendants therein.

The suit was decreed by the Court of first instance, and the said decision has been upheld by the lower Appellate Court. The defendants have thereupon preferred this appeal, in which the validity of the decisions of the Courts below has been challenged upon the two grounds which formed their defence as stated above.

As regards the first of these grounds we are not prepared to accede to the appellant's contention. This necessitates our dealing with the second ground.

So far as the second ground is concerned, on the finding of the lower Appellate Court it is clear that some of the persons on whom devolved the interest of the original transferee Gour Sundar Singh, by purchase

and inheritance, have not been made parties to the suit. The question whether under such circumstances the suit is maintainable is one about which there is a clear conflict of judicial opinion in this Court, and we must necessarily dissent from one or other of the catena of decisions dealing with the point.

The authorities in favour of the view that a suit framed in this way is maintainable are the cases of *Champat Kaphini Dasi v. Triguna Nath Sardar* [S. A. No. 1015 of 1915 decided 18th July 1916] *Subashi Dassi v. Raj Krishna Roy* (1), and *Meajan Mondal v. Jogendra Nath De* (2). A contrary view has been taken in the cases of *Kashi Kinkar Sen v. Satyendra Nath Bhadro* (3), *Shaikh Sahed v. Krishna Mohan Basak* (4), *Siba Krishna Sinha v. Jagat Chandra Taluqdar* (5) and *Abinash Chandra Roy v. Fulchand Chaudhuri* (6). In the case of *Krishna Dos Roy v. Kali Tara Chowdhurani* (7), Chatterjea, J., expressed an opinion that the liability of all the heirs of a contracting tenant is a joint liability, but Richardson, J., reserved his opinion on that question.

This conflict has been noticed in several cases decided in this Court; amongst which reference may be made to the decision in the case of *Mohendranath Bose v. Abinash Chandra Bose* (8), in which the advisability of referring the matter to the Full Bench was recognised. In the present case, the question directly arises and, in our opinion, it must be decided in order to dispose of the appeal.

The point upon which we must necessarily differ from the one or the other set of decisions referred to above is as to whether a suit for rent is maintainable against some of the heirs or successors-in-interest of a deceased tenant without bringing all the heirs or successors-in-interest on the record.

We accordingly refer the case to the Full Bench in accordance with the provisions of r. 2, Ch. VII, of the High Court Rules, Appellate Side.

Babu Upendra Kumar Roy (with him Babu Mon Mohan Banerjee), for the Appellant.

(1) 23 C. W. N. xxvii (27).

(2) 63 Ind. Cas. 949; 48 C. 518.

(3) 7 Ind. Cas. 840; 15 C. W. N. 191; 12 C. L. J. 642.

(4) 35 Ind. Cas. 563; 24 C. L. J. 371.

(5) 45 Ind. Cas. 732.

(6) 74 Ind. Cas. 1032; 50 C. 737; (1924) A. I. R. (C.) 165.

(7) 44 Ind. Cas. 80; 22 C. W. N. 289.

(8) 77 Ind. Cas. 364; 27 C. W. N. 521; (1923) A. I. R. (C.) 615.

Babus Prokas Chandra Pakrashi and Ramendra Mohan Majumdar, for the Respondents.

JUDGMENT OF THE FULL BENCH.

Walmsley, J.—I agree in the view expressed by my learned brother Mr. Justice B. B. Ghose in the judgment which he is going to deliver.

Greaves, J.—I also agree in the view expressed in that judgment.

C. C. Ghose, J.—The question that has been referred to the Full Bench is as to whether a suit for rent is maintainable against some of the heirs or successors-in-interest of a deceased tenant without bringing all the heirs or successors-in-interest on the record. In my view, the answer to the question ought to be in the negative. It will serve no useful purpose to discuss the conflicting authorities on the point. It is sufficient for me to observe that I adhere to the view which I expressed in the case of *Abinash Chandra Roy v. Fulchand Chaudhuri* (7). I have heard nothing during the course of the argument to induce me to depart from the opinion expressed by me in the above case. In my opinion, the suit as framed, should be dismissed and the appeal preferred by the defendants allowed.

B. B. Ghose, J.—The facts of the case which led to this reference shortly stated are these: The plaintiff is entitled to 4 annas share of a *taluq* under which there is a tenur which formerly belonged to one Gour Sundar Singh and which by successive devolutions and assignments has come into the possession of about twenty persons. The plaintiff has sued for his share of the rent of the tenure for the years 1324 to 1327 B. S., five persons some of whom have acquired their interest by succession and others under assignments from some of the heirs of Gour Sundar. All these persons were in possession during the period in suit along with others who have not been made parties. The only plea which now requires consideration is that the suit is not maintainable as the other tenants have not been made parties. The Trial Court passed a decree for money personally against the defendants and held that the tenure would not be bound by the decree, and on appeal that decree was affirmed by the Subordinate Judge. One of the defendants preferred a second appeal to this Court. There are two lines of cases in this Court taking contrary views, which has made it necessary for a

reference to the Full Bench of the question "whether a suit for rent is maintainable against some of the heirs or successors-in-interest of a deceased tenant without bringing all the heirs or successors-in-interest on the record."

It would scarcely serve any useful purpose to examine the various conflicting authorities. The question should be decided on well-recognised general principles. It is argued that the tenancy as well as the liability for payment of rent has been inherited by the representatives of the deceased tenant as one body and this body as a whole is liable for the rent on the contract of their predecessor. If the landlord omits to implead anyone of them in his suit for rent, the suit is defective and must be dismissed for not having been brought against the body of representatives as a whole. This argument seems to me to be grounded on a misconception. The heirs did not take the tenancy as an entire body forming as it were a partnership or a corporation, the individual members of which have no definite interest. They took as tenants-in-common, each having a definite share in the whole, which he might deal with in any way he pleased. As a matter of fact, as already stated, some of the heirs of the original tenant had assigned their interest to third persons. The liability of a tenant to pay rent arises from the fact of possession of the land as a tenant where there is no express contract, and all persons in possession of land as tenants are under an implied obligation to pay the rent for the land to the landlord, whether they got into possession by right of succession or assignment. A tenant-in-common is entitled to possession of every part of the estate and there is privity of estate between him and the landlord in the whole of the leasehold. The law imposes a liability on a tenant-in-common based on privity of estate for all covenants running with the land, and as his estate is an estate in the whole of the leasehold, there is no reason why he should not be liable for the entire rent. This view is supported by what is stated in *Leake on Contracts*, 7th, Edn., at p. 931, that each tenant-in-common being possessed of the whole may be sued separately upon covenants running with the land. Thus whether a contract is implied for payment of rent by all tenants-in-common in possession of a leasehold, or whether it is held that the law imposes the liability for payment of

rent by reason of privity of estate, anyone of such tenants may be sued for the entire rent due to the landlord. This may be either in accordance with the provisions of s. 43 of the Indian Contract Act which applies to express as well as implied promises, or under the general law based on privity of estate.

It is hardly necessary to add that a decree in such a suit will not have the effect of a decree for rent under Ch. XIV of the Bengal Tenancy Act.

On the grounds stated above I would answer the question in the affirmative, with the result that the appeal should be dismissed.

Mukerji, J.—The authorities bearing upon the point involved in this reference have all been noticed and their precise effect accurately summarised in the judgment of my learned brother Chatterjea, J., in the case of *Mohendra Nath Bose v. Abinash Chandra Bose* (9) and it is unnecessary to discuss them as the question has to be answered upon broad and general principles.

The question is whether a suit for rent is maintainable against some of the heirs or successors in-interest of a deceased tenant without bringing all the heirs or successors in-interest on the record. To answer this question, the matter has to be considered from two distinct points of view: *Firstly*, from the point of view of the defendants' liability, and *secondly* from the point of view of the frame of the suit.

As regards the first of these matters, we start with the position that in view of s. 88 of the Bengal Tenancy Act, it must be conceded that when a person obtains a share of a tenure either by assignment or by inheritance he becomes a co-tenant with the other tenant or tenants in the whole tenure, and in so far as the relations between him and his landlord are concerned he cannot be deemed to hold any estate in severalty. Each one of the persons in whom a share of the estate may vest by assignment or inheritance becomes a tenant-in-common in the whole of the estate by reason of the indivisibility of the estate without the landlord's consent. Each one of such co tenants has a privity of estate with the lessor in respect of the whole estate. The proposition is thus enunciated in *Foa on Landlord and Tenant*, Sixth Edition, p. 469: "Where, however, the share

of the demised premises is not held by the assignee in severalty—as where they become vested in joint tenants or tenants-in-common, the case is different because he, with others, holds the whole estate, and privity in respect of it exists accordingly between him and the lessor." From this it would seem to follow that each of the joint tenants or tenants-in-common would be liable to the lessor on the covenants running with the land, and so for the whole rent. The contrary view was contended for in the case of *United Dairies, Ltd. v. Public Trustee* (9). In that case Greer, J., observed as follows:—"The present case was argued before me on the assumption that in English Law, whatever may be the case in Ireland, a tenant-in-common is not liable for the whole rent, but only for a proportionate part; but I do not think this question appears to be definitely concluded by any of the decisions in the English Courts." The learned Judge exhaustively dealt with the authorities bearing upon the point and explaining the decision in the case of *Merceron v. Dawson* (10) which apparently contains *dicta* to the contrary effect, further observed as follows:—"It seems to me on the authorities, that it has never been conclusively established that an assignee holding with other tenants under the terms of the original lease is not liable jointly with those other tenants for the whole rent. He has an interest in the whole of the land leased...and I see no valid reason why tenants-in-common should be in a position as regards liability for rent different from that of joint tenants. I am inclined to think that each of the tenants-in-common has the privity of estate with the landlord in the whole of the land leased." The reasoning of the learned Judge seems to be unassailable and I agree in his conclusions. I am accordingly of opinion that each one of the defendants in the present suit is liable for the entire rent and there can be no objection to the maintainability of the suit on that ground. I am further of opinion that except in the case of original lessees or persons who were parties to the contract, the provisions of s. 43 of the Indian Contract Act have no application and need not be resorted to.

Turning now to the other question, namely,

(9) (1923) 1 K. B. 469 at p. 471; 92 L. J. K. B. 326; 128 L. T. 768; 67 S. J. 199; 39 T. L. R. 825.

(10) (1823) 5 B. & C. 479; 8 D. & R. 261; 4 L. J. K. B. (o. s.) 211; 108 E. R. 179.

whether the suit is maintainable by reason of defect of parties, the point is as to whether all the persons who are under a joint liability are necessary parties to a suit based upon such liability. Here again we start with the following propositions: If lands are let out to two or more tenants their liability to pay the rent is joint and several, except where it is made joint and not several by express agreement; the liability of assignees of the original tenant or tenants may be a joint liability *inter se* as amongst the assignees, or it may be a joint and several liability if there is an agreement to that effect. The liability of the persons upon whom the rights of the original tenant or tenants devolve on the death of the latter is a joint liability to the extent of the interest which devolves and not a joint and several liability in respect of that interest, as the whole body of persons who succeed in this way constitute in law but one heir.

Section 43 of the Indian Contract Act expressly refers to "promisor" and "promisee." As far as the liability under a contract is concerned it appears to make all joint contracts joint and several. Order I, r. 6, C.P.C., provides that the plaintiff may, at his option join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract including parties to Bills of Exchange, *hundis* and promissory-notes. Cases of joint liability or of joint and several liability which do not come within s. 43 of the Contract Act or O. I, r. 6 must be treated as cases for which no exception has been made in this country to the general rule which obtains in English Common Law and which is in consonance with justice, equity and good conscience. In the words of Lord Redesdale: "All persons materially interested in the subject ought generally to be parties to the suit, plaintiffs or defendants, however numerous they may be, so that the Court may be enabled to do complete justice by deciding upon and settling the rights of all persons interested, and that the orders of the Court may be safely executed by those who are compelled to obey them, and future litigation may be prevented." This general rule embraces two classes of parties as defendants, that is to say, those who are indispensable and, necessary parties without whom no decree at all can be rendered, and those who are proper parties whose presence makes the adjudication more complete and effectual. Under the English Law

where the liability is a joint and several one the plaintiff will not be compelled to add all the persons so liable as defendants, *Chalmers v. Guthrie* (11), but where an action has been commenced against one or some only of several joint contractors the defendant or defendants can apply to have the other joint contractor or contractors added and the proceedings stayed until this is done, *Kendall v. Hamilton* (12). The effect of the latest decision seems to be that a joint debtor, though he has not an absolute, has an ordinary and a *prima facie* right to have his co debtors joined; *Wilson v. Balearres Brook Steamship & Co.* (13) and *Robinson v. Geisel* (14). There is, in my opinion, no reason why this general right should be denied in this country to a person under a joint liability where the liability arises not under a contract to which O. I, r. 6 is confined and where the persons are neither severally nor jointly and severally but are only jointly liable.

In a case where the liability of the defendants arises not on contract, but on account of privity of estate, the defendant may insist on all the persons jointly liable, to be made party defendants. All such persons, in my opinion, are not merely proper, but also necessary parties. If objection is taken to the maintainability of the suit in their absence, the Court has to follow the provisions of O. I, r. 10 (2) of the C. P. C. In England it has been the essence of the procedure since the Judicature Acts to take care that a suit shall not be defeated by the non-joinder of the right parties. The same rule has been embodied in O. I, rr. 9 and 10, C. P. C. These two rules correspond to O. XVI r. 11 of the Rules of the Supreme Court, 1883 with regard to which the following is what has been said in *Chitty and Marks' Yearly Practice of the Supreme Court, 1925*:—"This Rule has not altered the legal principles with regard to the parties to actions or the right of a defendant to insist on the necessary parties before the Court. It has, however, altered the procedure and substituted an application to add the parties improperly omitted or to strike out the parties improperly joined or to

(11) (1923) 156 L. T. Journal. p. 382.

(12) (1879) 4 A. C. 504; 48 L. J. C. P. 705; 41 L. T. 418; 28 W. R. 97.

(13) (1893) 1 Q. B. 422; 62 L. J. Q. B. 245; 4 R. 286; 68 L. T. 312; 41 W. R. 486; 7 Asp. N. C. 321.

(14) (1894) 2 Q. B. 685; 9 R. 555; 71 L. T. 70; 42 W. R. 609.

stay the proceeding until the necessary parties are added. The Court has now, however, a discretionary power to refuse the order; but in the exercise of this discretion it is guided by the same principles as were applicable to the old plea in abatement."

In my judgment persons who are under a joint liability to pay the rent, are necessary parties in a suit for rent. They are so from more points of view than one. They are necessary for determining whether the liability which is *prima facie* joint is also joint and several; for protecting the defendant from being made to pay what may have already been paid by others; for safe-guarding against the eventuality of his being defeated in a suit for contribution, as the co-tenant against whom a suit for contribution is brought will not be bound by the result of the earlier suit; for preventing conflicting decisions as to the character and incidents of the same tenancy being arrived at in different suits; and for various other reasons. That a lessor is bound to implead in his suit all the lessees or assignees from the lessees who are known to him is a principle recognised from the earliest times. Bayley, J., in the case of *Merceron v. Dawson* (10), observed thus: "It may be conceded to the defendant that when the plaintiff is informed of the persons in whom the whole interest is vested they must be sued jointly." This principle has been seldom dissented from in this country, and there is no reason that I can think of why it should have been departed from. I do not suggest that a decree obtained in the absence of some of the co-tenants is necessarily a nullity; it is a valid decree and is effective only as a decree for money. But, if objection is taken at the right moment as to the maintainability of the suit, I am clearly of opinion that it should be held that the suit is not properly constituted. In *Roop Narain Singh v. Juggol Singh* (15), it was ruled that a suit for rent from several *rai-yats* on account of a holding which has been let out to them, cannot be brought against one of them, but must embrace all of them as defendants. The decision was passed before the Indian Contract Act was enacted. Section 43 of the Act and the provisions of the C. P. C. relating to parties to an action have abrogated this rule in some

measure only. In *Khetter Mohan Pal v. Prankristo Kabiraj* (16), it was assumed as well-settled that upon the death of the original tenant the landlord would be bound to sue so many at any rate of the heirs as had notified their names to him. The same principle appears to have been recognised almost consistently in this Court, and the following cases will show the current of judicial opinion on the point, *Ananda Kumar Naskar v. Hari Dass Haldar* (17), *Sreemuty Jogemaya Dasi v. Girindra Nath Mukherjee* (18), *Ramoyi Desi v. Rupai Pramanick* (19), *Abdul Rab v. Eggar* (20), *Basli Bibi v. Hanif-ud-din Mandal* (21) and *Kashi Kinkar Sen v. Satyendra Nath Bhadro* (3). I am aware that the rule has been departed from in recent years in some instances, but only on rare occasions and under exceptional circumstances. To depart from this rule gives rise to serious anomalies. To take the case of a permanent tenure, as an instance, it would make nugatory the provisions of s. 17 of the Bengal Tenancy Act and deprive the transferee of a share of his right to recognition which he is entitled to under the law.

It follows from what I have said above that in my opinion the suit as framed was not maintainable without impleading as defendants all the parties who are known to be the tenants of the holding. The plaintiff cannot take shelter under the plea of ignorance as to who the persons are: their names are entered in the finally published Record of Rights. The suit, however, cannot be dismissed on that ground. The Court must proceed under O. I, r. 10 (2), C. P. C., to make an order for the addition of such of these persons as are not already on the record as defendants, and it is only in the event of the necessary amendments not being made that the suit is liable to be dismissed. On such amendment being made the suit should be tried out in accordance with law, it being noted that the suit will not fail merely because the plaintiff may have lost his remedy against the added defendants.

In my judgment, therefore, the decree passed by the Courts below should be set

(16) 3 C. W. N. 371.

(17) 27 C. 545; 4 C. W. N. 608; 14 Ind. Dec. (N. 8.) 359.

(18) 4 C. W. N. 590 at p. 592.

(19) 9 Ind. Cas. 801; 13 C. L. J. 267 at p. 269.

(20) 35 C. 182 at p. 184; 12 C. W. N. 160.

(21) 6 Ind. Cas. 570; 12 C. L. J. 267.

(15) 10 W. R. 304.

aside, and the suit remanded to the Court of first instance to be dealt with as indicated above, and all costs hitherto incurred including the costs of this reference should abide the result.

In accordance with the judgment of the majority the appeal is dismissed with costs before the Divisional Bench but without any order as to costs in respect of this reference.

s. D.

Appeal dismissed.

PATNA HIGH COURT.

CIVIL REVISION No. 56 OF 1925.

May 5, 1925.

Present:—Mr. Justice Kulwant Sahay.

JAGANNATH SAHU AND ANOTHER—

DEFENDANTS—PETITIONERS

versus

SHEGOBIND PRASAD—PLAINTIFF—

OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Withdrawal of suit—Leave, when can be granted—“Other sufficient grounds,” scope of.

Under r. 1 of O. XXIII of the C. P. C. a Court has power to allow a plaintiff to withdraw a suit with liberty to institute a fresh suit in respect of the same subject-matter only when the suit is bound to fail by reason of some formal defect or on other sufficient grounds. The other sufficient grounds, however, must be grounds analogous to that provided for in sub-cl. (a) of the rule.

The fact that upon the case as made in the plaint the plaintiff is bound to fail is no ground for allowing a plaintiff to withdraw from a suit with liberty to bring a fresh suit.

Mahendra Ram v. Singi Lal, 48 Ind. Cas. 197; 3 P. L. J. 651, followed.

Revision from the decision of the Munsif, Ranchi, dated the 3rd January 1925.

Mr. P. K. Mukherji, for the Petitioners.

Messrs. Rai Guru Saran Prasad and Dhyani Chandra, for the Opposite Party.

JUDGMENT.—This is an application in revision on behalf of the defendants against the order of the Munsif of Ranchi passed under O. XXIII, r. 1, cl. (2) of the C. P. C. granting the plaintiff permission to withdraw from the suit with liberty to institute a fresh suit in respect of the subject matter of the suit.

The learned Munsif has allowed the withdrawal on the ground that upon the case as made by the plaintiff in the plaint the suit could not succeed. The case made

by the plaintiff in the plaint was that the property in dispute was the property of Musammam Jamuni, the maternal grandmother of the plaintiff and the plaintiff claimed the property as the assets of Musammam Jamuni claiming to be the heir of Musammam Jamuni. At the hearing of the suit the plaintiff wanted to adduce evidence to show that the property belonged to the husband of Musammam Jamuni and that the plaintiff inherited the property as the reversionary heir of the husband of the lady. The defendant objected to such evidence going in, on the ground that in the plaint he did not claim the property as the heir of Musammam Jamuni's husband. The learned Munsif says that unless the plaintiff was the heir of Musammam Jamuni's husband the suit would not be successful, because the defendants had produced a Will alleged to have been executed by Musammam Jamuni and had applied for Probate of the Will before the District Judge, and the question was pending before the District Judge. He accordingly gave the plaintiff permission to withdraw the suit. Now, under O. XXIII, r. 1, the Court could allow a plaintiff permission to withdraw the suit with liberty to institute a fresh suit in respect of the same subject-matter only when the suit is bound to fail by reason of some formal defect. Sub-clause (b) of cl. (2) of r. 1, however, gives the Court power to allow the withdrawal of a suit on other sufficient grounds. The other sufficient grounds, however, have been held by this Court to be grounds analogous to those provided for in sub-cl. (a). In my opinion, the Court had no jurisdiction to grant permission to withdraw the suit, because upon the case as made in the plaint the plaintiff was bound to fail. There is nothing in the plaint or in the order of the Munsif from which it could be held that there was a formal defect or a defect of such a nature as would prevent the suit being properly tried. The fact that upon the case as made in the plaint the plaintiff could not succeed is no ground for allowing the plaintiff to withdraw from the suit with liberty to bring a fresh suit. The conditions under which a suit may be allowed to be withdrawn with permission to bring a fresh suit have been discussed by this Court in the case of *Mahendra Ram v. Singi Lal* (1). In my opinion, the

(1) 48 Ind. Cas. 197; 3 P. L. J. 651.

learned Munsif was wrong in the present case to allow the suit to be withdrawn with liberty to bring a fresh suit.

The order of the Munsif must be set aside, and the suit will proceed in the ordinary course. The petitioners are entitled to their costs: hearing-fee one gold *mohur*.

Z. K.

Order set aside.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE

No. 5 of 1923.

May 15, 1925.

Present:—Justice Sir Hugh Walmsley, Kt.,
and Mr. Justice Mukerji.

KARIMANNESSA BIBI—CLAIMANT No. 4
—APPELLANT

versus

HAMEDULLA *alias* RAJA AND OTHERS—

CLAIMANTS—RESPONDENTS.

Waqf—Marz-ul-mout, *what is*—Death illness—
Paralysi—Possession of senses—Apprehension of death
—Mutwalli's misfeasance, *whether affects validity of*
waqf.

An old Muhammadan was attacked in February 1895 by paralysis of the lower limbs rendering him a helpless invalid, permanently confined to his bed. In March he executed a *waqfnama* and died in the following November:

Held, that the doctrine of *marz-ul-mout* applied and that the *waqf* was valid only to the extent of one-third of the *waqif's* assets. [p. 220, col. 1.]

Per *Mukerji, J.*—The limit of one year in cases of *marz-ul-mout* does not constitute a hard and fast rule. [p. 224, col. 2.]

In order to make the doctrine of *marz-ul-mout* applicable there must be (1) illness, (2) expectation of a fatal issue, and (3) certain physical incapacities which indicate the degree of illness. [*ibid.*]

Death illness is illness in which death is highly probable whether incapacities exist or not. [*ibid.*]

The question to be considered in cases of *marz-ul-mout* is whether the donor executed the deed of gift under apprehension of death. [p. 225, col. 1.]

Possession of one's senses and mental faculties is no index of the pressure of sense of imminent death. [p. 226, col. 1.]

Case-law and authorities reviewed.

Malfeasance or misfeasance of a *mutwalli* does not invalidate a *waqf* which at its creation was a valid one. [p. 221, col. 2.]

Appeal against a decree of the President of the Calcutta Improvement Tribunal, Calcutta, dated the 12th of August 1922.

Dr. D. N. Mitter, and Babu Narain Chandra Kar, for the Appellant.

M. Nuruddin Ahmed, and M. A. S. M. Akram, for the Respondents.

JUDGMENT.

Walmsley, J.—This appeal is directed against a decision of the President of the Calcutta Improvement Trust Tribunal in a dispute about the apportionment of some compensation money.

Premises No. 32, Durga Road have been acquired by the Trust. The Collector's valuation has not been accepted by those who appear to be the owners, and before making the valuation the President has decided the principles on which the compensation when it is fixed will be apportioned.

The former owner was Muhammad Tayeb; he had a wife named Sarifannessa; he died in November 1895, leaving a widow, five sons and three daughters. The claimant No. 4 is the appellant, and she is one of the daughters. Her claim as to the share that would ordinarily be hers is resisted on the ground that Muhammad Tayeb made a *waqf* of the property a few months before his death. The question, therefore, that the President had to decide was whether the *waqf* was valid or not. He held that it was valid, and it is against that decision that the appeal is directed.

The first ground on which the appellant assails the *waqf* is that it offends against the doctrine of *mushaa*. The reason for this assertion is two-fold. First, it is said that the wife Sarifannessa was owner of a portion, and secondly, that one Azimannessa also had a share in the property covered by the *waqf*. Neither of these assertions can be supported. Sarifannessa's plot of land was not an undivided share, but specific land with Tayeb's land forming the boundary on one side. It may be an open question whether the husband or the wife is the owner of the portion standing in Sarifannessa's name, but for my present purpose it is enough to point out that the premises are divided into specific plots. As for Azimannessa's portion, her name appears with that of the lady who sold to Sarifannessa, and with that of a third person in Billon's Register of 1893. In 1911 she asked for the holding to be sub-divided, and for permission to redeem her share of the rent. This was done without any objection. The circumstances indicate that the sub-division consisted of recognizing her possession of a specific

plot, and not of carving out from an undivided whole a plot equivalent to her interest. Further if the areas are considered, it appears that there were specific plots with ascertained areas, together amounting approximately to the area of the whole. I, therefore, agree with the learned President's finding that the doctrine of *mushaa* does not render the *waqf* invalid.

The second objection to the *waqf* is that it is really a disposition for the benefit of the grantor's family. The question is whether there is a substantial dedication of the property to charitable uses. The income from the property is not large, and a very considerable part of it must be spent for the benefit of members of the grantor's family. There are, however, specific sums to be paid for the maintenance of worship in a mosque established by the *waqif's* father, and directions are also given for using the income for the benefit of the travellers and students. The terms of the disposition are such that without scrupulous honesty on the part of the *mutwalli* little if any thing is likely to be left for the student and the traveller, but there may be a little and in the ordinary course of nature there should be more. I think the instrument lies very near the border line, and my own inclination would be to hold against its validity, but in deference to the opinion expressed by Greaves, J., in another suit, an opinion which is, of course, not binding but is entitled to consideration, and to the view taken by my learned brother on this Bench. I have come to the conclusion that I ought to regard the *waqf* as valid, so far as this objection is concerned.

The third objection is based upon the difficult doctrine of *marz-ul-maut*, or death bed illness. In Sir Roland Wilson's Book on Anglo-Muhammadan Law this doctrine is set out as follows: "A gift made in mortal sickness is so far regarded as a bequest that it cannot operate on more than a third of the testator's nett assets unless with the consent of all the heirs, nor in favour of one heir without the consent of all the others. Explanation I-A gift is said to have been made in mortal sickness, only if it was at the time, and seemed to the donor himself highly probable that the malady would soon and fatally, and if in fact it did so end. The donor's state of mind, which is the real ground

of the rule, may be, but it is not necessarily, to be presumed from the gravity of the symptoms. On the other hand no evidence of actual apprehensions of death will suffice in the absence of external indicia of danger, chief among which is inability to attend to ordinary avocations." There have been numerous decisions on the subject since those words were first written but I think that they set out the doctrine correctly.

The facts which appear to be proved in the present case are that Muhammad Tayeb then a very old man, was attacked by paralysis of the lower limbs in February 1895: he at once became a helpless invalid, permanently confined to his bed; he could not perform the ordinary offices of nature without assistance, and, more important, he could not leave his bed for religious exercises. He continued in this state until he died in the following November. The *waqfnama* which we are considering was executed in March.

The fact that Muhammad Tayeb was ill or at any rate bed-ridden for nine months, has given scope for the suggestion that the saving principle established for those who suffer from a malady of long continuance will make this *waqf* valid. Sir Roland Wilson, quoting from Baillie's Digest, has this note "The lame, the paralytic, the consumptive, and a person having a withered or a palsied hand, when the malady is of long continuance, and there is no immediate apprehension of death, may make gifts of the whole of their property," and adds, "The Hedaya fixes the period of long continuance at one year, but this is not taken as a hard and fast rule." In this case it is argued that the illness lasted for nine months, and that is almost a year, and, therefore, under this principle, Muhammad Tayeb was competent to make a gift of the whole of his property.

I do not think it is necessary to consider whether this rule is to be construed elastically or not, for the reason that I have no doubt that in March 1895 Muhammad Tayeb was expecting to die very soon. Not only was the immediate apprehension present to his own mind: there was also external signs which those about him would naturally interpret as indicating that death was at hand. It is true that as a fact he lingered for seven or eight months, and that no fresh illness supervened, and, therefore, it may be said that his own fears and his

relatives, expectations were mistaken, and that the malady did not soon end, in death. It was from that malady, however, that Tayeb died: he never got any better, and from February to November there was never a time when the malady became a mere disability; throughout it threatened an early end, and at the last it did prove fatal without any fresh illness supervening. I think, therefore, that the months of lingering before actual death do not take the case out of the doctrine. My conclusion, therefore, is that the *waqf* is valid only to the extent of one-third of the *waqf's* assets.

The appellant succeeds in part and the President is directed to appertain the compensation when determined in accordance with this view.

The appellant will be entitled to recover her costs from the contesting respondents in both Courts: hearing-fee in this Court is fixed at three gold *mohurs*.

Mukerji, J.—The only question that has been raised in this appeal is as to the validity of the *waqf* executed by one Muhammad Tayeb in respect of certain properties, one of which, namely, Premises No. 32, Durga Road comprising an area of 1 *bigha* 13 *cottas* 7 *chattaks* 25 square feet, has been acquired under the Land Acquisition Act. The validity of the *waqf* is questioned upon three grounds:—*First*, that the *waqf* offends against the doctrine of *mushaa* as the premises in question were the joint property of Muhammad Tayeb and his wife Sarifannessa and also because one Azimannessa was a co-sharer in the holdings of which the said premises formed a part; *second*, that the *waqf* is illusory and contains directions which are vague and incapable of execution; and *third*, that the *waqf* is invalid under the law of *marz-ul-mout*.

As regards the first of these grounds what appears upon the evidence is this. The premises aforesaid are comprised within revenue holding No. 318. This holding consists of two distinct plots of lands carved out of old holdings Nos. 64, 64 A, 66, 66 A and 67. The total area of all these holdings was more or less 2 *bighas* 8 *cottas* 9 *chattaks*. By a *kobala* Ex. G, dated the 20th March, 1889, Sarifannessa Bibi, wife of Muhammad Tayeb, purchased a plot of land 10 *cottas* in area, and it was recited in the document that previously her husband had acquired by several pur-

chases 1 *bigha* 5 *cottas* 14 *chattaks* of land, and in the Schedule to the document this land was stated as forming one of the boundaries on the East. On the 20th March 1895 Muhammad Tayeb executed a *waqfnama* in respect of various properties, including the aforesaid lands which were purchased by him as well as that purchased by his wife. The plots of land being distinct, neither Muhammad Tayeb nor Sarifannessa Bibi can be said to have had an undivided share in the lands in respect of which the *waqf* was made. As regards Azimannessa, all that appears upon the evidence is that in Billon's Register of 1893-94 one Azeman Bibi and one Meher Bibi and two others were recorded as tenants in respect of the aforesaid holdings. Meher Bibi sold the 10 *cottas* of land to Sarifannessa in 1889. Azimannessa applied in 1911 for sub-division of the holdings and for redemption of the holding to be allotted to her, and the said application was granted. The holding allotted to her appears from the order-sheet in that case to have consisted of an area of less than 5 *cottas*. The total area of the lands of the above-mentioned old holdings as stated in the *kobala* Ex. G was 2 *bighas* 8 *cottas* 9 *chattaks*, of which according to Billon's Register the portion in which Aziman Bibi was a joint tenant with Meher Bibi and others was 1 *bigha* 19 *cottas* and 6½ *chattaks*. The purchases by Muhammad Tayeb and Sarifannessa did not extend to the whole of the said 1 *bigha* 19 *cottas* and 6½ *chattaks* but only to 1 *bigha* 15 *cottas* 14 *chattaks* as stated in Ex. G. The evidence of Khoda Bux, witness No. 2, for the claimant No. 4, was that Aziman had 3½ *cottas* of land, in the holdings, and this seems to be the quantity left to her after the purchases made by Muhammad Tayeb and Sarifannessa. There is nothing to show that the land of Azimannessa was not a separate plot of land such as Meher's was, and it has not been proved that she was a co-sharer in the premises covered by the *waqf*. The doctrine of *mushaa*, therefore, has no application to the case.

The second ground may be disposed of in a few words. The object set out in the *waqfnama* was to make arrangements and provisions for the due performance of religious services in the mosque which had been erected by the father of Muhammad Tayeb at No. 26, Collinga Bazar Street. The inalienability of the properties and

the usual limitations and restrictions as to the powers of the *mutwalli* to deal with the *waqf* properties were laid down. It was provided that if any land or building included in the *waqf* estate were acquired by the Government for public purposes, the compensation money would be utilised for purchasing some other property for the purposes of the *waqf*. In para. 6 directions were given for the yearly repair of the mosque, and the daily lighting thereof, and for arranging for the five prayers that are to be held daily, and also the *jumma* prayer, the *azan* and *namaz*, and the *Id* and *Bakhr-id* prayers, and for the employment of *khatib* and *moazan*, the distribution of *iftari* during *ramzan*, the reading of *tarabi* prayer by a *hafez*, and for providing for such accessories as are ordinarily necessary for the purpose. The remuneration of the *hafez* was fixed at Rs. 25 a year, the *khatib* was to get Rs. 2 per month and his food, and the *moazan* Re. 1 a month and his food. Directions were given for the maintenance of students, and the entertainment of travellers and mendicants. Provision was also made for the accommodation and maintenance of a sister of the *waqif* and her daughter, and also the daughters of the *waqif* in certain circumstances. The five sons were appointed *mutwallis*, each for a year, and it was directed that the *mutwalli* in office will get his food and a salary of Rs. 5 and shall be bound to provide for the food of the four future *mutwallis*. The other directions need not be referred to. The income of the property was small, being about Rs. 100 or Rs. 125; and though a substantial part of it, under the directions contained in the *waqfnama* would go to the relations of the *waqif*, it is manifest that the primary object of the endowment was to support a mosque, to make arrangement for the performance of religious services therein, to carry on works of charity connected therewith, to feed travellers and to educate poor students. The provisions made for the relations can hardly be said to be such from which it may be deduced that the main purpose of the settlement was the aggrandisement of a private family. The directions given to the future *mutwallis* left a good deal of discretion in them as to how the work was to be carried on, but it was stated that they were to keep to the standard followed by the *waqif*. The directions, there-

fore, cannot be said to have been vague or unascertainable, and the *waqf* must be taken to have been a valid one. It is perhaps true that the *waqf* has been administered by the *mutwallis* in a manner not altogether satisfactory and some of them appear to have dealt with the properties as if they were proprietors. Malfeasance or misfeasance on the part of the *mutwallis*, however, cannot invalidate a *waqf* which at its creation was a valid one.

The third ground raises one of the difficult questions which the Muhammadan Law abounds in, namely, as to whether the *waqf* was invalid under the law of *marz-ul-mout*. The law of *marz-ul-mout* is not the same amongst all the schools; and moreover the reason of the rule as well as its essentials have been differently enunciated by different jurists. Lawyers who may be said to belong to the orthodox school expound the doctrine on the basis of certain principles, modern jurists seek to rest the law upon what they consider to be more in consonance with rational ideas, and judicial decisions have served to break the rigidity of it in no small measure, by interpreting it in a broad and liberal spirit.

A reference to the translations of some of the texts relating to this branch of the law, which are to be found in books of undoubted authority or have been relied upon in judicial decisions may not be unprofitable. In some cases the translations do not agree, and in others it is not easy to appreciate the exact meaning, the passages being darkened by parentheses or obscured by the translator's gloss. In the case of *Labbi Beebee v. Bibbun Beebee* (1), the following texts were referred to:—

Futawa-i-Alumgiri, Vol. 4, Ch. XI: "Now they speak of the definitions of 'fatal disease.' What has been adopted in *futwas* is that a disease from which death may probably result is a fatal disease, irrespective of whether the patient keeps to his bed or not" (page 552). "He who is affected with paralysis, partial or total, and he who has lost the use of any limb, or is effected with phthisis, and the disease is prolonged, and there is no fear of death, may make a gift of his whole property." (page 562).

Futawa-i-Fusul-Amadi:—"They have explained prolongation to mean one year, so

(1) 6 N. W. P. H. C. R. 159;

that if the disposition has been made after one year from the attack of the malady it is like a disposition made in the enjoyment of health." (page 414 M. S.)

Futawa-i-Alumgiri, Vol. I, Book of Divorce, page 640: "Our learned Doctors have explained the duration of sickness to be of one year, so that if the same sickness lasts for one year the acts of the sick person after one year would have the same effect as if he had done them in a state of health." There is no reason to suppose that the law of *marz-ul-mout* is not the same in regard to *talaq* as it is in the case of *waqf*.

Futawa-i-Shami, Vol. II, page 521: "If the sickness becomes old, that is to say, if one year elapses from its commencement, and no increase or decrease occurs in it, the sick person shall be deemed a healthy person, but if the sickness increases, whether before or after one year, and during the continuance of such increase the person dies of the same, he shall be deemed a sick person." Other *futwas* also to the same effect appear to have been produced before the Court. Another translation of the passage last quoted will be found in the case of *Fatima Bibee v. Ahmad Baksh* (2) and runs in these words:—"If the disease becomes old in this way, that it extends beyond a year, and no increase occurs within that (period), then he (the sick person) is (to be deemed) in health, but if he dies in a state of increase, whether the increase takes place before the year's prolongation of it, he is (to be deemed to be) sick."

A passage from *Jamai ul-Rumcoz* was also produced before the Court which, while admitting that some authorities doubt the prescription of the period of one year, gave, as supported by the better opinion, the rule that "gifts by paralytics are valid if the sickness lasts for a long time, so that a year elapses from the time when it first commenced."

Mr. Ameer Ali in his book on Muhammadan Law, Vol. I, page 56, quotes with approval the observations of *Radd-ul-Mukhtar* and says:—"It is not merely the fact that the disease is ordinarily fatal that requires consideration but the effect it is likely to have on the mind of the sufferer, which is the chief determining element. A malady of such a nature is called *Marz-ul-mout* or the illness of death. But where a person has suffered from an illness for a

long time so that it has become, as it were, 'a part of his constitution,' or where the progress of the disease is so imperceptible as to cause no apprehension to him, it does not come within the definition of *Marz-ul-mout*."

At page 57 is quoted the following passage from the *Durr-ul-mukhtar*: "The gift of a person suffering from paralysis, palsy and phthisis is invalid as to the whole when the disease has lasted over a year, and there is no fear of death from it, but if it has not extended for a year and there is no fear of death (on his part) the gift will take effect in respect of the third." The learned author states that the reason is there is said to be that if a person suffers from a malady which is ordinarily mortal for over a year, it ceases to have any appreciable influence on his mind as it has become a part of his nature.

At page 58, *Futawa Kazi Khan* is quoted in support of the proposition that "one struck with paralysis, phthisis or palsy is accounted sick whilst the disease is on the increase; but when the illness has lasted a long time and is not becoming worse, the sufferer is as one in health." Then the following passage of the text is quoted, "some lawyers have laid down that if a disease, however mortal, lasts for over a year, it should not be regarded as such, because the man becomes so accustomed to it as to lose all apprehension as to his own condition."

At page 59, *Durr-ul-Mukhtar* is quoted where it says on the authority of the *bazacia*, that "when a person is in imminent fear of death whether from disease or any other cause, so that in the case of an illness the man is so broken or weakened by it as to be incapacitated from conducting his ordinary avocations outside his house, for example, a *Faki* (Jurist) from going to the mosque, a tradesman to his shop, a woman from attending to her indoor occupations" it is *marz-ul-mout* and also on the authority of the *mujtaba*, that "where the illness has become so severe as to make it permissible for the sufferer to offer his prayer without standing up (Lit: in a sitting posture) it must be regarded as an illness of death."

The above doctrine, however, is different from that of *Futawa-i-Alumgiri* which was accepted in the case of *Fatima Bibi v. Ahmad Baksh* (2) and where the proposition was laid down in these

words:—"A death illness is one which it is highly probable will end fatally whether the sick person has taken to his bed or not; or whether in the case of a man, it disables him from rising up for necessary avocations out of the house or not, such as for instance, when he is a *Faki* or lawyer, from going to the *musjid* or place of worship, and when he is a merchant from going to his shop or whether in the case of a woman it does or does not disable her from necessary avocation within doors. But the illness is to be considered death-illness when a man cannot pray standing." This extract with the exception of the last sentence seems to be the translation of a passage from the *Futawa-i-Alumgiri*.

Mr. Tyabji in his Principles of Muhammadan Law quotes Baillie's Digest, Vol. I, 543, Grady's Edition of Hamilton's Hedaya 684, in support of the proposition that "pains of child birth are considered by the Muslim authors as *prima facie* a death illness whereas lameness, gout, paralysis, consumption or withered or palsied hand, after they have continued for a long time and have no immediate danger of death do not constitute death illness."

It is not very easy to reconcile this mass of conflicting dicta which, as they stand, present numerous points of diversity. Some jurists contend that every command of the *sharah* was characterised by its *illut* or reason or principle which is a mental idea and its *subub* or the cause or the way leading to it, which has an external and physical existence, and that one must adopt the *subub* in order to reach the obligation which the *illut* creates. According to them the reason of the rule is that when all hope of life is lost and there is every fear of likelihood of death taking place the right of the heirs to the property is created just in the same manner as it is created on the death of the owner who ceases by death to have any need for property. Hence it is, they say, that the law has set out in detail the manifestations, indications and signs, and these should be adhered to, whatever might be the doctor's opinion as to the character of the disease. According to them the limit of one year is conclusive and lays down a hard and fast rule which is to be preferred to a doubtful one depending upon such an uncertain thing as a mental condition like fear. Some others contend that in the case of a disease like paralysis, gout, consumption, etc., a

year was required to ascertain whether the illness was a death illness or not; that if the same illness continued uninterruptedly and death takes place on account of it within a year, the illness is a death illness and a gift made within the year is invalid; but if the illness is a lingering one and death does not take place before the end of the year reckoned from the time it commenced, the illness during the year or subsequent to it is not to be considered as death illness, and any gift made within or after the year is valid. According to some, a subjective apprehension on the part of the patient himself is hardly of any importance because though the reason or motive underlying the law is that illness weakens a man's physical and mental powers and he is, therefore, likely to act under such circumstances to the detriment of his spiritual interest by disappointing his heirs in their just expectations, according to the principles of Muhammadan Jurisprudence that has not to be proved as a fact in each particular case, but the law itself lays down hard and fast rules and criteria by which the validity of a sick person's act has to be determined. The efforts of modern jurists have been directed towards removing the conflict, and judicial decisions have tended to disentangle this mass of complications and lay down some principles which may be of easy application.

In the case of *Labbi Beebec v. Beebun Beebee* (1), Pearson and Turner, JJ., relying upon the authority of certain passages in *Futawa-i-Alumgiri*, *Futawa-i-Fusul-i-Amadi*, and *Futawa-i-Shami*, quoted above, held that under the Muhammadan Law the term *marzul-mout* is applicable not only to diseases which actually cause death, but to diseases from which it is probable that death will ensue, so as to engender in the person afflicted with the disease an apprehension of death that a person labouring under such a disease cannot make a valid gift of the whole of his property until a year has elapsed from the time he was attacked by it. Some of the texts referred to in that case dealt with paralysis 'partial or total,' characterized it as 'a fatal disease' and laid down the doctrine that when the sickness becomes old, that is to say, if one year elapsed from its commencement and no increase or decrease occurs and the same sickness continues, the sick person should be deemed a healthy person, and a disposition made after a year from the

attack of the malady was to be treated as a disposition made in the enjoyment of health. In that case the learned Judges overruled the contention that in the case of disease like paralysis, etc., a year was required to ascertain whether the illness was a death-illness or not, that if the same illness continued uninterruptedly and death took place on account of it within a year, the illness was a death-illness, and a gift made within the year was invalid, but if the illness was a lingering illness and death did not take place before the end of one year reckoned from the time it commenced, the illness during the year or subsequent to it, was not considered a death illness, and any gift made within or after the year was valid. They went on to observe: "The Muhammadan Law, as it would seem, in order to guard against acts done by a person afflicted with a disease which may disturb his calm judgment, has provided that the person afflicted with the disease shall be deemed incompetent to pronounce a divorce, or make a gift of his property until after the expiration of a year from the date on which he was attacked with the disease." This decision was followed in the case of *Muhammad Gulshere Khan v. Mariam Begum* (3) and the principle was laid down in these words: "According to the Muhammadan Law a gift by a sick person is not invalid, if at the time of such gift his sickness is of long continuance, i.e., has lasted for a year, and he is in full possession of his senses, and there is no immediate apprehension of his death." The doctrine as to the validity of the gift when the disease has lasted over a year is considered not to have been correctly appreciated in these decisions (Ameer Ali's Muhammadan Law, Vol. I, page 57, Footnote). In the case of *Hassarat Bibi v. Golam Jaffar* (4) Ameer Ali and Pratt, JJ. observed as follows:—"A careful study of the principles enunciated in the most authoritative Hanafi works would show that in determining whether the donation of a person suffering from a mortal illness comes within the doctrine applicable to *marz-ul-mout* gifts, several questions have to be considered, viz., (1) Was the donor suffering at the time of the gift from a disease which was the immediate cause of his death? (2) Was the disease of such a nature

or character as to induce in the person suffering, the belief that death would be caused thereby, or to engender in him the apprehension of death? (3) Was the illness such as to incapacitate him from the pursuit of his ordinary avocations or standing up for prayers, a circumstance which might create on the mind of the sufferer an apprehension of death? (4) Had the illness continued for such a length of time as to remove or lessen the apprehension of immediate fatality or to accustom the sufferer to the malady? The limit of one year mentioned in the law books does not, in our opinion, lay down any hard and fast rule regarding the character of the illness; it only indicates that a continuance of the malady for that length of time may be regarded as taking it out of the category of mortal illness." In the case of *Fatima Bibi v. Ahmad Baksh* (2), it was laid down (Rampini and Pargiter, JJ.) that ordinarily a malady should be considered to be of long continuance, if it has lasted a year, but agreeing with the observations made in the case of *Hassarat Bibi v. Golam Jaffar* (4), it was held the limit of one year does not constitute a hard and fast rule and that it may mean a period of about a year. In this case it was laid down that the texts mentioned three matters:—(i) illness, (ii) expectation of a fatal issue, and (iii) certain physical incapacities which indicate the degree of illness, and the following observations appear in the judgment:—"The learned Vakil for the defendants contends that the meaning of this is that, if the first and third exist then the second must necessarily be presumed, namely, that there is an expectation of death. The learned Vakil for the plaintiff contends, on the other hand, that there is no such necessary presumption that the matters of the third class are only evidence, and that the Court must decide from that and the other evidence whether the second actually exists, that is whether there is expectation of death. The latter appears to us to be the correct view: for the passage from *Futawa-i-Alumgiri* distinctly states twice that the definition of death illness is illness in which death is highly probable, whether the incapacities mentioned exist or not. These incapacities, therefore, are not infallible signs of death-illness.... At the time when this law was laid down, little medical knowledge existed. It was necessary, therefore, to decide when an illness was a death-illness; and

(3) 3 A. 731; A. W. N. (1881) 48; 2 Ind. Dec. (N. S.) 407.

(4) 3 C. W. N. 57.

that could only be done by simple rules dealing with certain symptoms which all persons could notice and comprehend. Yet it appears from these passages that even while the lawyers suggested that certain physical incapacities indicated dangerous illness, they did not lay down positively that these incapacities are conclusive...for it was no part of their definition of death-illness, whether the incapacities mentioned existed or not. It is only with regard to the extreme case, where a man cannot stand up to perform the primary and simple obligation of saying his prayers, that they declared the illness should be deemed a death-illness." The learned Judges upon the evidence held that there was nothing in the symptoms of the patient which should necessarily have excited in him an apprehension of death. This case was carried in appeal to the Privy Council and the Judicial Committee in *Fatima Bibi v. Ahmed Baksh* (5) dismissed the appeal, holding that the test which was treated as decisive on the point of the validity of the gift, namely, whether the deed of gift was executed by the donor under apprehension of death, was the right question in the case. The case of *Ibrahim Golam Ariff v. Saiboo* (6) went up to the Privy Council from a judgment of Chitty, J., then a Judge of the Burma Chief Court, which had been affirmed on appeal by Thirkell White, C. J., and Bigge, J. In that case the Courts appear to have proceeded upon the test which they considered to be the crucial test in the case, namely, whether there was an apprehension of death in the mind of the donor at the time of the execution of the deed of gift which formed the subject-matter of that case, and concurrently found that question in the negative. Their Lordships of the Judicial Committee on those findings refused to interfere holding that "the law applicable was not in controversy; the invalidity alleged arises where the gift is made under pressure of sense of imminence of death."

These cases must be taken to have set at rest the controversy relating to the rigidity of the one year rule. In view of these cases it is also impossible to contend any longer

that the subjective apprehension of death in the mind of the donor as distinguished from the apprehension caused in the mind of others, does not count in the law of *marz-ul-mout*. The existence of this subjective element as an ingredient in the law of *marz-ul-mout*, doubted by Woodroffe, J., in the case of *Kulsom Bibee v. Golam Hossein Cassim Ariff* (7) and Sir Abdur Rahim in his *Principles of Muhammadan Jurisprudence*, page 256 says that it is not a test at all in such matters.

The law of *marz-ul-mout* was considered in the case of *Sarabai v. Rabiabai* (8) in which Batchelor, J., laid down that "In order to establish *marz-ul-mout* there must be present at least three conditions:—(1) Proximate danger of death, so that there is, as it is phrased, a preponderance (*ghaliba*) of *khauf* or apprehension, that is, that at the given time death must be more probable than life, (2) there must be some degree of subjective apprehension of death in the mind of the sick person, and (3) there must be some external indicia, chief amongst which would be the inability to attend to ordinary avocations." These principles were adopted in a later decision of the same Court, *Rashid v. Sherbanoo* (9).

In view of the decisions of the Judicial Committee referred to above it may perhaps be doubted as to whether the third condition mentioned in the Bombay cases is really a *sine qua non*.

As regards the investigation into the nature of the illness in the present case we are to some extent relieved by reason of the fact that the malady that Mahammad Tayeb was suffering from was a specific one, and was definitely diagnosed as paralysis of the lower limbs. There is hardly any divergence amongst the witnesses as to the chief characteristics and features of the illness, except perhaps as to minor details as regards which very little preference may be given to one witness more than to another, in view of the fact that the evidence of each witness is coloured by his or her conception of what would or would not constitute *marz-ul-mout*. The evidence, or such of it as may be safely taken to be reliable points to the first attack of the illness having come in the month of February 1895. The *waqfnama* was executed, as I have said, on the 20th March, 1895,

(5) 35 C. 271; 10 Bom. L. R. 50; 7 C. L. J. 122; 12 C. W. N. 214; 18 M. L. J. 6; 3 M. L. T. 110; 14 Bur. L. R. 268; 35 I. A. 67 (P. C.).

(6) 35 C. 1; 4 A. L. J. 572; 11 C. W. N. 973; 9 Bur. L. R. 872; 17 M. L. J. 408; 6 C. L. J. 695; 2 M. L. T. 479; 4 L. B. R. 154; 34 I. A. 167 (P. C.).

(7) 10 C. W. N. 449.

(8) 30 B. 537; 8 Bom. L. R. 35.

(9) 31 B. 264; 9 Bom. L. R. 252.

It was presented for registration on the 21st March 1895, and actually registered on the 23rd.—Muhammad Tayeb died in February, 1895. There is no reliable evidence, one way or the other as to whether the intensity of the affliction went on on the increase or whether it varied at any time during the period he suffered from it. The trend of the evidence is to the effect that from the first attack medicines began to be administered and he was kept on liquid diet. The lower limbs having been paralyzed he would always remain on bed and had to be helped or raised to a sitting posture. On the other hand, we have it that he was taken on a chair into a palanquin on which he was carried to the Office of the Registrar where he personally admitted the execution of the document. There is, therefore, no reason to hold that his brain was affected about the time that the document was executed or at any time; and the evidence of the witnesses who want to make out that his mental faculties had been in any way impaired cannot possibly be believed. The evidence relating to the part that he took in connection with the preparation of the drafts for the *waqfnama* and the instructions that he gave in connection with the transaction clearly show that he was in full possession of all his faculties. There was nothing suggestive of senile decay, and he was fairly well with all his powers, but for the paralysis of the lower limbs, for the ripe old age of 94 or 95 that he is said to have been of at the time. These findings are substantially the same at which the learned President has arrived on the evidence in the case, and with his findings in this respect I entirely agree.

The question, however, is not what the testamentary capacity of Muhammad Tayeb was at the time the document was executed, but to quote the words of the Judicial Committee in the case of *Fatima Bibi v. Ahmed Buksh* (5) "Whether the deed was executed under an apprehension of death," or in other words of their Lordships as used in the case of *Ibrahim Golam Ariff v. Saiboo* (6) whether the *waqf* was made "under pressure of a sense of imminence of death." The possession of one's senses and mental faculties is no index of this apprehension; in fact the proportion of the one to the other would, if anything, vary in the inverse ratio. We have the fact that from the day that he was struck by the disease

he was kept in liquid diet, the fact that he was an old man of 94 or 95, the fact that there was nothing before him suggesting that the disease had taken a favourable turn, the fact that the illness continued till the 21st March 1895 on which date the document was executed and the fact that steps were taken the very next day to get the document registered, these facts to my mind suggest unmistakably that Muhammad Tayeb apprehended that he would not survive the illness and that his end was approaching. Apart from the texts to which I have already referred, the one thing which was held in the case of *Hassarat Bibi v. Golam Jaffar* (4), as likely to create in the mind of Muhammad Tayeb an apprehension of death, and which dictum was approved in the case of *Fatima Bibee v. Ahmed Baksh* (2) exists in the present case. It has been found by the learned President and rightly so upon the evidence, and in fact that finding has not been challenged before us, that Muhammad Tayeb from the time that the disease came upon him was unable to stand up for prayer. There is a rational foundation for the rule as to why this inability is regarded in Muhammadan Law as creating such apprehension. It is only in a case of utter and absolute disability that one would say his prayers without standing; and when one finds this disability attending him during prayers, it is bound to fill his mind with an apprehension that the end is not far off. At the date of execution of the deed the disease was a little over a month old, and in no sense had continued for a sufficient length of time so as to be a part of his nature. I think all the circumstances point to his having apprehended at the time he executed the deed that it was highly probable that the malady would soon end fatally. At that point of time there was a preponderance of apprehension that death was more probable than life though he lingered on for seven or eight months more and then expired. The *waqf*, in my opinion, was made under a sense of impending death which he feared was coming on as a result of the illness he was suffering from. The learned President has relied upon a passage in Baillie's Digest, page 543, which runs thus:—"The lame, the paralytic, the consumptive, when the malady was of long continuance and there is immediate apprehension of death may make gifts of the whole of the

property." In my opinion the facts indicate that the apprehension of death was immediate, and that the deed was executed under an apprehension that death was imminent in the sense that there was nothing to stand between the illness and the death, or, in other words, that the latter would follow inevitably as a necessary result of the former and at no distant date. More than that is not necessary under the law of *marz-ul-mout*.

There is on the record a judgment of my learned brother Greaves, J., dealing with the question of the validity of this *waqf*. That judgment is, undoubtedly, entitled to every respect but as the learned President has held it cannot operate as *res judicata* in the present case. It may also be remarked that Greaves, J., was able to find upon the evidence that was before him, that Muhammad Tayeb suffered for more than a year from his illness before his death, a finding which the evidence before us does not support.

For the above reasons I am unable to agree in the view taken by the learned President on the question of the validity of the *waqf*. I am of opinion that the *waqf* was invalid except to the extent of a third of the properties covered by it, which belonged to the *waqf*.

The appeal will be allowed and apportionment of the compensation in respect of the premises, when it is made, will be made on the basis indicated above.

The appellant will be entitled to her costs from the contesting respondents both in this Court and of the Court below.

S. D.

Appeal allowed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2243 OF 1924.

January 30, 1925.

Present:—Mr. Justice Campbell.

MANGTU AND ANOTHER—PLAINTIFFS—
APPELLANTS

versus

LACHHI RAM—DEFENDANT—
RESPONDENT.

Appeal, second—Nuisance—Finding of fact—Interference by High Court.

Where an Appellate Court on a consideration of the evidence in the case and all the circumstances, local and others, comes to the conclusion that a latrine does

not constitute a nuisance, the finding is one of fact and cannot be interfered with in second appeal.

Second appeal from an order of the District Judge, Delhi, dated the 9th May 1924.

Mr. N. C. Pandit, for the Appellants.

Mr. Shamair Chand, for the Respondent.

JUDGMENT.—The defendant in this suit, Lachhi Ram of Rewari, obtained permission, from the local Municipal Committee, to build a house including a *sandas* which is described, in the present memorandum of appeal before me, as a latrine of a very filthy and primitive kind. It appears to be an arrangement by which excrement and dirty water is expelled from the first storey of a house on to the ground underneath. The two plaintiffs sued for an injunction directing the defendant to close the *sandas* as a nuisance.

The Trial Court decreed the suit but in appeal it was dismissed by the learned District Judge who held that no nuisance had been proved.

It appears to me that the finding of the learned District Judge is one of fact and that there can be no interference with his decision in second appeal. Admittedly the *sandas* has been built on the defendant's own land and the plaintiffs can only interfere with him on the ground of nuisance being created. The District Judge has considered all the circumstances, local and others, in coming to his conclusion and appears to have studied all the evidence. I cannot presume, as I am invited by the learned Counsel for the appellant to do, that he did not realize what *sandas* is, or he did not realize the precise character and position of the *sandas* in question.

Rewari town has a Municipal Committee and under the Municipal Act the Committee must be presumed to have powers to deal with any nuisance which may be created hereafter by this *sandas*. This fact has also been mentioned by the learned District Judge and the plaintiffs will have their remedy in that direction.

I find no ground for interference on second appeal and dismiss the appeal with costs.

Z. K.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 324
OF 1923.

May 19, 1925.

Present:—Mr. Justice Suhrawardy and
Mr. Justice Duval.

BANSHIBADAN MANDAL—APPELLANT
versus

CHHAUNAT BIBI *alias* CHHANNU

BIBI AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 2 cl. (2) (a), 47, 104 (2), O. XXI, rr. 89, 92, O. XLIII, r. 1 (j)—Second appeal from appellate order setting aside execution sale.

An order under s. 47, C. P. C., which is an adjudication from which an appeal lies as an appeal from an order, is excluded from the definition of a decree under sub-cl. (2) (a) of s. 2, C. P. C. Therefore, under s. 104, cl. (2), C. P. C., no second appeal lies from an order passed under O. XXI, r. 92, against which an appeal lies under O. XLIII, r. 1 (j), C. P. C., even if the auction-purchaser happens to be decree-holder.

Appeal against an order of the District Judge, 24-Pergannas, dated the 28th May 1923, affirming that of the Munsif, Second Court, at Barasat, dated the 2nd January 1923.

Mr. Hemendra Nath Sen and Babu Gopendra Nath Das, for the Appellant.

Babu Dwijendra Krishna Dutt, for the Respondents.

JUDGMENT.—This is an appeal by the auction-purchaser in execution of a money decree. The respondents deposited the amount for which the property was sold and purchased by the appellant; but it was contended the money deposited was short by 12-annas. Both the Courts below have held that this was due to a *bona fide* mistake and set aside the sale. The second appeal is from the appellate order of the District Judge of 24-Parganahs.

A preliminary objection is taken by the respondents that no second appeal lies. We think that this contention should prevail. The order passed after the deposit made under O. XXI, r. 89 is an order under r. 92. An appeal lies from an order passed under that rule under O. XLIII, r. 1 (j), C. P. C. But no second appeal lies from the order passed upon first appeal, under s. 104, cl. (2). It is argued by the learned Advocate for the appellant that as the auction-purchaser was the decree-holder, the matter is covered by s. 47; and under s. 2, C. P. C., the order passed under s. 47 is a decree and is appealable. We think that this contention is not sound. Section 47 covers matters arising between parties to the suit

relating to execution, discharge and satisfaction of the decree. An order passed under that section is a decree as defined in s. 2, C. P. C. But cl. (a) of that section excludes an order which is an adjudication from which an appeal lies as an appeal from order. All orders, therefore, between decree-holder and judgment-debtor under s. 47 are not decrees and appealable as such. In the present case an appeal lies as an appeal from order under O. XLIII, r. 1 (j). A second appeal, therefore, does not lie. We are fortified in our view by the decision in the case of *Asimuddi Sheikh v. Sundari Bibee* (1). The appellant has referred to the case of *Raghubar Dayal Sukul v. Jadu Nandan Missir* (2) which was, however, a case under the Bengal Tenancy Act. In this view we hold that a second appeal does not lie and this appeal is dismissed with costs two gold mohurs.

S. D.

Appeal dismissed.

(1) 10 Ind. Cas. 345; 38 C. 339; 15 C. W. N. 844; 14 C. L. J. 224.

(2) 13 Ind. Cas. 365; 15 C. L. J. 89; 16 C. W. N. 736.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL

No. 1864 OF 1924.

March 12, 1925.

Present:—Mr. Justice Campbell.

SHEO NATH—DEFENDANT—APPELLANT
versus

PURAN MAL—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. III, para. 7—Execution of decree—Agricultural land, farming out of—Conditions of farm, determination of—Duty of Court.

Where in execution of a decree the Executing Court proposes to farm out agricultural land belonging to the judgment-debtor, the term of the farm and the other conditions must be decided by the Court itself. The Court must seek the Collector's advice on the subject and should ordinarily follow it, but is not bound to do so. [p. 229, col. 1.]

Mr. Shamair Chand, for the Appellant.

Mr. G. S. Salarya, for the Respondent.

JUDGMENT.—Puran Mal held a decree against Surjan Singh and in execution thereof after the death of Surjan Singh attached certain land in the possession of Sheo Nath, son of Surjan Singh. Sheo Nath objected that the land was ancestral and, therefore, not liable to attachment

in execution of the decree. The Court held that 22 *bighas* $7\frac{1}{2}$ *biswas* were not ancestral that the rest was ancestral that the 22 *bighas* $7\frac{1}{2}$ *biswas* could be attached and sold in execution of the decree but that the decree-holder should be "made to pay the mortgage money of Sheo Nath with respect to this land."

The meaning of this last provision is to be found in the fact that Surjan Singh had mortgaged this area and that after his death the mortgage was redeemed by Sheo Nath with his own money. In effect, therefore, the learned Subordinate Judge held that the equity of redemption only of the 22 *bighas* $7\frac{1}{2}$ *biswas* was liable for the satisfaction of the decree.

Against this order the decree-holder did not appeal, but Sheo Nath appealed contending that the 22 *bighas* $7\frac{1}{2}$ *biswas* were ancestral land. He failed, but the learned District Judge upheld a second objection that sale of the land would be in contravention of the Punjab Alienation of Land Act. He accordingly accepted the appeal so far as to direct that instead of the land being sold it should be farmed out to the decree-holder for such term of years as the Collector might deem fit.

Sheo Nath has come to this Court in second appeal, and his learned Counsel has pointed out with reason that the learned District Judge overlooked the fact that the First Court made no more than the equity of redemption of the land liable for the decree. The contention that no more than this can be ordered to be farmed out in such satisfaction as aforesaid must prevail. I wish to observe also that the learned District Judge was wrong in directing that the farm should be for such term of years as the Collector might deem fit. The term of years and other conditions have to be decided by the Court. The Court understanding instructions must seek the Collector's advice on the subject and should ordinarily follow it, but is not bound to do so.

I accept the appeal with costs and direct in modification of the learned District Judge's order that the First Court shall arrange for the temporary alienation in satisfaction of the decree of such proportion of the 22 *bighas* $7\frac{1}{2}$ *biswas* as it may hold to represent the value of the equity of redemption as against that of the mortgage charge paid off by Sheo Nath. The Court may, however, if it thinks fit, adjust the

matter in such other equitable manner as may present itself, e g., by farming out the whole land and arranging that the annual profits shall be divided between the decree-holder and Sheo Nath in proportion to the respective values of the equity of redemption and the mortgage charges.

Z. K.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 28
OF 1923.

May 1, 1925.

Present:—Justice Sir Hugh Walmsley,
Kt., and Mr. Justice B. B. Ghose.

RAKHAL CHANDRA BARDHAN—
DEFENDANT—APPELLANT

versus

PROSAD CHANDRA CHATTERJEE

AND OTHERS—PLAINTIFFS—RESPONDENTS.

Fraud—Suspicion—Circumstantial evidence—Letters of Administration—Position of Hindu widow as administrator—Registration Act (XVI of 1908), s. 58 (1) (e)—Consideration—Endorsement by Registering Officer—Presumption—Burden of proof—Purdah nashin lady—Independent advice, etc.

Fraud is not presumed or inferred lightly. [p. 233, col. 2.]

Moonshee Buzloor Raheem v. Jadonath Bose, 11 M. I. A. 551 at p. 602; 8 W. R. P. C. 3; 2 Suth. P. C. J. 59; 2 Sar. P. C. J. 259; 20 E. R. 208, referred to.

Circumstances of mere suspicion should not be taken as proof of fraud, there must be sufficient evidence to overcome the natural presumption of honesty and fair dealing. [*ibid.*]

Circumstantial evidence is not only sufficient but in many cases it is the only proof that can be adduced to establish fraud. [*ibid.*]

Mathoor Pandey v. Ram Ruchya Tewaree, 11 W. R. 482; 3 B. L. R. A. C. 108, referred to.

A Hindu widow obtaining Letters of Administration of the estate of the last male owner is in the same position as any other administrator and a sale effected by her with the sanction of the District Judge cannot be questioned on any ground not available against any other administrator. [p. 234, col. 2.]

Kamikhya Nath Mukerjee v. Hari Churn Sen, 26 C. 607; 13 Ind. Dec. (N. S.) 990, *Chuni Lal Halder v. Makshada Debi*, 52 Ind. Cas. 309; 23 C. W. N. 652 and *Anoda Charan Mondal v. Atul Chandra Malik*, 54 Ind. Cas. 197; 23 C. W. N. 1045; 31 C. L. J. 3, relied upon.

An endorsement made on a *kabala* by a Registering Officer in accordance with the statutory provision in s. 58 (1) (e) of the Registration Act that a certain sum of money was paid as consideration in his presence raises a presumption that the consideration was paid and the onus lies on the person who alleges that it is untrue to prove it. [*ibid.*]

Ali Khan Bahadur v. Indar Parshad, 23 C. 950; 23 I. A. 92; 7 Sar. P. C. J. 63; 12 Ind. Dec. (N. S.) 631 (P. C.), referred to.

Any person taking a conveyance from a *purda nashin* lady must prove that the document was explained to her, that she understood what she was doing and that she had independent advice. Where, however, it is established that the lady knew what the nature of the document was that she was executing and that she had independent advice, it is not necessary to prove the formal reading over or explanation of the document. [p. 235, col. 1.]

Appeal against a decree of the Subordinate Judge, Third Court, 24-Pergannas, dated the 4th December 1922.

Sir Provash Chandra Mitter, Messrs. A. N. Bose, S. P. Ghose and Babu Shyama Das Bhattacharji, for the Appellant.

Dr. S. C. Basak, Babus Sitaram Banerji and Haripada Ghose, for the Respondents.

JUDGMENT.

Walmsley, J.—This appeal is preferred by the principal defendant Rakhal Chandra Prodhan, and it is directed against a decree declaring the right of the plaintiffs to the property in suit as reversioners to the estate of the late Rakhal Chandra Banerji and directing that they should recover possession with mesne profits.

The facts that need be stated are as follows. One Haridas Banerjee died, leaving a widow, three daughters, and one son, the Rakhal Chandra Banerjee just mentioned. Rakhal died in 1883, soon after his father, without issue, and his estate went to his widowed mother Thakomani. Thakomani died in 1909, and her three daughters were then the mothers of nine sons, and these nine grandsons inherited each $\frac{1}{9}$ th of the estate. The original plaintiffs are the two sons of Kusum Kumari; they have bought the shares of five of their cousins, and thus become owners of $\frac{7}{9}$ th. The other $\frac{2}{9}$ th belonged to the defendants Nos. 2 to 4, and these defendants were transferred to the category of plaintiffs after the institution of the suit, so that the claim is for the entire interest in the property described in the schedule.

Rakhal Chandra Banerjee's estate consisted of a house and some paddy land at Italghatta, on the outskirts of Calcutta, and a house at Bhowanipur in the suburbs.

In 1819 Thakomani applied for Letters of Administration to the estate of her son, and she was appointed Administratrix. An order was made in her favour in November, but the grant was not made until the following June. A few days later Thakomani sought and obtained permission from the Judge to sell the house and 10 *bighas* at Italghatta, and on July 26, 1890, she sold

the same to the appellant for the sum of Rs. 2,400. The suit is aimed at this alienation. It is said that the proceedings connected with it were fraudulent from beginning to end. The fraud is described in paras. 7—12 of the plaint. Briefly stated the fraud is said to be as follows; *first*, that Thakomani did not really apply for Letters of Administration, her name was used, but without her knowledge; *secondly*, that the application for Letters of Administration contained inaccurate statements, intended to deceive, about the property and about the other persons interested in the estate; and *thirdly*, that Thakomani was persuaded to execute the conveyance by false representations that the document was nothing more than a lease.

The persons who are said to be guilty of this trickery are the appellant, and Shyam Lal Chatterji one of Thakomani's sons-in-law.

The defendant's case on the other hand is that everything was above board, that Thakomani found it impossible to keep up the house at Italghatta, that she needed money, that she knew all about the application for Letters of Administration and fully understood that she was selling the property.

The learned Judge has found in favour of the plaintiffs on all points in a judgment which seems to me extremely one-sided. He has been very free in his findings of fraud, and he says that the conclusion is irresistible that the fraud was committed at the instance of the appellant.

To take the last point first, I find it impossible to agree with the learned Judge's view. It is common ground that overtures were made to the appellant for the purchase of the house. Either the appellant, or his broker, I do not think it matters which, pointed out that a purchase from Thakomani as a Hindu widow was dangerous, and suggested that she should obtain Letters of Administration and then secure the Judge's permission to sell. That suggestion was perfectly legitimate. In fact no cautious Solicitor would advise a client to buy on any other terms. I have no doubt that the application for Letters of Administration was made with this end in view, but that fact cannot afford any ground for suspecting fraud instigated by the appellant.

The learned Judge proceeds to argue that the whole proceedings were fraudulent,

because there was a mis-description of the assets of the estate, and because the grandsons were incorrectly described as minors living with their grandmother. I am not prepared to regard either of these mistakes or mis-representations as amounting to fraud. The learned Judge does not say on whom the fraud was committed: the most that can be said is that by understating the assets the revenue was defrauded of a few rupees, and that by describing the grandsons erroneously the citations were imperfect. But that is all, and I cannot hold that there was fraud. Further the Probate Act contains provisions for revoking a grant made improperly. Here the grandsons grew to manhood and saw the Italghatta house in possession of the appellant: they cannot have imagined that he was in possession as lessee and not as owner, and I cannot believe the plaintiff's statement that they knew nothing of the sale until the appellant filed his written statement in the suit of 1917. That being so they have had ample opportunity of challenging the validity of the grant, and as they have not done so I do not think that they can now in this suit ask to have it treated as void.

Then there is the last charge of fraud: that Thakomani was deceived as to the nature of the instrument. There is a little evidence to the effect that she spoke of a lease, but there is no evidence that she ever made a grievance of the matter. For many years she saw the appellant in possession and she received no rent from him: it is impossible, therefore, to believe that she laboured under the mistaken idea that she had only given a lease. Moreover it is proved that her son-in-law Shyam Lal was acting as her adviser, and there is no evidence that he was interested in deceiving her. There is the further fact that a substantial sum of money was paid to Thakomani in the presence of the Sub-Registrar. I cannot, therefore, hold that any deception was practised on Thakomani to induce her to execute the conveyance.

On all these points I think that the learned Judge is wrong. There is, however, one point on which there is more to be said for the plaintiffs. Thakomani was a *parda nashin* lady, and as such entitled to special protection. It is said that she had no independent advice, and, therefore, the transaction is voidable. It is true that she had no advice except that of her son-in-law, Shyam Lal. Now it is not essential in every

case that a *pardanashin* should have independent advice. The circumstances surrounding the transaction have to be considered and the present case is one in which I think it was not necessary. Surrounding circumstances show that she fully understood what was being done, that the transaction was a reasonable one, that for years neither the widow nor any member of her family felt that unfair advantage had been taken of the lady. Further the document was a short and simple one: it was not beyond Thakomani's understanding to know that she was selling the house outright; and she had at her elbow her son-in-law Shyam Lal whose good faith there is no reason to doubt. I think, therefore, that the mere fact that there was no independent adviser is not fatal to the transaction. *

There is one other point. The defendant has gratuitously created some difficulty for himself in regard to 10 *cattas* of the land in suit. My learned brother has dealt with this story of a gift to the spiritual guide's son at some length and for me it is enough to say that the *kabala* also covers these 10 *cattas*.

In my opinion, therefore, the appeal should be allowed and the suit dismissed with costs in both Courts.

Ghose, J.—This is an appeal by the defendant and arises out of suit for recovery of possession of a house and lands attached to it situated in a village Italghatta in the district of 24-Pargannas described in the schedule to the plaint. This property and certain other properties belonged to one Rakhal Chandra Banerji, the last male owner, who died sometime in 1883. His property was inherited by his mother Thakomani. He had three sisters, Kusum Kumari, Uttam Kumari and Basanta Kumari, plaintiffs Nos. 1 and 2 are the two sons of Kusum Kumari, Uttam Kumari had five sons and Basanta Kumari two sons. Thakomani died on the 9th of January 1909. Plaintiffs claim the property as reversioners of their maternal uncle Rakhal Chandra Banerjee. Plaintiffs Nos. 1 and 2 claim $\frac{2}{9}$ th share by right of succession and another $\frac{5}{9}$ ths share by purchase from three of the sons of Uttam Kumari and also from the two sons of Basanta Kumari, $\frac{7}{9}$ ths share in all. The other $\frac{2}{9}$ ths share is represented by a son and two grandsons by a deceased son of Uttam Kumari. They were originally made *pro forma* defendants but were transferred to the category of plaintiffs on their appli-

cation. Thakomani obtained Letters of Administration of the estate of her son Rakhal as an intestate, from the District Judge of Alipur on the 26th of June 1890 and made an application for permission to sell the disputed property on the 16th of July 1890 which was granted. Thakomani thereupon sold the property to the defendant Rakhal Chandra Burdhan on the 26th of July 1890, who has since been in possession.

The plaintiffs allege that the Letters of Administration as well as the sanction for sale were fraudulently obtained by collusion between the defendant and Shyam Lal Chatterjee, the husband of Uttam Kumari. The *kabala* was also similarly obtained by fraud. The defendant, therefore, acquired no right to the disputed property by his alleged purchase. Defendant denied the allegations of the plaintiff and asserted that he was no party to any fraudulent transaction. The Trial Court made a decree in favour of the plaintiffs for possession of the disputed property except 1 *bigha* of land, which defendant had subsequently purchased from another person and with regard to which there is no question before us. There was also a decree for mesne profits against the defendant.

A large number of issues were raised before the Subordinate Judge but the principal questions for decision are covered by Issues Nos. 2, 7, 9, 10 and 12. Those are: whether the suit is barred by limitation; whether Thakomani applied for Letters of Administration or somebody else did so in collusion with defendant; whether the Letters of Administration and permission for sale were fraudulently obtained by Sham Lal in collusion with defendant; whether Thakomani received any consideration for the *kobala*; and whether defendant acquired any title to the property and is entitled to retain possession of it after the death of Thakomani. All these questions were found in favour of the plaintiffs. Appellant disputes all the findings of the Court below.

Besides the disputed property Rakhal Chandra Banerji left some agricultural lands at Italghatta, about 23 *bighas* in area, and another house at Bhowanipur, a suburb of Calcutta. After the death of her son, Thakomani with her mother-in-law removed to her house at Bhowanipur as there was no one in the village to look after her and as her son-in-law Shyam Lal was living

near her house at Bhowanipur. The Subordinate Judge has held that the disputed house was in a good condition at the time when it was sold. I am unable to agree with that finding. He does not seem to have dealt with the evidence of defendant's witness Barada Kanta Mandal, an old man of about 80 years, and who lives near the disputed property. He is one of the landlords with regard to the rent-paying portion of the disputed land and seems to be independent. He says that the house was in a dilapidated condition and overgrown with *pepul* trees. It was an old house in which the grandfather of Rakhal had lived, and it is quite probable that when it was left untenanted for several years it would be overgrown with trees and fall into decay as is usual in this part of the country. There is no evidence, as the Subordinate Judge supposed, that there was a *durwan* to take care of the property, and the fact that a *dhobi*, an "untouchable", was allowed to live in a portion of the house belonging to a Brahmin shows that the house was abandoned by the lady, and was not really fit for her to live in.

The fraud alleged by the plaintiffs shortly stated is that Shyam Lal was a poor man who had many dependants to support and he made the application for Letters of Administration in the name of Thakomani for his own benefit in collusion with the defendant, and got the *kobala* executed in favour of the defendant by representing to her that it was a lease on rent. Further the defendant in concert with Shyam Lal caused it to be mentioned in the application that the property in suit was the only property left by Rakhal Chandra Banerjee and also obtained the permission for sale by suppression of the fact that Rakhal had other properties and also alleging that the value of this property was Rs. 2,000 only whereas it was worth Rs. 15,000 at least.

I am unable to hold that Thakomani did not herself apply for Letters of Administration on the evidence, and I do not attach any importance to the fact on which so much stress was laid by the Subordinate Judge, that the name of the person who signed the name of Thakomani does not appear in the petition. The petition was presented by a Pleader on behalf of Thakomani and, in the absence of any evidence to the contrary, it must

be presumed that he had proper authority from the lady to do so and the Court which made the grant must have been satisfied as to that fact. It is not possible for the defendant to disprove the allegation of the plaintiffs at this distance of time when all the persons who took part in the transaction are dead. The subsequent events also show that Thakomani could not have been ignorant of those proceedings. It is quite true that there were certain mis-statements of facts in the application for grant of Letters of Administration, notably the omission to state that Rakhal had two other properties. The statement that the daughters and their sons ordinarily lived under her care may not have been quite correct and it may be that one of the sons of her daughters had attained majority at that time, although it is stated they were all minors. The question is whether these mis-statements were made with a fraudulent motive. If Thakomani had made the application, as I consider it to be the case, she was a party to the intended fraud and it is alleged that Shyam Lal was also acting in this matter. Shyam Lal was the husband of Uttam Kumari who had five sons and it is difficult to hold in the absence of any other evidence that Shyam Lal was taking part in a fraudulent transaction which would affect the interest of his sons who were prospective reversioners with regard to 5/9ths share of the property. It rather seems to me that the house was really a burden on the estate, which was difficult to keep, and it was, therefore, thought expedient to sell it. There would not be many purchasers of such a dwelling house in a village and the purchaser who was found would not purchase it without the production of Letters of Administration and the sanction of the District Judge for sale. It became, therefore, necessary to apply for Letters of Administration, and the other properties of Rakhal were not included in the application presumably for avoiding the payment of stamp duty with regard to those properties and as it was not necessary for the enjoyment of those properties. The grant shows that the stamp duty for this property only was readily available, as the order for grant was made on the 28th of November 1889 and the Letters of Administration was issued on the 26th of June 1890, when the stamp duty was paid. It does not appear to me that these mis-statements in the application were made

with any fraudulent intent. If Shyam Lal had any such desire he would have managed to sell the 23 *bighas* of agricultural lands or the house at Bhowanipur for which he might probably have got many willing purchasers.

Assuming that the Letters of Administration and the permission to sell were fraudulently obtained, it is contended by the appellant that there is no evidence to show that the defendant was a party to the fraud. In this case there is no direct proof that the defendant was in any way concerned with the transactions in the matter of obtaining the Letters of Administration or the permission for sale. It is quite true that circumstantial evidence is not only sufficient but in many cases it is the only proof that can be adduced to establish fraud. But as was observed in the case of *Mathura Pandey v. Ram Ruchya Tewaree* (1) cited by the Subordinate Judge, circumstances of mere suspicion should not be taken as proof of fraud, but the evidence must be sufficient to overcome the natural presumption of honesty and fair dealing. In approaching this question one must be careful not to add an illustration to the observation made by the Privy Council many years ago, that Judges in India are perhaps somewhat too apt to see fraud everywhere *Moonshee Buzloor Raheem v. Jadonath Bose* (2). It has been held in numerous cases that fraud is not to be presumed or inferred lightly. This cannot be too strongly emphasized especially in a case like this. In this case the plaintiff does not give any evidence of any circumstance which would lead to an inference of fraud. The facts on which the fraud of the defendant has been found by the Court below are shortly these:—Defendant says in his written statement that he came to know of the Letters of Administration and the permission to sell when the broker made the proposal for sale of the property to him, but it appears that the date of the *bainapatra* or agreement to sell, was prior to the application for Letters of Administration which was made on the 26th of August 1889. Defendant says in his evidence that when the *bainapatra* was made he went with it to Mr. Rutter, who was an attorney of this Court, for his advice, who told him not to purchase the property, but when

(1) 11 W. R. 482; 3 B. L. R. A. C. 108.

(2) 11 M. I. A. 551 at p. 602; 8 W. R. P. C. 3; 2 Suth. P. C. J. 59; 2 Sar. P. C. J. 259; 20 E. R. 208.

some months afterwards the broker brought the Letters of Administration and the permission for sale, Mr. Rutter advised him to make the purchase. From this the learned Subordinate Judge infers that the defendant asked the broker to produce Letters of Administration from the District Judge as well as the permission to sell. I agree that it might have been so. Mr. Rutter as an attorney might reasonably have advised the defendant not to make a purchase from a Hindu widow unless she obtained Letters of Administration and permission to sell the property from the District Judge, and the defendant might have informed the broker of this advice. But I am unable to make a further inference that the defendant afterwards took part in the making of the application and the mis-statements contained in them. This seems to me to be a violent presumption to make. There was nothing wrong on the part of the defendant to inform the broker as to the conditions under which he was willing to purchase the property and it may be reasonable to infer that the broker represented those facts to Thakomani or Shyam Lal. Thereupon the application was made with those mis-statements and the object of those mis-statements might have been as I have indicated above. The circumstances do not, in my opinion, override the presumption of honest dealing by the defendant. The Subordinate Judge attached great importance to the fact of the non-production of the *bainapatra* by the defendant. After the execution of the *kobala* I do not see that the *bainapatra* had any importance with regard to the title of the defendant, and there was no reason whatsoever for his filing it in Court. If the plaintiffs thought that the *bainapatra* would support their case in any way it was their business to call for it. This they had not done at anytime in the course of the suit nor did they ask the defendant to produce it when he was being examined. I do not think it fair to the defendant to make any adverse inference against him for not producing that document. Nor do I see what inference of fraud can be made for the non-production of the *bainapatra* or how it could have established fraud if produced. It is not shown that the defendant was very anxious to purchase the property. If he was so anxious there would not have been a delay of seven months in taking out the letters after the order for it had been made,

apparently for non-payment of Rs. 40 as stamp duty. Besides there is nothing to show that the defendant had any particular attraction for that property. He was a resident of Calcutta and it has not been shown that he had any other property in the place which would make it especially desirable for him to acquire this property. This was not used by him as a dwelling house and only recently when that part of the country has been developed he has filled up the tanks and let out the lands for the purpose of erecting rice mills. On these grounds I am unable to agree with the finding of the Subordinate Judge that the defendant was a party to any fraud in the matter of the proceedings taken in the Probate Court, and I think the circumstances are quite consistent with the presumption of his honest dealing.

If the defendant was no party to any fraud in the matter of the grant of the Letters of Administration and the permission to sell, the purchase by the defendant cannot be assailed on the ground of want of legal necessity. A Hindu widow obtaining Letters of Administration of the estate of the last male owner is in the same position as any other administrator and a sale effected by her with the sanction of the District Judge cannot be questioned on any ground not available against any other administrators. This was held in *Kamikhya Nath Mukerjee v. Harichurn Sen* (3), which was followed in *Chuni Lal Haldar v. Makshada Debi* (4) and *Annoda Charan Mondal v. Atul Chandra Malik* (5).

The next question is whether Thakomani received any consideration for the *kobala*. There is an endorsement on the *kobala* by the Registering Officer that Rs. 2,049 was paid in his presence. This endorsement was made in accordance with the statutory provision in s. 58 (1) (c) of the Registration Act. This raises a presumption that the consideration was paid and the onus is on the person who alleges that it is untrue to prove it. *Ali Khan Bahadur v. Indar Parshad* (6). No evidence has been given by the plaintiffs that the consideration was not paid. But it is contended on their behalf that their allegation is proved by

(3) 26 C. 607; 13 Ind. Dec. (N. S.) 990.

(4) 52 Ind. Cas. 309; 23 C. W. N. 652.

(5) 54 Ind. Cas. 197; 23 C. W. N. 1045; 31 C. 1, J. 3.

(6) 23 C. 950; 23 I. A. 92; 7 Sar. P. C. J. 63; 12 Ind. Dec. (N. S.) 631 (P. C.).

the defendant's own evidence. Defendant says in cross-examination, "I paid the consideration money either to Nirmal or to Shyam Lal in the presence of the Sub-Registrar". This it is urged shows that the money was not paid to Thakomani. It does not seem to me that this evidence contradicts the endorsements on the *kobala*. It might have been that the defendant handed over the money to either of those persons and he made it over to the lady. Defendant's witness Hari Das Chandra proves that he saw the money being handed over to the lady. The Subordinate Judge has commented on the evidence of this witness adversely, because he made some wrong statements as regards the date of execution and the house in which Thakomani lived. But this witness gave his deposition more than 32 years after the execution of the *kobala* and it is not improbable that even an honest witness might have made mistakes in these matters. He was an attesting witness to the document and it is likely that he would remember only the important facts, it would not, therefore, be correct to hold that the consideration for the *kobala* was not paid.

The Subordinate Judge has further observed that there is no evidence that the document was read over or explained to the lady and, therefore, it was not binding on the lady herself much less on the reversioners. This question was not put in issue and probably for that reason there is no such evidence. It is true that any person taking a conveyance from a *purda nashin* lady must prove that the document was explained to her, that she understood what she was doing and that she had independent advice. I think that the question should have been raised in the pleadings and issues so that the defendant might know what he was required to prove. I think, however, where it is established that the lady knew what the nature of the document was that she was executing and that she had independent advice, it is not necessary to prove the formal reading over or explanation of the document. The defendant here was a stranger to the lady and he had no other dealings with her. Shyam Lal her son-in-law was looking after her interest and it is not proved that Shyam Lal was acting in collusion with the defendant. Defendant took possession of the property in 1890 immediately after his purchase. Thakomani lived till January 1909, nearly

19 years after the sale, and never questioned the transaction during all this period. If the positive case made by the plaintiffs that she executed the deed thinking that it was a lease was true, she would certainly have demanded rent during this period and would have been able to discover if any fraud had been committed on her. If she had believed that she had executed any document other than a *kobala* there was ample time to discover the fact. There is also an important fact which proves that the lady was fully aware that she was executing a *kobala*. The defendant proves, and there is no reason for disbelieving him on this point, that the lady had religious scruples about selling the temples and idols of Shiva to a non-Brahmin, as the defendant is. She, therefore, proposed that she would execute a deed of gift for them in favour of a Brahmin, and so a deed of gift Ex. B was executed in favour of defendants spiritual guide. That being so, it shows unmistakably that the lady knew she was executing a *kobala* for the house in dispute. If the lady knew that she was making an out and out sale, the importance of reading over the document disappears altogether. Moreover, it appears that the plaintiff No. 1 had been to the house. He also knew that the lady was not in possession, but he says that she told him that a portion of the house had been leased out. Shyam Lal Chatterji appears to have died before the lady, plaintiff No. 1 being the eldest of the reversioners, it may be expected that he would enquire about the state of the property. But he says that even after the death of his grandmother when he went to the village, he did not make any enquiry as to who was in possession of the property and if anybody had purchased it. This leads me to the conclusion that everything relating to the transaction about the property was known to the plaintiffs and it was for that reason he made no enquiries. If the plaintiff's case had any foundation, it is inexplicable why they delayed 11 years and 11 months after the death of Thakomani in bringing this suit, as plaintiffs appear to be fairly well to do. This leads weight to the suggestion of the defendant that the locality having now improved and the land having become profitable being let out for erecting rice mills, the plaintiffs are trying to oust the defendant. In my judgment the circumstances show that Thakomani was fully aware that she was executing a

kobala and that she had the advice of her son-in-law Shyam Lal in the matter and the transaction was quite fair and lawful.

The next question is one of limitation. If Art. 141 of the Limitation Act is applicable to the suit, it is within time having been brought on the 7th of December 1920 the lady having died on the 9th of January 1909. The *pro forma* defendants were made plaintiffs on the 4th of January 1912. This was within 12 years. The appellant, however, argues that the plaintiffs seek possession in this case not simply on the ground that they are entitled to the property on the death of a Hindu female, but they also claim on the ground that the alienation by the lady as administratrix was tainted by fraud. Unless they can get relief on the ground of fraud they are not entitled to succeed. The period of limitation must, therefore, be three years under Art. 95 of the Act. I think there is a good deal of substance in this contention but as I have found there is no fraud on the merits, I do not think it necessary to elaborate the discussion on the point. Lastly a question was raised on behalf of the respondents that assuming they are unable to succeed with regard to the house and lands, they are entitled to a decree for the temples and idols and the land included in the deed of gift Ex. B as the lady was not entitled to make a gift. This question was not raised in the Court below and was not put in issue. If this had been done evidence might have been led to show that it was for the benefit of the idols that the gift was made. The recitals in Ex. B show that the daily worship, etc., of the idols were not being properly carried on. But the further difficulty in the plaintiff's way is that the properties sued for in the plaint are all included in defendant's *kobala* Ex. A, as would appear from a comparison of the boundaries given in the *kobala* with the boundaries given in Ex. L (the previous plaint in a suit brought by the plaintiffs and withdrawn with regard to the disputed property). Although there have been some changes in the description of the boundaries in the present plaint, it is clear that the property is the same as included in the other documents. It is apparent, therefore, that Ex. B was executed by the lady only to satisfy her religious scruples and not with the object of conferring a new title.

I agree on these grounds that the appeal

should be allowed and the suit dismissed with costs in both Courts.

S. D.

Appeal allowed.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL MISCELLANEOUS No. 196 of 1923.

April 12, 1925.

Present :—Mr. Rupchand Bilaram, A. J. C.
DAVID SASSOON & Co. LTD.—
RESPONDENTS No. I

versus

SHIVJIRAM DEVIDAS—RESPONDENTS
No. II.

*Civil Procedure Code (Act V of 1908), O. IX, r. 13—
Ex parte order—Defendants' default—Application to
set aside order—Terms—Discretion of Court.*

Where an order passed *ex parte* is not challenged on the ground of an irregularity entitling the applicant to have it vacated *ex debito justitiæ*, but the defendant applies to be relieved of his own default, he should be put to terms, for instance, he may be called upon to deposit the amount claimed by the opposite party before a judgment which is otherwise regular is vacated, specially when the *bona fides* of the applicant's defence are not free from doubt. [p. 237, col. 2; p. 238, col. 1.]

Watt v. Barnett, (1878) 3 Q. B. D. 183, followed.

Application to set aside an order passed *ex parte* on 8th December 1924 on Respondents I's application under O. XXI, r. 50 (2), C. P. C.

Messrs. *Pahlajsing* and *B. Advani*, for Respondents No I.

Messrs. *Srikishondas* and *H. Lulia*, for Respondents No. II.

ORDER.—I am not satisfied at present either as to the sufficiency of the alleged cause for non-appearance on December 2 and 5, 1924, or as to the *bona fides* of this application.

Mr. *Pahlajsing* has pointed out that the medical prescriptions prior to December 5, produced by the applicant are not original, but copies. There is some apparent discrepancy in the certificates produced, and the fact that the three different doctors have been consulted at different times, and have been asked to give medical certificates also requires an explanation. Dr. *Kishorilal's* certificate dated November 28, 1924 shows that the applicant had fever on that date. Dr. *Gopichand's* certificate shows that the applicant had fever on December 1, and that he was under his treatment from December 1 to December 8, and again from December

12. This certificate does not refer to applicant having been suffering from pneumonia. This certificate is dated December 14. The certificate of the third doctor which is dated December 12 refers to the applicant suffering from some sort of pneumonia. The certificates require to be proved and the discrepancies may possibly be reconciled and the cause of different doctors being called and explained, when and if the doctors are examined on commission.

Proceeding, however, on the assumption that if permitted the applicant would be in a position to reconcile the discrepancies and to offer a reasonable explanation for his non-attendance on the two dates fixed to bring his case within the purview of O. IX, r. 13, C. P. C. I think this is a fit case in which I should in that event in the exercise of the discretion vested in me by that rule insist on at least the principal amount, viz., Rs. 7,487-14 0 awarded to respondents No. 1 being deposited in this Court as a condition precedent to the order of December 8, 1924 being vacated. In that order I have given full details of the present litigation, and the causes which have contributed to respondents No. 1 not being able to enforce the award in question as a decree upto now, though it was passed on June 26, 1923.

The subject matters of the award are certain ordinary mercantile contracts containing the usual submission clause, which according to the admission of the applicant's Pleader are all signed by the applicant, though he now pleads that he was not a partner of the firm for whom he signed the contracts, but was either their manager or authorized representative.

A notice issued by this Court calling upon respondent No. 2 to show cause why the award should not stand filed, and if the award was objected to, to apply within 20 days of the service of the notice to have the award taken off the file, was tendered to the applicant by the bailiff of the Lahore Court on August 19, 1923. In this notice he was described as the managing partner of respondents No. 2. He refused to accept the notice, and failed to apply to this Court within the time allowed under the rules of this Court to have the award by this Court taken off the file.

This notice was held by this Court to have been duly served, and the award proceedings transferred to the Lahore Court to enable respondents No. 1 to apply in exe-

cution proceedings to that Court for recovery of the amount due under the award.

An unfortunate mistake had, however, occurred in this office and the note put up by the office showed that the notice was served on the applicant as the manager of respondents No. 2 and not as managing partner of respondents No. 2. This mistake appears to have been availed of by the applicant in avoiding payment of the amount awarded to respondents No. 1.

Respondents No. 1 experienced some difficulty in realising the fruits of their award in the executing Court. In order to rectify the mistake they applied to this Court for issue of fresh notice on the applicant as the managing partner of respondents No. 2. It was only in response to this notice that the applicant applied to this Court to take the award off the file and *inter alia* pleaded that respondents No. 1 could not enforce the award against him without special leave under cl. (2) of O. XXI, r. 50 C. P. C., and that it had been so held by the Executing Court. This plea resulted in a fresh application filed by respondents No. 1 for leave under this rule which is said to have been filed by them *ex majore cautela*. Both the applications for leave to take the award off the file which is headed "Objections to the award" and the application for leave under O. XXI, r. 50, C. P. C., cl. (2), have been dealt with by me by my order dated December 8, 1924.

This order is not challenged on the ground of an irregularity entitling the applicant to have it vacated *ex debito justitiæ*. He admits his default and explains it by alleging that he was ill. It is doubtful if he has a *bona fide* defence. If a commission issues, it would mean further delay. The applicant showed no anxiety to deny his liability as a partner actual or ostensible at the earliest opportunity afforded to him when the first notice was tendered to him, and was refused by him. Such refusal was a contempt of the process of this Court. He has also shown no desire to expedite the disposal of this all important question, though he was aware that the witnesses were being brought down by respondents No. 2 from Lahore to give evidence, he failed to give proper instructions to his Pleader to cross-examine the witnesses.

Rule 13 of O. IX, C. P. C., gives me a wide discretion to impose terms before granting the application, and I see no reason why I should not follow the English

precedents which as a rule require that the defendant when applying to be relieved of his own default, should be put to terms before vacating a judgment which is otherwise regular, specially when the *bona fides* of the applicant's defence are not free from doubt. Yearly Practice 1924 notes to O. XXVII, r. 15 at page 371 and *Watt v. Barnett* (1) where a defendant served by substituted service applied to have the decree set aside on the ground that he had no knowledge of the proceedings and was ordered to give security. Though the amount due to respondents No. 2 is far in excess of Rs. 6,487-14-0, I think it would meet the ends of justice, if I make it a condition precedent to the applicant depositing this amount in Court within fifteen days of this date to prove his *bona fides* before he can claim this indulgence. If he makes the deposit I shall be prepared to assume that he was ill on the dates fixed and shall vacate the order dated December 8. If no deposit is made, then this application shall stand dismissed with costs.

Call up for further orders on 8th May 1925.

P. B. A.

Order accordingly.

(1) (1878) 3 Q. B. D. 183.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1612 OF 1924.

July 24, 1925.

Present:—Mr. Justice Lindsay and
Mr. Justice Kanhaiya Lal.

BACHAN SINGH AND OTHERS—PLAINTIFFS
—APPELLANTS

versus

BIJAI SINGH AND OTHERS—DEFENDANTS
—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 52—
Lis pendens, doctrine of, applicability of—Pre-emption
suit—Property transferred after institution of suit in
favour of person having equal right of pre-emption
with plaintiff, effect of.

The doctrine of *lis pendens* applies to pre-emption suits just as well as to other suits. [p. 239, col. 1.]

Where after the institution of a suit for pre-emption but before the expiry of the limitation for the institution of such a suit, the vendee transfers the property to a person who has an equal right of pre-emption with the plaintiff, any rights which the plaintiff had against the transferee at the date of the institution of the suit cannot be affected by the subsequent transfer of the property in the latter's

favour. The position in such a case is the same as if the transferee instead of taking a transfer of the property had brought a rival suit for pre-emption. [*ibid.*]

Second appeal from a decree of the Subordinate Judge, Farrukhabad, dated the 24th September 1924.

Mr. *Gulzari Lal*, for the Appellants.

Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT.—After hearing the arguments in this case we have come to the conclusion that the appeal must be allowed. It is quite true that the judgment of the lower Appellate Court is based upon a ruling of this Court reported as *Har Keshi v. Mewa Ram* (1). There can be no doubt that on the facts that case is not distinguishable from the case now before us, but nevertheless, for the reasons we are about to give, we think it should not be followed.

What happened in the present case was this. One Charan Singh sold some property to Bijai Singh and Chandrahas. This Bijai Singh was a co-sharer in the property while Chandrahas was a stranger. This sale was made on the 15th December 1922.

The four plaintiffs-appellants here before us filed a suit for pre-emption on the 1st December 1923.

On the 14th December 1923 a rival set of pre-emptors Gulzar Singh and others filed their suit for pre-emption and on this very day, that is on the 14th December 1923, the vendees Bijai Singh and Chandrahas sold the property to one Pokhar Singh. It is conceded before us that Pokhar Singh has as good a right of pre-emption as any of the parties who brought the rival pre-emption suits.

The result of the litigation in the Court of first instance was that it was found that the rival pre-emptor and Pokhar Singh had an equal status to pre-empt and a decree was framed dividing the property four-tenths to one party, five-tenths to another party and one-tenth to Pokhar Singh.

On appeal the decree of the Court of first instance has been reversed and the suits of the plaintiffs-pre-emptors have both been dismissed. The result of this, therefore, must be to leave all the property with Pokhar Singh.

In the case of *Har Keshi v. Mewa Ram* (1) upon which the lower Appellate Court relies, no question was raised regarding the application of the doctrine of *lis pendens*.

(1) 72 Ind. Cas. 247; (1928) A. I. R. (A.) 294; 9 O. & A. L. R. 495.

We think, however, that that doctrine must be applied to pre-emption suits as well as to any other suits. We have laid this down in a ruling in *Bhikhimal v. Debi Sahai* (2). Now it is plain that in the present case the transfer which was made to Pokhar Singh was *pendente lite* and the plaintiffs-appellants before us can say that the doctrine of *lis pendens* ought to be applied in the suit which they instituted, and that any rights that they had against Pokhar Singh at the institution of the suit should not be interfered with by anything done by the original vendees of the property pending the trial of the suit.

It has been said that the plaintiffs and Pokhar Singh have equal status in the matter of claiming pre-emption and it is clear that if Pokhar Singh instead of taking a transfer of the property had brought a rival suit for pre-emption, he would have been given a share of the property in proportion to the extent of his claim along with the other plaintiffs-pre-emptors.

It appears to us, therefore, that on the application of this principle the decree of the Court of first instance was correct in the circumstances as they then existed. We have, however, to take notice of the fact that one set of pre-emptors has dropped out and has allowed the decree of the lower Appellate Court to become final. We have, therefore, now before us only one set of four pre-emptors and the purchaser Pokhar Singh, and applying the principles laid down above, we think that the proper decree to pass is that the plaintiffs-appellants be given four-fifths of the pre-empted property on payment of Rs. 320. Pokhar Singh who has already purchased may retain the remaining one-fifth of the property. We allow the plaintiffs two months to deposit the sum mentioned above in the Court of first instance to the credit of Pokhar Singh. If the deposit is made within the time limited the plaintiffs' claim will be decreed to that extent and they will be entitled to four-fifths of their costs in both the Courts below. If the deposit is not so made then their suit will stand dismissed with costs to Pokhar Singh in both the Courts below. As regards the costs of this Court we leave the parties to bear their own costs.

Z. K.

Appeal allowed.

(2) 89 Ind. Cas. 219; 23 A. L. J. 615; L. R. 6 A. 487 Civ.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 69-B OF 1924.

August 4, 1924.

Present:—Mr. Kinkhede, A. J. C.

DULICHAND—PLAINTIFF—APPLICANT

versus

Musammam SONI—DEFENDANT—NON-APPLICANT.

Contract Act (IX of 1872), s. 196—Contract by guardian—Ratification by minor after attaining majority—Effect—Repayment—Appropriation—Court, powers of—Hindu Law—Minor, when bound by acts of guardian—Test.

An admission by a person who has attained majority, which imparts complete ratification by him of the acts of his guardian, dispenses with the necessity of any proof being adduced by the creditor to show that the debts were binding. [p. 240, col. 2.]

In the absence of anything to show that a re-payment was towards a particular item a Court is entitled to appropriate it towards the earliest outstanding item irrespective of its being in time or not. [p. 241, col. 1.]

A minor will be bound by the act of his guardian, if the act is such as the infant might reasonably and prudently have done for himself if he had been of full age. [p. 241, col. 2.]

Application for revision against the decree of the Judge Small Cause Court, in Small Cause Court Suit No. 291 of 1923, decided on the 29th February 1924.

Mr. A. V. Khare, for the Applicant.

Mr. G. G. Hatwalne, for the Non-Applicant.

ORDER.—In this case the Small Cause Court Judge has given a partial decree to plaintiff against the assets of one deceased Ramchandra. The claim so far as it was based upon a bond dated the 19th June 1920, executed by his guardian mother Sonai on his behalf during his minority has been dismissed on the ground that the debts which went to form the consideration of that bond were not proved to be binding on the minor and that the only item which was binding on the minor's estate was more than satisfied out of the re-payments. The plaintiffs have, therefore, come up in revision.

I have gone through the record and I find that the judgment of the lower Court is not according to law and is liable to be upset.

The document or bond dated the 19th June 1920, contains words "This bond shall bind my estate and heirs." These words indicate that the intention of the executant was not merely to create a personal covenant or to bind the minor by a personal promise to pay, but did indicate the source, namely, the estate out of which the debt was

A reference to Ex. P-III shows that the re-payments of Rs. 6-12-0 were made before the silver worth Rs. 2-8-6 was purchased. In the absence of anything to show that it was a re-payment towards any particular item I am entitled to appropriate it towards the earliest outstanding item irrespective of its being in time or not. This will necessarily go towards the 1st item of Rs. 100. There is no re-payment towards the 2nd item of Rs. 160 on account of price of cotton seed. Thus at the end of the year 1975 Sambat a balance of Rs. 255-12-6 remained outstanding. In the year 1976 there were dealings in gold and silver. Reading the debits and credits in juxtaposition and taking into consideration their identical nature and the dates when the transactions took place and the re-payments were made, I am of opinion, that the circumstances under which the re-payments were made clearly showed that they were meant to wipe off the transactions of gold and silver purchases. This would show that the re-payments aggregating Rs. 235-6-6 must go to wipe off the debit of Rs. 265-7-6 of the year 1976 Sambat. This leaves a balance of Rs. 30-1-0 only against the debtor's name. Thus the aggregate outstanding debts come to Rs. 285-13-6. Adding Rs. 204-4-0 on account of interest the total debits come to Rs. 490-1-6. Adding Rs. 9-14-6 taken in cash the total comes to Rs. 500 which is the consideration of the bond which is ratified.

The lower Court has already held that the seed that was supplied, was for cultivation and for feeding the agricultural cattle. The minor was, therefore, bound to re-pay this loan. It was a pre-existing liability which he as owner of agricultural land was bound to satisfy. This liability was incurred for the minor's benefit; he could not deny his liability for the same. As regards the old bond debt of Rs. 100, there is no doubt no direct evidence about the circumstances in which it was incurred; but in my opinion in the face of the debtor's own admission as to its binding character, there is no escape from liability for that item also. Now the only item which remained is Rs. 30-1-0 on account of ornaments. The same argument applies to this item also. It is said that there must be conscious admission with full knowledge of facts for purposes of ratification and that the deceased Ramchandra must not be credited with knowledge of the facts

especially as his mother was not there and the bond was not taken out. I am not prepared to uphold this contention. Moreover, when major portion of the amount is proved to be due, I do not see any force in the contention that each item has not been proved by the creditor to have been incurred for the benefit of the minor. Moreover, Mr. Mayne lays down the following test in Hindu Law, para. 218, 9th Edition:—

"That the minor will be bound by the act of his guardian, if the act is such as the infant might reasonably and prudently have done for himself if he had been of full age."

In view of these circumstances I am disposed to hold that the debt was of a nature as the infant might reasonably and prudently have himself borrowed had he been of age. The observations of the Allahabad High Court in *Peare Lal v. Sunder Singh* (1) are also very significant and show how the question should be looked at. For all these reasons, I am of opinion, that the debt was such as bound the estate and, therefore, it was that it was ratified by the debtor; it is consequently recoverable out of assets of the minor in the hands of his mother defendant No. 2, who has since succeeded to them owing to her daughter-in-law's (defendant No. 1's) re-marriage after the date of the decree.

Treating the debts as Sonai's own debts they have been kept alive by her by the execution of the bond, dated the 19th June 1920 and they are recoverable out of the assets in her hands.

I, therefore, upset the decree dismissing the plaintiff's suit, and decree the full claim and costs of both Courts and direct that the decretal amount shall carry interest at Rs. 0-8-0 per cent. per mensem, and the entire amount due to plaintiffs shall be recoverable out of the assets of Ramchandra held by Sonai.

G. R. D.

Order accordingly.

(1) 68 Ind. Cas. 805; 44 A. 756 at p. 758; 20 A. L. J. 658; (1922) A. I. R. (A.) 436.

SIND JUDICIAL COMMIS- SIONER'S COURT.

ORIGINAL CIVIL SUIT No. 458 of 1920.

August 13, 1923.

Present:—Mr. Rupchand Bilaram, A. J. C.

LAKHMICHAND GHANDAMAL—

PLAINTIFFS

versus

FIRM OF GOKULDAS RANCHORDAS—

DEFENDANT.

Civil Procedure Code (Act V of 1908), O. XXX, r. 3
—Firm, suit against, nature of—Liability of each partner—Summons, whether to be served on each partner—Firm having another firm as partner—Dissolution of former, effect of, on latter.

A firm as such has no legal existence and partners in a firm carry on business both as principals and as agents for each other within the scope of the partnership business. A firm's name is a mere expression, not a legal entity. [p. 242, col. 2.]

Sadler v. Whiteman, (1910) 1 K. B. 868 at p. 889, *In re Vagliano Anthracite Collieries*, (1910) 79 L. J. Ch. 769; 103 L. T. 211; 54 S. J. 720 and *R. v. Holder*, (1912) 1 K. B. 483 at p. 487; 81 L. J. K. B. 327; 106 L. T. 305; 76 J. P. 143; 22 Cox C. C. 727; 56 S. J. 188; 28 T. L. R. 173, followed.

When a suit is instituted against a firm in the firm's name it is a suit filed against every partner of the firm and a decree against the firm has the same effect as a decree against all the partners thereof. [p. 242, col. 2.]

Clark v. Cullen, (1882) 9 Q. B. D. 355; 47 L. T. 307, followed.

Where, therefore, a suit is instituted against a firm in the name of the firm and some of the partners are individually served under the provisions of O. XXX, r. 3 of the C. P. C., the suit cannot be held to be incompetent on the ground of all the partners not being individually served. [p. 243, col. 1.]

Where the partners composing a firm as one single entity form a partnership with another person the dissolution of the latter partnership does not dissolve the former partnership. [*ibid.*]

A cause of action against the partners of a firm is a joint cause of action against all partners and each one is jointly and severally liable for the whole of the claim and not only to the extent of his share in the partnership. [p. 243, cols. 1 & 2.]

Mr. Kimatrai Bhojraj, for the Plaintiffs.

Mr. Jhamatmal Valiram, for the Defendant.

ORDER.—The plaintiff Lakhmichand son of Ghandamal has filed this suit on 3rd May 1920 against the firm of Gokaldas Ranchoredas & Co., of Bombay for accounts of a dissolved partnership and for recovery of the amount which may be found due to him. He has served four persons Valji, Chaturbhuj, Gangji and Purshotam under O. XXX, r. 3, C. P. C. He asserts that the defendant's firm which carried on business at Bombay entered into partnership with him in respect only of certain dealings for the purchase of certain commodities in the Punjab and Karachi and sale thereof

in the Punjab, Karachi or Bombay, the plaintiff being entitled to eight annas share and the firm of Gokaldas Ranchoredas & Co. to the remaining eight annas share.

Valji who has been served as one of the partners of the defendant's firm filed a written statement on 3rd January 1922 *inter alia* denying that he was a partner of the defendant's firm and contended that "the Court has no jurisdiction as all the partners of the defendant's firm resided and still reside and carry on business or work for gain in Bombay," and that the cause of action had arisen at Bombay where the partnership was entered into and the accounts had to be settled.

Ex parte orders were passed against Chaturbhuj, Gangji and Purshotam. Subsequently, however, the *ex parte* order against Chaturbhuj was set aside and he has adopted the same defence as that of his brother Valji. The suit has been proceeded with and is part-heard.

An application has been made on behalf of Valji on the 22nd of May 1923 for permission to raise a further defence alleging that the suit is bad for non-joinder of one Gokaldas Ranchoredas as a co-defendant and the suit is, therefore, incompetent. Not only has this application been filed at a very late stage of the suit, but it is altogether misconceived. The suit has not been instituted only against the four persons who have been individually served but the suit is against each partner of the firm of Gokaldas Ranchoredas & Co. It is, no doubt, true that the firm as such has no existence and that the partners carry on business both as principals and as agents for each other within the scope of the partnership business, and that the firm's name is a mere expression and not a legal entity. *Sadler v. Whiteman* (1), *In re Vagliano Anthracite Collieries* (2), *R. v. Holder* (3). But Order XXX, r. 1, C. P. C., corresponding to O. 48 A, R. S. C., permits the use of the firm's name for the sake of convenience. When a suit is instituted against a firm in the firm's name, it is a suit filed against every partner of the firm and a decree against the firm has the same effect as a decree against

(1) (1910) 1 K. B. 868 at p. 889.

(2) (1910) 79 L. J. Ch. 769; 103 L. T. 211; 54 S. J. 720.

(3) (1912) 1 K. B. 483 at p. 487; 81 L. J. K. B. 327; 106 L. T. 305; 76 J. P. 143; 22 Cox C. C. 727; 56 S. J. 188; 28 T. L. R. 173.

all the partners formerly had. *Clark v. Cullen* (4).

If Gokaldas Ranchoredas was a partner of the firm at the time the cause of action accrued to the plaintiff, then he is a party to the suit, and is one of the defendants on the record already. If the plaintiff had brought this suit under the C. P. C. of 1882 he would have sued A, B, C, D and E carrying on business in the name of Gokaldas Ranchoredas by their managing partners A or A, B, C and D the mere fact that he did not apply for service against any individual partner of the firm would not at all affect the maintainability of the suit.

It is next contended that the suit is a suit for accounts of a dissolved partnership, and, therefore, O. XXX, r. 1, C. P. C., has no application to the present suit and that the partnership having been dissolved each partner must be sued and served individually.

Whether the business of Gokaldas Ranchoredas & Co. was then continuing or not, there is no substance in this contention as well. The plaintiff does not allege that he became a partner in the firm of Gokaldas Ranchoredas & Co. or that under the partnership terms each partner had a separate or individual share, but his case is that all the partners composing the firm of Gokaldas Ranchoredas & Co. as a body or as one single entity formed another partnership with him, their joint share being eight annas. The dissolution of this new partnership did not, therefore, dissolve the partnership between the partners of the firm of Gokaldas Ranchoredas & Co. *inter se*. Even if it be assumed that the business done by Gokaldas Ranchoredas & Co. in partnership with the plaintiff was also done in the same name, then technically there were in the eye of law two partnership firms one of Gokaldas Ranchoredas & Co. consisting of the five original partners and another of Gokaldas Ranchoredas & Co. consisting of the original partners and the plaintiff. The dissolution of the second partnership did not dissolve the first partnership.

The cause of action of the plaintiff against the partners of the firm of Gokaldas Ranchoredas & Co. is a joint cause of action against all the partners, though in view of

s. 43, Indian Contract Act, each of the partners of that firm is jointly and severally liable to the plaintiff for the whole of his claim and not only to a part of his claim limited to the proportionate amount of the interest which he may have as a member of the firm of Gokaldas Ranchoredas & Co.

Order XXX, r. 9, C. P. C., permits the institution of suits in the firm's name even in the case of suits between a partner and the firm and of suits between two firms having a common partner.

The suit being instituted in the name of a firm is only an easy mode of suing each individual partner and saves the plaintiff the necessity of ascertaining the name of each person who is jointly or severally liable to him.

There is no greater hardship on the persons served as representing the firm in a suit for accounts by a principal against his commission agent than in a suit for accounts of a dissolved partnership.

The object of the application is to delay the disposal of the suit which is part-heard.

I reject the application with costs.

Z. K.

Application rejected.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 50 OF 1925.

July 16, 1925.

Present :—Mr. Justice Sulaiman and
Mr. Justice Daniels.

AHMAD HUSAIN KHAN *alias*
CHHANGU KHAN—DEFENDANT—
APPLICANT

versus

HARDIAL *alias* LALMAN—PLAINTIFF—
OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 115, O. IX, rr. 9, 13—Ex parte decree, application to set aside—Order setting aside ex parte decree on condition of payment of costs within fixed period—Extension of time, application for, refusal of—Revision.

An order restoring a case dismissed for default, or setting aside an *ex parte* decree, on condition of the payment of a reasonable amount of costs to the opposite party, within a time fixed by the order, is not an illegal order, but on the contrary is an order contemplated by rr. 9 and 13 of O. IX of the C. P. C. [p. 244, col. 1.]

Where in the case of such an order, the petitioner applies to the Court for extension of the time fixed for payment of costs and the Court refuses to extend the time, its order is not open to revision. [*ibid.*]

Civil revision from an order of the District Judge, Shahjahanpur, dated the 16th December 1924.

Mr. A. P. Bagchi, for the Applicant.

Mr. U. S. Bajpai, for the Opposite Party.

JUDGMENT.—This is an application in revision under the following circumstances. A suit was decreed *ex parte* against the applicant on 29th April 1924. On 26th July the Subordinate Judge set aside the *ex parte* decree on condition of the defendant paying the plaintiff Rs. 40 as costs by the 28th of July. The defendant did not at the time make any objection that the time allowed was too short. On the 28th of July the defendant having failed to deposit the money applied for ten days' further time, which was refused. An appeal from this order was dismissed by the learned District Judge. It appears to us that because the learned Subordinate Judge in the exercise of his discretion considered that the defendant was not entitled to an extension of time for payment of the money this does not amount either to a failure to exercise jurisdiction against which a revision can lie. The applicant has drawn our attention to a decision in *Jagarnath Sahi v. Kamta Prasad Upadhyaya* (1), in which the opinion was expressed that a conditional order was not a proper form in which to pass the order, and that an order should first be made directing payment of the money by a certain time and then a separate order passed restoring or declining to restore the suit according as the money had been paid or not. The real question in that case was as to the order from which an appeal lay, and it was held that the final order dismissing the suit or refusing to restore the suit was the one from which an appeal could be filed. In a later case, *Nand Lal v. Kishori* (2), to which one of the same learned Judges was a party, some doubt appears to have been felt as to the correctness of the earlier ruling. However that may be, to prevent any misapprehension we wish to lay down definitely that an order restoring a case dismissed for default on condition of the payment of a reasonable amount of costs to the opposite party within a time fixed by the order is not an illegal order, but, on the contrary, is an order contemplated by O. IX, r. 13 of the C. P. C. This application

has no force, and we dismiss it with costs including in this Court fees on the higher scale.

Z. K.

Application dismissed.

PATNA HIGH COURT.
APPEAL FROM APPELLATE DECREE No. 54
OF 1923.

July 27, 1925.

Present:—Mr. Justice Adami and
Mr. Justice Sen.

RAMJEE PRASAD—DEFENDANT—
APPELLANT
versus

Rai BISHUNDUTT AND OTHERS—
RESPONDENTS.

Limitation Act (IX of 1908), s. 14—Land Registration Act (B. C. VII of 1876), ss. 28, 29, 30—Proceedings before Land Registration Collector, whether "civil proceedings"—Land Registration Collector, whether "Court."

The term "civil proceeding" used in s. 14, Limitation Act, is not meant to cover an application made under ss. 28 and 29 or s. 42 of the Land Registration Act nor can the Land Registration Deputy Collector be called a "Court" within the meaning of s. 14, Limitation Act, for the purpose of deciding cases under those sections of the Land Registration Act. [p. 246, col. 1.]

Appeal from a decision of the District Judge, Muzaffarpur, dated the 23rd June 1923, reversing that of the Additional subordinate Judge, Muzaffarpur, dated the 10th January 1917.

Messrs. Sivanandan Ray and Satyadeo Sahay, for the Appellant.

Mr. Rai T. N. Sahai, for the Respondents.

JUDGMENT.

Adami, J.—The plaintiff in this suit sought for a declaration of his title to, and confirmation of his possession in certain shares in the estate of Bisbunpur Sad. Previous to 1896, the plaintiff's share was shown in the Register D of the Land Registration Department to be 2 annas, 16 gundas 1 kowri 1 krant 1 dant. In 1896 the estate was partitioned and divided into eight *puttis*, one of these was the residuary *putti* which is the subject of the suit.

Shortly stated, the plaintiff's case is that after the partition the shares of the various co-sharers in the residuary *putti* were entered in the name of one of the sharers only, and the separate sharers of the different co sharers were not shown. Rai Brahma

(1) 23 Ind. Cas. 138; 12 A. L. J. 38; 36 A. 77.

(2) 26 Ind. Cas. 895; 12 A. L. J. 1270.

Dutt who alone was shown in Register D seems to be the brother of the plaintiff.

The plaintiff, in February 1902, purchased an eight annas share in the *patti* at an auction-sale held in execution of a mortgage decree, and in June 1902 he applied for the registration of his name in respect of the purchased share. He was registered for 7 annas, 14 *gundas* share and was left jointly recorded with the other co-sharers for the rest of the share. The plaintiff afterwards in 1912 applied to the Land Registration Department under s. 42 of the Land Registration Act, pointing out that the Register D did not show his shares separately as had been shown in the Register previous to the partition. The Deputy Collector held that s. 42 did not apply and rejected his application. The plaintiff then made another application under ss. 28 and 29 of the Act, making the same request as he had before, namely, that his shares should be separately recorded. The defendants 1st and 2nd parties to this suit both objected before the Deputy Collector and on the 7th of May 1914, the Deputy Collector found that a question of title was involved and that he could not decide the case; he rejected the application telling the petitioner that he might go to the Civil Court if so advised, for a declaration of his specific interest in each of the three villages which formed the *putti*.

The plaintiff then instituted the present suit on the 30th July 1914. According to his plaint, the defendant No. 1 Ramjee, had been recorded in the Register for a larger share than he was entitled to and the plaintiff sought to have some part of this share taken from Ramjee, and also a portion of a share taken from another defendant, and added to his own share.

It is unnecessary in this second appeal to mention the shares claimed; it is sufficient to say that both the Courts below have found that the plaintiff is entitled to the share he claims. The Subordinate Judge, however, dismissed the suit of the plaintiff finding that the defendant No. 1 or his vendors had been in possession of the shares claimed by the plaintiff since 1902 at least, and that the plaintiff had never been in possession of those shares.

On appeal the learned District Judge, agreeing with the Subordinate Judge as to the title of the plaintiff; found with regard to the present appellant, defendant No. 1, that he was recorded in Register D for a

considerably larger share than he was entitled to, and, after considering the question of limitation and finding that the time taken in prosecuting his case before the Land Registration Department would be excluded, he decreed the plaintiff's suit as against defendant No. 1 and directed that 18 *gundas* out of the defendant No. 1's share in village Bakarpur should be transferred to the plaintiff and 3 *gundas* of defendant No. 1's share in Mirpur should be similarly transferred, while 11 *gundas* out of the share recorded in the name of the defendant's grandfather should be recorded in the plaintiff's name. The plaintiff was also declared to be entitled to be recorded for eight annas 12 *gundas* out of the group entry relating to village Doberkothi.

The main question which arises in this second appeal is whether the decision of the learned District Judge regarding limitation was correct. The learned Advocate for the appellant does not attack the findings come to as to the amount of shares of the parties and in fact he could not as these are findings of fact.

Mr. Sivanandan Ray points out that according to the findings the plaintiff has never been in possession since February 1902 at least, when the entry of the defendant's shares was made in the Land Registration Department Register D, that the shares are held by the co-shares exclusively, and since the suit was not instituted till the 30 July 1914 and the entry of the defendant No. 1's shares was made in the Land Registration Department, Register D in February 1902, more than 12 years have elapsed and the suit must be barred.

The defendant No. 1 has been recorded separately for his share in the Land Registration Department and, as shown by the learned District Judge, where the co-sharers are found to have exclusive possession of a specific and stated share, limitation may run against the other co-sharers claiming that share in a suit.

The learned District Judge has found that the time taken in prosecuting his case before the Land Registration Deputy Collector and before the Commissioner and the Board of Revenue in appeal, that is to say, from the 23rd of November 1912 to the 7th of May 1914 should be excluded under the provisions of s. 14 of the Indian Limitations Act, 1908. That s. runs as follows:—"In computing the period of limitation prescribed for any

suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding whether in a Court of first instance or in a Court of Appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it."

The question is whether the proceeding in the Land Registration Department can be called a civil proceeding and whether the land Registration Deputy Collector can be held to be a Court for the purposes of the section; thirdly, whether the cause of action is the same in this suit as it was in the Land Registration Department and whether in can be said that the cause is one which from defect of jurisdiction or cause of a like nature the Land Registration Deputy Collector was unable to entertain.

I have myself grave doubts on each of these points. I do not think that the term "civil proceeding" used in the section is meant to cover an application made under ss. 28 and 29 or s. 42 of the Land Registration Act; nor do I think that the Land Registration Deputy Collector could be called "a Court" for the purpose of deciding cases under those sections. Then again though the cause of action is in both cases the record made in the Land Registration, Register D, after the partition, the relief sought before the Deputy Collector was different from the relief sought here. Before the Deputy Collector the plaintiff merely asked that his share should be separately shown and he stated what he alleged that share was. Before this Court the plaintiff seeks to have his title declared and to be confirmed in possession, or in the alternative to recover possession. It is difficult to say that the Land Registration Deputy Collector had no jurisdiction to order that the register should show the shares separately; but it was found that really the question was one of title and, therefore, the Deputy Collector refused to deal with it. I do not think that it can be said that the Deputy Collector was unable to entertain the application before him from defect of jurisdiction or other cause of a like nature. The plaintiff really sought to have his title declared by the separate record of his shares in the Register D and the proper venue for obtaining the relief he really wanted was the Civil Court. Instead of going to the Civil

Court, he went to the Land Registration Department, and when the Deputy Collector had decided that the case was one in which title had to be decided instead of at once coming to the Civil Court, the plaintiff prosecuted his case in appeal before the Revenue Authorities. In my opinion s. 14 of the Limitation Act will not save the suit from limitation.

The learned District Judge has relied on the case of *Girjanath Roy Chowdhory v. Ram Narain Das* (1), where the plaintiff was allowed under s. 14 to deduct the period during which he was *bona fide* seeking redress from the Revenue Authorities who had no jurisdiction to deal with the question raised by him, and the suit was held to be not barred by lapse of time. In that suit the question was very shortly dealt with and I think is distinguishable from the present case.

The defendant No. 1 had bought shares in three villages from admitted co-sharers in 1886, 1902 and 1905; he was recorded in Register D in 1902 with regard to the lands purchased in 1886 and 1902, and his vendor was recorded in 1902 in respect of the lands bought by the defendant in 1905, and the Trial Court found that the defendant and his vendors had been in possession ever since and the plaintiff had never been in my possession. The suit was instituted more than 12 years after February 1902, and in my opinion the learned Subordinate Judge was correct in finding that the suit was barred by limitation as against defendant No. 1.

The learned Advocate for the respondent raised an objection to the appeal on the ground that defendant No. 1 had sold his interest in the *patti* in 1919 and, therefore, he had no right to appeal. I do not think that this contention can be upheld, for it is quite clear that it is due to the defendant's vendees that his title to the shares should be supported and upheld. It seems that an application was made for substitution but it was rejected by the Court.

I would, therefore, allow the appeal, set aside the decree of the learned District Judge so far as it affects the shares which are the subject-matter of this appeal and dismiss the suit as against the defendant No. 1. Each party will pay his own costs throughout.

Sen, J.—I agree.

S. D.

Appeal allowed.

(1) 20 C. 264; 10 Ind. Dec. (N. S.) 179.

[90 I. C. 1925]

SHEODAYAL v. RAMPRASAD.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 434 OF 1923.

March 20, 1924.

Present :—Mr. Kinkhede, A. J. C.

SHEODAYAL—DEFENDANT—APPELLANT
versus

RAMPRASAD—PLAINTIFF—RESPONDENT.

C. P. Tenancy Act (I of 1920), ss. 11, 12, 13, 14, 105—Hindu Law—Widow—Will of property inherited by widow, validity of—Occupancy holding, devise of—Ejectment, suit for—Jurisdiction of Civil and Revenue Courts.

A Hindu widow has only a restricted power of alienation over property which she has inherited from her husband. She has only a life-estate in such property and can make no disposition which would enure beyond her lifetime; much less she can make one which is to come into operation after her death. [p. 247, col. 2.]

A Hindu widow, therefore, who inherits an occupancy holding from her husband cannot make a testamentary disposition of it and thus defeat the provisions of s. 11 of the C. P. Tenancy Act. [ibid.]

The intention of enacting the law of tenancy in the Central Provinces was to recognize a tenant-right of a restricted character as regards its heritability, transferability and partibility under certain conditions and limitations; but it was never understood to carry with it the incident of devisability by Will at the instance of the tenant. It is property in which the interest carved out is more of a limited or personal character, than of a character conveying unlimited powers of disposition to the incumbent for the time being. [p. 247, col. 2; p. 248, col. 1.]

Where a transfer is invalid, irrespective of the provisions of the C. P. Tenancy Act, the Act is not called into operation; there is nothing upon which it can fasten; there is no legal transaction for the consideration of the Revenue Officers. In such a case the intended transferee is not a transferee at all and if he enters upon possession under colour of the transaction his entry is a trespass at civil law and he can be ejected from the land by a suit in the Civil Courts. The jurisdiction of the Civil Courts to entertain such a suit is not ousted by anything contained in ss. 12, 13, 14 and 105 of the C. P. Tenancy Act. [p. 248, col. 2; p. 249, col. 1.]

Case-law discussed.

Appeal against a decree of the Additional District Judge, Narsinghpur, in Civil Appeal No. 20 of 1923, dated the 6th July 1923.

Mr. J. C. Ghosh, for the Appellant.

Mr. M. Gupta, for the Respondent.

JUDGMENT.—One Saraswati Bai inherited an occupancy holding from her husband. She died in April 1921. Before her death she made a testamentary disposition in respect of the occupancy holding as per Will bearing vernacular *Mitti Magh Sudhi 9 of Sambat 1977* which corresponds to 15th February 1921 (Ex. D-1) in favour of defendant-appellant who is her husband's relation but not necessarily the next heir. The landlord, therefore, instituted a suit

to eject the defendant from the land as a trespasser. It has been concurrently found that defendant is not the next heir entitled to succeed to the holding. The First Court, however, held that the Civil Court had no jurisdiction to entertain the suit because the Will was a transfer and consequently the plaintiff's remedy lay in an application to the Revenue Officer to set it aside, and not in a civil suit. The suit was accordingly dismissed. The lower Appellate Court has, however, upset the decree of the First Court and decreed the claim. Hence this second appeal. The finding that the defendant-appellant is not the next heir is final and binding as between the parties as a finding of fact and no attempt was made to challenge it before me.

The property in suit being admittedly inherited property in the hands of Saraswati Bai, she, as a Hindu widow, had only a restricted power of alienation over it. Her own interest in the holding like the other inherited estate was for her lifetime: cf. *Bhura v. Ramrao* (1), she could make no disposition of it which would enure beyond her lifetime; much less could she make one which is to come into operation after her death: cf. *Mukund v. Larman* (2). If this was her position under Hindu Law as I hold it was, she could under that law make no testamentary disposition of her inheritance, by means of a Will and thus defeat the provisions of s. 11 of the new Tenancy Act, 1920, which are to the effect that the occupancy holding shall on the death of the tenant pass by inheritance in accordance with his personal law. To uphold a tenant's right to make a testamentary disposition of his occupancy holding would be to defeat these plain provisions of the Statute which alone can govern question of succession to such holdings. It is argued that s. 11 must be read as if the words "dying intestate" were inserted between the words "tenant" and "shall" in that section. There is absolutely no warrant in law for reading the section in this manner. The intention of enacting the law of tenancy in the Central Provinces has been understood, in all the law Courts for all these years to be to recognize a tenant's right of a restricted character as regards its heritability, transferability, partibility under certain conditions and limitations but it has never been

(1) 17 Ind. Cas. 306; 8 N. L. R. 151,

(2) 5 Ind. Cas. 752; 6 N. L. R. 46,

understood to carry with it the incident of devisability by Will at the instance of the tenant. It is property in which the interest carved out is more of a limited or personal character, than of a character conveying unlimited powers of disposition to the incumbent for the time being. The whole trend of the decisions on the question of tenancy has always been one way and I dare say consistent with such intention.

As far back as in 1887 Crosthwaite, J. C., with reference to s. 43 of the old Tenancy Act of 1883, then in force held in *Laxmi Bai v. Alyar Khan* (3) that an occupancy tenant could not make any disposition of his tenant's right by Will. Had this view been erroneous the Statute which has been changed twice since then would have surely undergone a change in this respect so as to clothe the tenant with a right to make a bequest of his tenant's right? The question had arisen again in 1901 in connection with the powers of an absolute occupancy tenant to make a testamentary disposition of his right in the holding and it was held by Ismay, J. C., in *Anandi Bai v. Harlal* (4) that a Will by an absolute occupancy tenant was invalid. This case was apparently under the Tenancy Act of 1898. Since then there has been a change and the new Tenancy Act of 1920, has appeared in the Statute book, but we do not find any change which would vest a devisable interest in the tenant of the Central Provinces. This clearly supports the argument that the Legislature thinks that the Statute has all along been rightly interpreted by the Court of the Province in this matter.

Ismay, J. C., has pointed out in *Anandi Bai v. Harlal* (4) that, the word "transfer" implies the making over of possession or control, an alienation of property or of some interest in property made as between living persons. That a "Will" is not a "transfer" is clear from the above definition of the latter word, as also from that of the term "Will" itself which means a disposition of property which is to come into effect after the testator's death. The distinction between a testamentary disposition and an alienation or transfer is well pointed out in a ruling in *Muhammad Sayeed v. Muhammad Ismail* (5), where it

was held that the word "alienate" in para. 11 of the Third Schedule of the C. P. C., contemplates a transfer which is to take effect immediately and not after death and that it does not, therefore, include a disposition of property by Will. It is thus clear that a bequest is not a "transfer" and, therefore, according to the personal law of the tenant as qualified by the Tenancy Act, it is a disposition beyond the legal competence of a tenant to make.

The decision of Hallifax, A. J. C., in the case of *Ramchandra Balkrishna v. Ramchandra Jairam* (6) is cited as an authority for the view that an absolute occupancy tenant can make a valid bequest of his right in the holding. I have gone through the decision and I find that although that learned Judge has doubted the correctness of the view taken in *Anandi Bai v. Harlal*, (4) he has not actually deemed it necessary to give his dissentient decision on that point. Even if he had dissented from the view in *Anandi Bai v. Harlal* (4), I for my part would not be prepared to endorse his view on this point as it is not at all in consonance with Hindu notions much less with the policy of the law of tenancy so long recognized by the Legislature and the law Courts of these Provinces, and I would respectfully dissent from the same.

I, therefore, hold that the decision of the lower Appellate Court that a "Will" is not a "transfer" is correct. It, therefore, follows that there being no transfer, the Revenue Officer's jurisdiction could not be invoked. Even assuming for the sake of argument that the disposition in question amounted to a transfer, it is, in my opinion, invalid under the Hindu Law which gives no testamentary power to a Hindu widow over property inherited from her husband, and consequently it is a transfer which is otherwise invalid, irrespective of the prohibition contained in the C. P. Tenancy Act. The remarks of Stanyon, A. J. C., in *Ganeshdas v. Shankar* (7) are very pertinent here: "Where a transfer is invalid, irrespective of the provisions of s. 46 or 70 of the C. P. Tenancy Act of 1898, the enactment is not called into operation: there is nothing upon which it can fasten: there is no otherwise legal transaction for the consideration of the

(3) 2 C. P. L. R. 167.

(4) 15 C. P. L. R. 1.

(5) 8 Ind. Cas. 834; 33 A. 233; 7 A. L. J. 1176.

(6) 65 Ind. Cas. 952; (1923) A. I. R. (N.) 222.

(7) 13 Ind. Cas. 909; 8 N. L. R. 22 at p. 27.

[90 I. O. 1925]

RAMSEKHAR PRASHAD SINGH v. MATHURA LAL.

Revenue Officer. He cannot be required to make terms upon the basis of a nullity. In such a case the intended transferee is not a transferee at all, and if he enters upon possession under colour of the transaction, his entry is a trespass at civil law."

It is thus clear that the Civil Court's jurisdiction to entertain the suit is not ousted by anything contained in ss. 12, 13, 14 or 105 of the new Tenancy Act, and that the same was rightly entertained. The decision appealed against is correct and the appeal, therefore, fails and is dismissed with costs throughout against the appellant.

Z. K.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 171
OF 1922.

May 27, 1925.

Present:—Mr. Justice Kulwant Sahay and
Mr. Justice Sen.

*Babu RAMSEKHAR PRASHAD
SINGH AND OTHERS—PLAINTIFFS—
APPELLANTS*

versus

*MATHURA LAL AND OTHERS—DEFENDANTS
—RESPONDENTS.*

*Limitation Act (IX of 1908), Sch. I, Art. 132—
Mortgage—Money payable by instalments—Entire
amount becoming due on default in payment of one in-
stalment, effect of—Option of mortgagee—Waiver—
Limitation.*

Where a mortgage-bond provides for the payment of the mortgage-money by instalments and there is a condition attached that if default is made in payment of any one of the instalments the mortgagee would be entitled to demand the full amount secured by the bond with interest, the mortgagee has the option to demand the entire amount if there is default in payment of any one of the instalments. It is, however, open to the mortgagee to avail himself of this right or to waive it. He can exercise his option and demand payment of the entire amount on default of any one of the instalments or he can, under the terms of the bond, wait until the last instalment falls due. It is not obligatory for the mortgagee to bring a suit for realization of the entire amount as soon as any one of the instalments falls due. If he waits until the expiry of the time for payment of all the instalments, his claim would not be barred in so far as the instalments which are within the period of limitation from the date of the institution of the suit are concerned. [p. 250, col. 1.]

Mata Tahal v. Bhagwan Singh, 63 Ind. Cas. 477; 19 A. L. J. 406, *Rup Narain Bhattacharya v. Gopi Nath Mandol*, 11 O. W. N. 903 and *Narna v. Ammani Amma*, 35 Ind. Cas. 418; 4 L. W. 77; 20 M. L. T. 174; (1916) 2 M. W. N. 125; 31 M. L. J. 865; 39 M. 981, relied on.

Appeal from a decision of the District Judge, Shahabad, dated the 11th November 1921, confirming that of the Munsif, First Court, Arrah, dated the 20th December 1920.

Messrs. Atul Krishna Roy and Shashi Sekhar Prasad Singh, for the Appellants.

Messrs. Parmeshwar Dayal and S. C. Mazumdar, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs against the decision of the District Judge of Shahabad, which confirmed the decree of the Munsif and dismissed the plaintiffs' suit.

The suit was on the basis of a *kishtbandi* mortgage-bond, dated the 16th April 1909, executed by the defendant No. 1 Mathura Lal in favour of the plaintiffs. The principal amount secured was Rs. 291 and the stipulations contained in the bond were that this sum of Rs. 291 was to be paid in 9 annual instalments, the first 7 instalments being of Rs. 33 and the last two of Rs. 30 each. The instalments were to be paid in the month of September each year. There was a condition attached that if default was made in payment of any one of the instalments the mortgagees would be entitled to demand the full amount secured by the bond with interest thereon at the rate of 12 per cent. per annum. The first instalment was payable on the 29th of September 1909. It appears that there was default in the very instalment and the plaintiffs brought the present suit on the 13th January 1920 to enforce the mortgage. In this suit not only the mortgagor the defendant No. 1 but also the other members of his family were made defendants.

The defence of the defendants other than defendant No. 1 was that the debt was not contracted for any legal necessity of the family and, therefore, the mortgage was invalid. As regards the claim for a personal decree against the defendant No. 1 it was pleaded that the suit was barred by limitation and the defendant No. 1 further pleaded payment.

It has been held by both the Courts below that the debt has not been proved to have been contracted for any necessity of the family or for the benefit of the family and that the mortgage was, therefore, invalid. It has further been held that the personal claim against the defendant No. 1 was barred by limitation.

It is contended on behalf of the appellants that the finding of the learned District

Judge on the question of limitation was erroneous. His finding on the question of legal necessity for the loan has not been challenged.

As regards the question of limitation, it is contended that the instalments which fell due within six years of the institution of the suit were not barred by limitation. The question as to whether those instalments which fell due within six years of the suit were or were not barred by limitation would depend upon the terms of the bond. The bond provides for payment of a sum of Rs. 291 in 9 annual instalments. The instalments which fell due within six years of the date of the suit, namely, the 13th January 1920, would, therefore, be saved from limitation. But it is contended that the entire amount fell due when there was default in the payment of the first instalment and, therefore, the suit ought to have been brought within six years of the first instalment which fell due on the 29th September 1909. In our opinion this contention is not sound. The contract was for payment of the debt by instalments extending up to the 29th September 1917. It was left to the option of the creditors to demand the entire amount if there was default in payment of any one of the instalments. It was open to the creditors to avail themselves of this right or not to do so. They could exercise their option and demand payment of the entire amount on default of any one of the instalments or they could under the terms of the bond wait until the last instalment fell due. It was not obligatory for the creditors to bring a suit for realization of the entire amount as soon as any one of the instalments fell due. If they waited until the expiry of the time for payment of all the instalments, their claim would not be barred in so far as the instalments within the period of limitation were concerned. This view has been taken in a number of cases: *vide*, *Mata Tahal v Bhagwan Singh* (1), where the facts appear to be very much similar to the facts of the present case in *Rup Narain Bhattacharya v. Gopi Nath Mandol* (2) and *Narna v. Ammani Amma* (3). In this view of the case it is clear that the claim of the plaintiffs in so far as the

instalments from September 1914 to 1917 are concerned was not barred by limitation.

The plaintiffs will, therefore, get a personal decree against the defendant No. 1 for a sum of Rs. 126 being the instalments from September 1914 to September 1917, with interest thereon at the rate of 12 per cent. per annum from the date of default of each instalment, and proportionate costs of the suit throughout.

Z. K.

Order accordingly.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2762 OF 1923.

January 3, 1925.

Present:—Mr. Justice Campbell.

MEHR DAD AND ANOTHER—DEFENDANTS—
APPELLANTS

versus

MOHAMMED ALI SHAH AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata between co-defendants—Question decided between co-defendants in previous suit after contest.

The parties to a suit were both impleaded as defendants in a former suit and in their pleadings in that suit contended with each other on a question of relationship, the decision of which was involved in the relief given to the plaintiff in that suit:

Held, that the decision in the previous suit on the question of relationship operated as *res judicata* between the parties to the subsequent suit. [p. 251, col. 1.]

Second appeal from a decree of the District Judge, Gujranwala, dated the 31st August 1923.

Dr. Nand Lal, for the Appellants.

JUDGMENT.—My order dated the 1st of May 1924, should be read as part of this judgment. [*Vide* 84 Ind. Cas. 927.] The lower Appellate Court has returned a finding that the plaintiffs have succeeded in proving that Ghulam Shah is the common ancestor of themselves and Mohammad Shah by virtue of the testimony of a witness Fateh Shah coupled with the finding in a previous suit decided by Mr. Harrison District Judge, Gujranwala, on the 31st of March 1917.

The learned Counsel for the appellants concedes that if the lower Appellate Court's finding was based solely on the evidence of Fateh Shah, he could not contest it because it is a finding of fact; but he argues that the decision in the previous suit is

(1) 63 Ind. Cas. 477; 19 A. L. J. 406.

(2) 11 C. W. N. 903.

(3) 35 Ind. Cas. 418; 4 L. W. 77; 20 M. L. T. 174; (1916) 2 M. W. N. 125; 31 M. L. J. 865; 39 M. 981.

altogether irrelevant and, therefore, the learned District Judge's finding being based only partly on Fateh Shah's evidence and partly on an inadmissible judgment in a former case is bad.

In the former suit the descendants of Ghulam Hussain and Ghulam Kadir (See the pedigree table in the judgments of the Courts below) sued the present appellants and others for the whole occupancy tenancy of Mohammad Shah. They joined the present plaintiffs as *pro forma* defendants admitting their rights to hold the tenancy jointly with them but saying that they were unable to join in the suit because they lived in another District. Of these *pro forma* defendants Nur Shah and Mohammad Ali Shah appeared and pleaded that the claim of the then plaintiffs was correct. The landlord defendants denied the alleged relationship with Mohammad Shah or that common ancestor held the land. The First Court dismissed the suit, but in appeal the District Judge held that the land was held by the grandfather of Mohammad Shah who was also the grandfather of the plaintiffs and gave the latter a decree for half the tenancy. These being the facts I agree with the present learned District Judge that the finding in the previous case is binding on the landlords who were parties to that case. In that suit the relationship between the present plaintiffs and the then plaintiffs was never denied and s. 11 of the C. P. C., in my opinion, is a bar to the question of the relationship of Mohammad Shah with the descendants of Mahbub Shah being tried again, both by operation of Explanation VI (in view of the terms of the plaint in the former suit) and because the two sets of defendants in that suit (the present plaintiff and the contesting defendants) contended with each other in their pleadings on this very point and its decision was involved in the relief given to the plaintiffs.

Thus there is nothing contrary to law in the present learned District Judge's return to the reference which can render his finding open to attack. As a result the appeal fails and is dismissed with costs.

Z. K.

Appeal dismissed.

PATNA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 615
AND 677 OF 1922.

February 25, 1925.

Present:—Justice Sir B. K. Mullick, Kt.,
and Mr. Justice Kulwant Sahay.

IN S. A. No. 615 OF 1922.

Musammât RAMDULARI KUER—
DEFENDANT No. 2—APPELLANT

versus

UPENDRANATH BASU—PLAINTIFF,
NARUL HUDA AND OTHERS—
DEFENDANTS—RESPONDENTS.

IN S. A. No. 677 OF 1922.

NARUL HUDA—DEFENDANT No. 1—
APPELLANT

versus

UPENDRANATH BASU—PLAINTIFF,
Musammât RAMDULARI KUER AND
OTHERS—DEFENDANTS—RESPONDENTS.

*Transfer of Property Act (IV of 1882), s. 52—
Lis pendens—Execution sale—Compromise decree—
Compromise brought about by inducement of money—
Fraud—Suspicion.*

It is not safe to come to a finding of collusion and fraud on mere suspicion. [p. 253 cols. 1 & 2.]

The doctrine of *lis pendens* applies to a purchase at an execution sale during the pendency of a suit which terminates in a consent decree and the fact that the compromise was the result of inducement in money makes no difference. [p. 253, col. 2.]

Appeals from a decision of the District Judge, Gaya, dated the 21st February 1922, affirming that of the Subordinate Judge, Gaya, dated the 14th December 1920.

IN S. A. No. 615 OF 1922.

Messrs. S. Sultan Ahmad and N. K. Prasad, II, for the Appellant.

Messrs. S. M. Mullick and Siva Narayan Bose, for the Respondents.

IN S. A. No. 677 OF 1922.

Sir Ali Imam, Messrs. Rai G. S. Prasad, and N. C. Ghose, for the Appellant.

Messrs. S. M. Mullick, and S. N. Bose, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—These appeals arise out of a suit brought by the plaintiff-respondent for declaration of his title to and recovery of possession of four-annas share in the eight annas *purwari takhta* of Mouza Garua. Both the Courts below have decreed the suit. Appeal No. 615 is by the defendant No. 2, and Appeal No. 677 by the defendant No. 1.

The facts giving rise to the suit are shortly these:—

Mouza Garua in Mahal Rampur Mafi, Touzi No. 6758, in the district of Gaya is divided into two *takhtas* of eight-annas

each known as the *purwari takhta* and the *pachhiari takhta*. Four-annas out of the eight annas *pachhiari takhta* belonged to the plaintiff and the father of the defendant No. 4. The remaining four-annas was *wakf* property. Defendant No. 3 Reyaz Ali Khan was the owner of the entire *purwari takhta*. He, however, sold one anna-share to a third person and he had seven-annas of the *purwari takhta* left to him. The four-annas share belonging to the plaintiff and to the father of the defendant No. 4 in the *pachhiari takhta* was held in lease by the defendant No. 3. In 1915 a rent suit was brought by the plaintiff and the father of the defendant No. 4 against the defendant No. 3, and a decree was passed against the defendant No. 3 on the 23rd November 1905. In execution of this decree the defendant No. 3's four-annas share in the *purwari takhta* was attached on the 5th of June 1907 and it was sold in execution of the 19th September, 1907 and was purchased by the plaintiff and the father of the defendant No. 4. The sale was confirmed on the 26th November 1907 and a sale certificate was granted and delivery of possession was formally given to the auction-purchasers on the 12th June 1908. It is alleged by the plaintiff that he and the father of the defendant No. 4 applied for mutation of their names by right of the purchase in the execution sale, but they discovered that in the Collector's register the name of the original defendant No. 2 Rai Bindeswari Prasad stood recorded by right of purchase under a deed of sale dated the 16th November 1907 executed by the defendant No. 3 in favour of Rai Bindeswari Prasad. The application for registration of name was accordingly withdrawn. The father of the defendant No. 4 sold his interest to the plaintiff on the 15th of October 1908, and the plaintiff as the owner of the entire four-annas share purchased at the auction-sale on the 19th of September 1907 brought the present suit for declaration of his title and for recovery of possession.

The suit was contested by the defendant No. 1 and the defendant No. 2. The original defendant No. 2 Rai Bindeswari Prasad died after filing a written statement and his widow Musammam Ramdulari Kuer was substituted in his place and is now the defendant No. 2. The defendant No. 1 is a purchaser from the defendant No. 2

under a deed of sale dated the 20th Baisakh 1323 (May 1916). Their defence was that the property originally belonged to one Jaikaran Lal who was the maternal grandfather of Rai Bindeswari Prasad. Jaikaran Lal died leaving a widow, Jasoda Kuer, and on her death the property passed to her daughter, Musammam Lochan Kuer, who was the mother of Rai Bindeswari Prasad. Musammam Lochan Kuer sold the property to one Musammam Peyari and she in her turn sold it to the defendant No. 3.

The case of the defendants Nos. 1 and 2 was that the sale by Musammam Lochan Kuer was without any legal necessity and all that passed by the conveyance executed by Musammam Lochan Kuer was only her life interest. Musammam Lochan Kuer died on the 5th of May 1906 and, on the 5th of May 1907, Rai Bindeswari Prasad instituted a suit (No. 69 of 1907) against the defendant No. 3 for possession of the property on the allegation that the sale by Lochan Kuer was inoperative after her death. This suit was compromised and a compromise decree was passed in favour of Rai Bindeswari Prasad on the 13th of December 1907. It is contended on behalf of the contesting defendants that the purchase of the plaintiff in execution sale on the 19th September 1907 was during the active prosecution of the suit brought by Rai Bindeswari Prasad which was a contentious suit and that the doctrine of *lis pendens* applied to the plaintiff's purchase. It was further contended that the sale by Masammam Lochan Kuer was without any legal necessity and was not binding on the reversioner Rai Bindeswari Prasad after the death of Lochan Kuer. It was further alleged that the deed of sale dated the 16th of November 1907 mentioned by the plaintiff in his plaint as having been executed by the defendant No. 3 in favour of Rai Bindeswari was not executed with the knowledge or permission of Rai Bindeswari and, that he did not acquire the property under that deed of sale but under the compromise decree passed on the 13th December 1907.

Both the Courts below have held that the Suit No. 69 of 1907 instituted by Rai Bindeswari was a collusive suit and the compromise decree was also a collusive decree and, that, therefore, the doctrine of *lis pendens* did not apply to the plaintiff's purchase. They further held that the deed of sale of the 16th of November 1907

was executed with the knowledge and consent of Rai Bindeswari Prasad and that having regard to the fact that the interest of defendant No. 3 had already been sold in the execution of the plaintiff's decree on the 19th September 1907 no interest passed to the defendant No. 2 under that deed of sale.

The important question for decision in the present appeals is as to whether the purchase of the plaintiff at the auction-sale held on the 19th September 1907 is affected by the doctrine of *lis pendens*. This would depend on a finding as to whether the Suit No. 69 of 1907 brought by Rai Bindeswari Prasad against the defendant No. 3 was a *bona fide* and contentious suit or whether it was a collusive suit. The learned District Judge as well as the learned Subordinate Judge have held that this suit was a collusive suit. This finding is based on mere suspicion. The dates of the various transactions are set out in the judgment of the learned District Judge and, from the fact that the suit of Rai Bindeswari was brought in May 1907, within a month of the date on which the plaintiff had filed his application for execution, namely, the 11th of April 1907, and that Rai Bindeswari entered into an agreement of sale with defendant No. 3 while his suit was still pending and after attachment of the property in the execution of the plaintiff's decree and, in fact, after the auction-sale thereof, and that on the 16th of November 1907 Rai Bindeswari took a *kobala* of the same property from the defendant No. 3 while the suit was still pending, and that in December 1907 after the sale in execution in favour of the plaintiff had been confirmed there were consultations between Rai Bindeswari and his Pleaders with reference to his suit and that on 12th December 1907 a petition was filed in Bindeswari's suit that the parties were compromising and on the next day, that is on 13th December 1907 a petition of compromise was filed in the suit wherein the defendant No. 3 stated that Bindeswari's claim was correct and that he was not in a position to refute it by evidence, the learned Judge came to the conclusion that Rai Bindeswari's suit was not *bona fide* and contentious suit, but was a fraudulent and collusive suit in order to defeat the plaintiff. I am, however, not prepared to agree with the conclusion of the learned Judge. It is not safe to come

to a finding of collusion and fraud on mere suspicion. The suit brought by Rai Bindeswari on the face of it appears to be a *bona fide* suit. It appears that the suit was instituted on the 5th of May 1907; written statement was filed on 24th of June 1907; issues were settled on the 2nd July 1907; documents were filed by the defendant on the 11th July 1907; time was taken by the plaintiff to produce evidence and on the 25th of July 1907 a list of witnesses was filed by the plaintiff Rai Bindeswari. All these took place before the auction-sale in favour of the present plaintiff and there is no reason to assume that the proceedings taken in Rai Bindeswari's suit were not *bona fide* proceedings in active prosecution of a contentious suit. I agree with the learned Judge that the *kobala* of the 16th November 1907 must be taken to have been executed with the knowledge and consent of Rai Bindeswari and the defence of the defendants Nos. 1 and 2 in the present case that the said *kobala* was executed at the instance of a servant of Rai Bindeswari without his knowledge and consent cannot be true. But it is quite evident that that *kobala* was really in settlement of the dispute between Rai Bindeswari and the defendant No. 3. No doubt a sum of money was paid by Rai Bindeswari to the defendant No. 3 as a consideration for the *kobala* but that would not in any way affect the result of the case. When, however, Rai Bindeswari discovered that before the execution of his *kobala* on the 16th November 1907 the property had already been sold in execution of a decree in favour of the plaintiff there was a consultation between him and his lawyers and as his suit had not been finally disposed of Rai Bindeswari was advised by his lawyers to file a petition of compromise in the suit and to obtain a compromise decree. To my mind the fact that Rai Bindeswari had taken a *kobala* before the compromise petition was filed will not affect the rights of the parties and it must be held that the purchase of the plaintiff was during the active prosecution of a contentious suit. That the doctrine of *lis pendens* will apply to a purchase during the pendency of a suit which terminates in a consent decree is settled by authorities. I may only refer to the case of *Tinoodhan Chatterjee v. Trilokya Saran Sanyal* (1). This case is also an authority for the

proposition that the doctrine applies to a purchase at an execution sale. The fact that payment was made by Rai Bindeswari to the defendant No. 3 in order to obtain the consent decree will not affect the doctrine of *lis pendens*. This view is supported by the case of *Tangor Majhi v. Jaladhar Dowari* (2), where in spite of the fact that a sum of Rs. 2,000 was paid by the plaintiff in order to induce the defendant to agree to a compromise decree it was held not to affect the doctrine of *lis pendens*.

The learned District Judge has observed that the plaintiff in the present suit had established his title as against the defendant No. 3 before any proceedings were instituted by the defendant No. 2. It is difficult to understand what the learned Judge means by this observation. The mere fact of the plaintiff having applied for execution and asked for attachment of the property at the time when the suit of Rai Bindeswari was brought did not establish the title of the plaintiff as against the defendant No. 3. I have already observed that the sequence of dates as set out in the judgment of the District Judge does not lead to the irresistible conclusion that Rai Bindeswari's suit was not a contentious suit. I am, therefore, of opinion that the purchase of the plaintiff is affected by the doctrine of *lis pendens* and, under s. 52 of the Transfer of Property Act, his purchase must be subject to the rights of Rai Bindeswari under the compromise decree passed in Suit No. 69 of 1907.

It has been contended on behalf of the plaintiff that the *kobala* of the 16th of November amounts to an admission on the part of Rai Bindeswari that the sale by Lochan Kuer was a valid sale and binding upon the reversioner and, in this view of the case, it must be held that the defendant No. 3 had a valid title which passed to the plaintiff under the auction-sale. The question as to whether the sale by Lochan Kuer was a sale binding upon the reversioner need not be gone into in the present case. The learned District Judge has refused to consider this question on grounds which do not appear to be sound. The question was distinctly raised in the written statement and in the issues framed in the Trial Court and evidence was adduced on the point. Had it been neces-

sary to consider this question it would have been necessary to make a remand, but in view of the fact that the plaintiff's purchase is affected by the doctrine of *lis pendens* it is not necessary to decide this question.

In the circumstances the plaintiff is not entitled to the declaration asked for by him and his suit must be dismissed. The decision of the learned District Judge, must be set aside and the suit dismissed with costs throughout, and the appeals allowed. There will be only one hearing-fee in both the appeals.

Mullick, J.—I agree. In my opinion there was no legal evidence to support the finding that the suit brought by Rai Bindeswari Prasad on the 5th May 1907 was fraudulent and collusive. I agree that the plaintiff's purchase was subject to the rule of *lis pendens* and he acquired no title as against Rai Bindeswari Prasad.

The appeals must, therefore, be decreed.
S. D. Appeals decreed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2778 OF 1923.

March 5, 1925.

Present :—Mr. Justice Broadway and
Mr. Justice Jai Lal.

NUR MAHOMMAD—DEFENDANT—

APPELLANT

versus

LALCHAND—PLAINTIFF—RESPONDENT.

Provincial Insolvency Act (III of 1907), s. 6 (4)—Limitation Act (IX of 1908), s. 5—Insolvency, petition for, by creditor—Debtor denying debt—Insolvency Court, power of, to determine existence of debt—Limitation for petition—Extension of time—Act of insolvency, date of—Transfer of property by debtor—Interpretation of Statutes.

The meaning of an Act is not to be interpreted with reference to what its framers intended to do but with reference to the language which they did in fact employ. [p. 255, col. 2.]

Gulam Muhammad v. Panna Ram, 72 Ind. Cas. 433; (1924) A. I. R. (L.) 374, followed.

Where a petition for insolvency is presented by a creditor and the debtor denies owing anything to the petitioning creditor, the Insolvency Court has jurisdiction to decide whether or not the debt alleged by the creditor is owing to him. [p. 255, col. 1.]

Mohr Singh v. Laukra Mal, 181 P. R. 1883, distinguished.

Section 5 of the Limitation Act does not apply to a petition for insolvency presented under the provisions of the Provincial Insolvency Act. [p. 255, col. 2.]

(2) 5 Ind. Cas. 621, 14 C. W. N. 322.

Trasi Deva Rao v. Parameshwara, 27 Ind. Cas. 144; 39 M. 74; 29 M. L. J. 451, relied on.

Where the act of insolvency relied on by a petitioning creditor is an alienation of his property effected by the debtor, the date of the act of insolvency must be taken to be the date of the alienation, that is to say, the date of the deed of transfer, and not the date on which mutation is attested. [p. 256, col. 1.]

Second appeal from an order of the District Judge, Multan, dated the 8th August 1922.

Dr. Nand Lal, for the Appellant.

Mr. Nanak Chand, for the Respondent.

JUDGMENT.—This appeal has arisen out of certain proceedings instituted by one Lal Chand against one Nur Mohammad under s. 6 of Act III of 1907. The lower Appellate Court found that Nur Mohammad owed more than Rs. 500 and was unable to pay his debts. These being questions of fact are binding on us. It was, however, contended by Dr. Nand Lal for Nur Mohammad that, inasmuch as Nur Mohammad had denied owing any debt whatever to the petitioning creditors, the Insolvency Court had no jurisdiction to go into the question of his indebtedness. It was further urged that the act of insolvency—in this case the transfer in favour of Nur Mohammad's minor son Haji of all Nur Mohammad's property—had occurred more than three months prior to the presentation of the petition and was, therefore, barred by limitation, s. 5 of the Indian Limitation Act being inapplicable so as to extend the time. The question as to the applicability of s. 5 being of importance was referred to a Division Bench by an order made by me on the 20th March 1923. The points referred to were (1) whether when a debtor denies owing anything to the petitioning creditor the Insolvency Courts had jurisdiction to decide whether or not a debt was owing to the petitioning creditor, and (2) whether time could be extended under s. 5 of the Indian Limitation Act.

These points have been argued before us by Dr. Nand Lal on behalf of Nur Mohammad and Mr. Nanak Chand on behalf of the petitioning creditor. Dr. Nand Lal urged on the authority of *Mohr Singh v. Laukra Mal* (1) that when a debtor denies owing anything to the petitioning creditor the proper order should be to refer the petitioning creditor to the Civil Courts directing him to prove his claim in those Courts. That decision was based on the

Punjab Laws Act and is, therefore, distinguishable, the present proceedings being under Act III of 1907. Section 6, sub cl. (1) of Act III of 1907, provides that a creditor shall not be entitled to present an insolvency petition against a debtor, unless (a) the debt owing by the debtor to the creditor amounts to Rs. 500, and (b) the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition.

Dr. Nand Lal contended that the words "the debt owing by the debtor" imply that the debtor must admit the debt to be owing and that unless he does so the Insolvency Court has no jurisdiction to decide whether or not the debt is owing. In this view we are unable to agree, as, in our opinion, it is for the Insolvency Court to decide whether a petitioning creditor is owed a sum exceeding Rs. 500.

The second question as to limitation appears to us to be clear. Admittedly s. 5 of the Indian Limitation Act does not apply to application of this nature. In addition to the authorities referred to in the referring order Dr. Nand Lal places reliance on *Trasi Deva Rao v. Parameshwara* (2). Having regard to what was held in these authorities we hold that s. 5 of the Indian Limitation Act did not apply to petitions made under Act III of 1907. We note that the Legislature has altered the law on the subject and under the new Insolvency Act s. 5 has been specifically declared to be applicable.

Next it was contended by Mr. Nanak Chand that the act of insolvency must be held to have taken place on the 20th August 1919, i. e., on the date when mutation of the transfer was sanctioned. To this proposition Dr. Nand Lal strenuously demurred pointing out that in s. 6 (4) (c) what was laid down was that the Act of Insolvency must "have occurred" within three months before the presentation of the petition. We are in agreement with the view taken by Scott-Smith and Brasher, JJ., in *Gulam Muhammad v. Panna Ram* (3), and consider that the meaning of an Act is not to be interpreted with reference to what its framers intended to do, but with reference to the language which they did in fact employ. In the present case it is perfectly clear to us that whatever the intention of the Legis-

(2) 27 Ind. Cas. 144; 39 M. 74; 29 M. L. J. 451.

(3) 72 Ind. Cas. 433; (1924) A. I. R. (L.) 374.

(1) 181 P. R. 1883.

lature may have been the words employed clearly mean that the act of insolvency must have occurred within three months of the petition. Here, in our judgment, the transfer in favour of the minor son must have taken place not later than the 8th of July 1919. The attestation of the mutation on the 20th of August 1919 is only further evidence of the transfer which had already been effected and we, therefore, are constrained to hold that the petition is bad, having been made more than three months after the act of insolvency had occurred.

We, therefore, accept this appeal and, setting aside the decision of the lower Appellate Court, restore that of the Court, of first instance dismissing the petition. In the circumstances of the case we leave the parties to bear their costs throughout.

Z. K.

Appeal accepted.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND EXECUTION OF DECREE APPEAL

No. 26 OF 1925.

August 17, 1925.

Present:—Mr. Simpson, A. J. C.

Musammāt MOHAN DEI—JUDGMENT-

DEBTOR—APPELLANT

*versus*BALMUKUND RASTOGI—DECREE-HOLDER
—RESPONDENT.

Landlord and tenant—Hereditary non-transferable lease—Execution of money-decree against lessee—Lease, whether can be sold—Lessee, whether can object.

The condition against alienation in a hereditary non-transferable lease in Oudh is inserted for the benefit of the superior proprietor and it is not competent to the transferor of the interest, in a suit between himself and the transferee, to raise the plea that the transfer is void. Where, however, an attempt is made to sell the interest of the lessee in execution of a money-decree against him, not only the lessee can raise the objection that his interest under the lease is not transferable but he is bound to do so. If he allows the lease to be transferred in execution of a decree he would be liable to the *taluqdar*. [p. 259, col. 2.]

Case-law discussed.

Appeal against an order of the District Judge, Gonda, dated the 30th March 1925, upholding that of the Subordinate Judge, Gonda, dated the 26th January 1925.

Mr. Aditya Prasad, for the Appellant.

Messrs. Ramachandra and H.D. Chandra,
for the Respondent.

JUDGMENT.—This is a second appeal in execution proceedings. The appellant Musammāt Mohan Dei, is the judgment-debtor. The respondent, Balmukund, is the decree-holder. The appellant's point is that the property, which the decree-holder wishes to sell, is not transferable. In fact, it is one of those hereditary non-transferable leases, which have frequently been before this Court.

I have before me the judgment of the Settlement Officer, dated 16th September 1869, under which the land in suit is still held. The suit was between the ex-zemindar of the village and the *taluqdar*. The ex-zemindar sued for sub-settlement. This was refused, but, with the consent of the *taluqdar*, the ex-zemindar received 600 *kachcha bighas* of land as *sir*. With that we are not now concerned. But the *taluqdar* also gave what is called "the right of taking the lease" of certain villages at such *jamās* as may be determined between the parties. "The *sir* land is held on a tenure both heritable and transferable. The right to lease is heritable but not transferable." These are the express words of the judgment. But both the Courts below have attached importance to the immediately preceding sentence, in which it was said that the *taluqdar* cannot possibly pay the Government demand, unless his under-proprietors paid him. They have considered that these words amount to a decision by the Court that the ex-zemindars were under-proprietors. This is a mistake. There is no justification for pressing the expression used, to that extent. All that the Settlement Officer wished to say was that the *taluqdar* cannot pay the Government demand unless those holding under him pay him. The expression "under-proprietor" is used loosely. It is perfectly clear that the right to lease was not transferable, and that the lease-holders, as such, were not under-proprietors.

The land in suit was held under this lease by one Bhabhuti. The respondent, Balmukund, obtained a decree against Bhabhuti. The judgment and decree are before me. It was a simple money-decree. He proceeded to attach these leases with a view to selling them. Bhabhuti objected in an application dated 28th November 1922. Among other pleas, he raised one that the property in question was held under a perpetual lease, and could not be sold in execution of a decree. This application was dismissed for default on 6th January

1923. This decision may be *res judicata* against the present appellant, Musammât Mohan Dei, who is the widow of Bhabhuti, but Counsel for the respondent has not supported the decree on this ground, so I do not propose to take up that point.

The proceedings dragged on, and in October 1924, Bhabhuti died. On the 14th November 1924, his widow Musammât Mohan Dei, made the application, against the dismissal of which she now appeals. She set up a case that the lease being hereditary but non-transferable, was, in effect, a series of life-estates, and that she was applying, not as the representative of her husband, but as the next holder of a life-estate in the lease. The learned Subordinate Judge considered that the question of *res judicata* turned on whether the lease was transferable or not. He thought that if the lease was not transferable, her contention would be sound, because her husband would have only a life-estate in the lease. On the other hand, if the lease was transferable, there would be a *res judicata* against her, but she would also fail on the merits. He passed, therefore, to the main contention, and there he decided that the lease could be sold in execution of the decree. He relied upon *Rampher Singh v. Ram Khelawan Singh* (1), *Wazir Mohammad v. Har Prasad* (2), *Golak Nath v. Mathura Nath* (3) and *Jogeshar Misra v. Nath Koeri* (4).

On appeal, the learned District Judge said that the question had to be determined on the interpretation of the settlement decree. He mentioned the use of the word "under-proprietor", which, as I have already shown, is of no importance. He pointed out correctly that the condition against alienation is inserted for the benefit of the superior proprietor, and that it is not competent to the transferor of the interest, in a suit between himself and the transferee, to raise the plea that the transfer is void. He concluded by dismissing the appeal, adding that he had considerable hesitation in arriving at this conclusion.

Musammât Mohan Dei comes here on second appeal. Her point is that the lease is not saleable in execution of a money-decree. Along with this another point has to be decided,

and that is, whether such an objection lies in her mouth, or can be taken only by the superior proprietor. I propose to review all the cases which have any bearing on the point, but I may say at once that the matter is really concluded in appellant's favour by two decisions of this Court, which related to the same lease, namely, *Nand Ram v. Amanat Fatima Begam* (5) and *Mohammad Abdul Karim Khan v. Niwaz Singh* (6) which will be dealt with in their proper order.

The first case to be considered is *Kanhaiya Bakhsh v. Raja Mehdi Ali Khan* (7). In this case, certain persons had sued the *taluqdar* for a sub-settlement. On 23rd April 1870, the Settlement Courts dismissed their claim, but passed a decree in their favour conferring on them a heritable non-transferable lease of the village at a yearly rent of Rs. 600. These lessees executed a deed in favour of the plaintiffs. It is not necessary to set forth the exact terms of this deed, but the suit was brought by the plaintiffs on the basis of this deed against the *taluqdar*, who had obtained possession of the land. It was held, that if the transaction had been a sub-lease or a usufructuary mortgage, it would be valid and not prohibited by the decree of the Settlement Court, because it would not be a complete transfer by the lessees of their rights. But seeing that this transaction was neither, but was transfer which might result in the complete transfer of all the rights possessed by the lessees, it was prohibited by the Settlement Court decree and was invalid. Consequently, the plaintiff's suit was dismissed. This case is authority for saying that the condition that the lease shall not be transferred is enforceable, at least between the transferee and the *taluqdar*.

The next case is *Rameshwar Bakhsh Singh v. Radhay Panday* (8). In this case, certain occupancy tenants executed a usufructuary mortgage in favour of the plaintiff and put him in possession. Then they relinquished the right of occupancy in favour of the superior proprietor, who dispossessed the plaintiff-mortgagee. The plaintiff-mortgagee brought a suit for possession. It was held, that the usufructuary mortgage was not valid, because it might result in a complete transfer of the occupancy right.

(1) 2 O. C. 252.

(2) 13 Ind. Cas. 613; 15 O. C. 67.

(3) 20 O. 273; 10 Ind. Dec. (N. S.) 185.

(4) 65 Ind. Cas. 335; (1922) Pat. 49; 3 P. L. T. 205; 4 U. P. L. R. (Pat.) 9; (1922) A. I. R. (Pat.) 19 & 114; 1 Pat. 317.

(5) 6 O. C. 94.

(6) 3 Ind. Cas. 868; 12 O. C. 267.

(7) 2 O. C. 12.

(8) 2 O. C. 204.

The *obiter dictum* in *Kanhaiya Bakhsh v. Raja Mehdi Ali Khan* (7) that a usufructuary mortgage was not prohibited by the Settlement Court decree in that case, was dissented from, on the ground that usufructuary mortgage may, by operation of law, become a complete transfer of the right of the mortgagor. That is, of course, a point with which we are not now concerned [*Kanhaiya Bakhsh v. Raja Mehdi Ali Khan* (7)] was not overruled. This case decided that a usufructuary mortgage by an occupancy tenant is not valid.

The next case is one of those relied on by the learned Subordinate Judge, *Rampher Singh v. Ram Khelawan Singh* (1). Certain representatives of the *zemindari* body of a village brought a suit against the *talukdar*. A compromise was arrived at between the parties, by which the members of the *zemindari* body were to pay to the *talukdar* the Government revenue and a certain portion of the profits, and to have a heritable but not a transferable right in the village. Nineteen years later, one of them sold a fractional share in the village, and the purchaser obtained possession. The son of the vendor brought the suit for possession of the fractional share sold, and, among other pleas, he alleged that the tenure which his father held was not transferable, and that, therefore, he was entitled to have the transfer set aside, and to recover possession of the share sold by his father. The Courts below found that the restriction on the right of transfer in the decree of the Settlement Court was imposed entirely for the benefit of the *talukdar*. It was not intended for the benefit of the decree-holders or their descendants. They found that repeated transfers had been made in past years, that the *talukdar* had acquiesced in these transfers, and that it was not open to the plaintiff, a member of the *zemindari* body, to question the transfer. These decisions were upheld on second appeal. It was held that the restriction of alienation was intended for the benefit of the *talukdar*, and his heirs as an obligation on the subordinate holders and their heirs. There was no intention to create an estate in tail for the benefit of the subordinate holders' heirs. The points decided in this case are more clearly brought out in later decisions, but I may note the bearing of the decision on the learned Subordinate Judge's view that the *res judicata* and the liability to sell in execution of a decree, are bound up to-

gether. The true doctrine is, that such a lease as this is, is not liable to sale in execution of a money-decree. but, nevertheless that it is not a succession of life-estates, and that each hereditary owner fully represents the estate. I may say further that this case is no authority for saying that this lease can be sold in execution of a money decree. It merely decides (1) that if a lessee makes a transfer in breach of the condition, he is estopped from taking the plea in a suit between transferor and transferee, and (2) that the consent of the *talukdar* will validate the transfer.

Next comes *Kesho Singh v. Chaudhri Mohammad Azim* (9). In this case there was a decree of the Financial Commissioner of Oudh, dated 27th April 1869, under which the appellant obtained, by consent of the *talukdar*, a decree for a permanent hereditary farming lease. The point for decision was whether the appellant was liable to pay interest on arrears of rent, and that question again turned on the question whether he was, or was not, an under-proprietor. It was held, that his estate was hereditary under the decree, and that it must also be held to be transferable under s. 6 of the Transfer of Property Act, because all property is transferable unless otherwise provided. The estate, being hereditary and transferable, satisfied the definition of an under-proprietor. This case must be considered to have been overruled by the next case, which is the most important one for our present purpose.

Nand Ram v. Amanat Fatima Begam (5). In this case the first defendant obtained a money-decree against the second and third defendants, and, in execution of this decree, he attached and proclaimed for sale one of these hereditary leases. The plaintiff was the *talukdar*, and she objected, but her objection was thrown out, and a sale took place, at which the first defendant himself purchased the property. The plaintiff then brought a suit for a declaration that the rights of the second and third defendants in the village were not liable to sale, and for a decree for cancellation of the sale. All three Courts decreed plaintiff's claim. This case is directly in point. It is authority for the proposition that leases of this kind cannot be sold in execution of money-decrees. Yet, the case was not so

strong as the case now before me, for the decree was for a perpetual hereditary farming lease. There was not, as there is in the case before me, the express word "non-transferable" in the judgment of the Settlement Court. Yet, it was held that the lease was not transferable. *Kesho Singh v. Chaudhri Mohammad Azim* (9) was overruled on the ground that in the proceedings before the Financial Commissioner, the defendants had claimed decrees for sub-settlement on the ground that they were under-proprietors, but that they had failed. It was decided, therefore, that their successors, the defendants, in the case before the Court, were not under-proprietors but something less. It was said, that if they did not obtain an under-proprietary right, they must have acquired some sort of tenancy right, and it was decided that the right was that of a tenant holding under a decree of a Court, such as is referred to in s. 41 of the Rent Act of 1868 and s. 52 of the Rent Act of 1886. (Section 52 was re-cast when the Rent Act was amended in 1921 but the law not changed in any way). It was then considered whether such a tenant has a transferable right. It was said:—

"It may safely be assumed that prior to the introduction of British rule into Oudh no mere tenant could have transferred his right to another and compelled his landlord to recognize the transferee as his tenant. Indeed a prolonged inquiry into the supposed existence of 'occupancy right' in Oudh left it at least doubtful whether the status of any tenant in Oudh was higher than that of a tenant-at-will. The right of such a tenant to transfer his interest would have been of no practical value. In this state of things, it was only natural that the rights of tenants of all kinds should, in the Settlement Courts, have been regarded as not transferable.

"The first Rent Act for Oudh probably helped to maintain this view, for 'under-proprietor,' was defined as meaning any person possessing a heritable and transferable right of property in land for which he is liable to pay rent, and 'tenant' was defined as meaning 'any person not being an under-proprietor who is liable to pay rent.' These definitions appear also in the Act of 1886. I have seen the records of a great many cases in the Settlement Courts in which the *taluqdar*, while not willing to concede under-proprietary rights to a claimant, consented to the pass-

ing of a decree for a 'farming,' 'hereditary' or 'permanent' lease at a rate almost, if not quite as favourable as the claimant would have obtained under a decree for sub-settlement. It was evidently understood by the Courts, the *taluqdars* and claimants against *taluqdars*, that a decree for a lease, however, permanent and at whatever rate, conferred upon the claimant a right inferior to that of an under-proprietor, and I have no doubt that the reason was that the rights of such lessee were regarded as not transferable, while under-proprietary rights were, of course, transferable. If we hold that the rights of tenants holding under a decree of Court are transferable, we shall create a large number of new under-proprietary rights in Oudh.

"In my opinion, unless the contrary is shown expressly or by implication, tenants holding under decrees of Courts cannot transfer their rights. They are the persons referred to in s. 40 of the Land Revenue Act of 1876 as holders of heritable non-transferable leases whose rent has not been fixed by contract.

"Holders of leases under decrees of Courts who can transfer their rights must be held to be under-proprietors. To hold in the present case that Badulla, the ancestor of defendants Nos. 2 and 3, obtained a transferable right in the village would be equivalent to holding that he was an under-proprietor, although the Financial Commissioner expressly held that he had failed to prove under-proprietary rights.

"For these reasons, I would hold that the second and third defendants have not transferable rights in the village and I would dismiss this appeal with costs."

There is only one possible distinction that can be drawn between that case and the case which I have to decide. It is, that in that case, the *taluqdar* was the plaintiff, while in the case before me, the objection is taken by the lessee. I do not think that this distinction holds good. If the lease is not transferable, because the lessee is under an obligation to the *taluqdar* not to transfer it, then not only can the *taluqdar* enforce the condition against the transferee, as in *Nand Ram v. Amanat Fatima Begam* (5), but the lessee himself can raise the same objection against the holder of a money-decree. In fact, he is bound to do so. If he allowed the lease to be transferred in execution of a decree,

he would be liable to the *taluqdar*. Possibly, in English Law, it would be different, but English Law has no application to these leases. The case we have just considered is some authority for saying so, but it is more plainly laid down in the next case.

Jang Bahadur v. Rae Raja (10). This was a case of a mortgage. As in the present case, there had been a claim for sub-settlement which was rejected, and there had been a consent decree for possession at the rent which they were paying. Their status was not defined in the decree, but it had been held in a previous litigation to be a heritable and non-transferable right. They mortgaged some of this land, and then relinquished their holding to the landlord. The mortgagee would not give up possession, and the landlord had to sue to eject him. An argument was advanced, which had found favour with the Allahabad High Court, that a man must not be allowed to derogate from his own grant, and that a tenant who has granted a mortgage, cannot relinquish his holding so as to defeat the rights of the mortgagee. But this argument was rejected. It was said, that it was not just that the *taluqdar* should be compelled to recognise the transfer of a non-transferable right, and that if the mortgagee chose to advance money on a bad title that was his own affair. An argument was advanced, based upon English Law, that every lease is transferable, and that even if there is a clause in the lease against assignment, it will not entitle the landlord to eject the sub-lessee, unless there is a special clause in the original lease providing re-entry as a penalty in case of assignment. This argument was rejected. It was said:

"The Settlement Courts in Oudh in 1867 were presided over by men of good common-sense, but they were not trained lawyers, and the province was not in those days over-run with members of the legal profession, to insist upon stipulations, based on niceties of English Law, being put into decrees. I have no doubt that at the time this decree was given, it was the intention of every one concerned that, if the tenants transferred their holdings, out they should go."

The importance of this decision is, that it lays down that English Law is not applicable to these leases, and, therefore, the

Calcutta and Patna cases, on which the learned Subordinate Judge relies, have no bearing on the present case.

The next case is *Mohammad Abdul Karim Khan v. Niwaz Singh* (6). This case dealt with the same rights which were the subject of the litigation reported as *Nand Ram v. Amanat Fatima Begam* (5). It had been held then that these rights were not transferable, and, therefore, not saleable in execution of that decree. The *taluqdar* afterwards obtained three decrees for arrears of rent, and he asked to have the same right brought to sale. The sole contention taken in second appeal was that the question of non-transferability of the tenure could not be raised against the appellant for whose benefit alone the tenure is made non-transferable. *Rampher Singh v. Ram Khelawan Singh* (1) was cited in favour of the appellant, and also *Binda Prasad v. Rajendra Prasad* (11) in which it had been held that a sale of an occupancy tenure by a tenant to his landlord is valid, such a sale being nothing more than a relinquishment of the holding for consideration. But this argument did not find favour with the Court. It was said that the object of the *taluqdar*, appellant, was to get rid of the law of ejectment laid down in s. 52 of the Rent Act, and that the rights, not being transferable, could not be sold in execution of a decree, even if the *taluqdar* wished to sell them. This is a strong case. Even the *taluqdar* could not bring these rights to sale in satisfaction of a decree for arrears of rent, much less can the present respondent do so. And this does away with any such distinction as there might be between the present case and *Nand Ram v. Amanat Fatima Begam* (5).

The next case is *Hirday Behari v. Prag Tiwari* (12). In this case, the appellant, who held certain of these leases, mortgaged them with possession to the defendant, and then brought a suit for possession on the ground that his own mortgage was illegal. It was held that he was estopped from taking this plea. A distinction was drawn between a prohibition against alienation contained in a Statute, and a similar prohibition contained in a contract. It was held that a prohibition contained in a decree was of the contract class. It was held, therefore, that the mortgage,

(11) 10 O. C. 235.

(12) 11 Ind. Cas. 527; 14 O. C. 144.

(10) 7 O. C. 265.

in breach of the conditions of the Settlement Court decree, was not a transfer for an illegal purpose, within the meaning of s. 6 of the Transfer of Property Act, or for an unlawful object or consideration within the meaning of s. 23 of the Contract Act. It was merely in breach of the conditions imposed by the decree of the Settlement Court, and on the same footing as a transfer, contrary to the terms of a contract or deed. The plaintiff, therefore, was held bound by his own act, and estopped from pleading that he had no power of transfer. This decision does not show that these leases can be sold in execution of a money decree, though it might show that they could be sold in execution of a mortgage decree.

Lastly, there is the case of *Wazir Mohammad v. Har Prasad* (2). In this case one Bala Prasad obtained a consent decree in the Settlement Court on the 28th April 1879. It conferred a heritable but non-transferable right in the land, which was to be held rent free. Bala Prasad died in 1909, and the land came into the possession of his son-in-law, Harhar Prasad. The plaintiff was the *talukdar*, and had sued for the ejectment of Harhar Prasad, on the ground that the heirs of Bala Prasad were his daughters, and as they had failed to take possession of the property, the land must be taken to have been abandoned, and to have escheated to the *talukdar*. The defence was that the defendant was in rightful occupation. The first point was, that Bala Prasad had a right to transfer the property; and had transferred to his daughter, the wife of Harhar Prasad, and, that this transfer had been attested by the plaintiff's father, who had thus consented to it. Harhar Prasad, defendant, also set up a *just tertii*, by pleading that as Bala Prasad had admittedly left heirs, the plaintiff had no right to get possession. The case came before a single Judge, who referred it to a Bench, saying that the reference will provide an opportunity for finally determining the question of the interpretation of these settlement decrees under which so much land is held in this Province. The Bench proceeded to discuss this general question, and, in particular, whether the declaration in the decree, that the right conferred is non-transferable, is absolute so as to render any transfer made by the decree-holder absolutely void, or whether it is only qualified, amounting merely to a restriction

upon such alienations as are made without the consent of the superior proprietor, with the result that a transfer made with such consent is good in law. It was held, as had already been held in *Hirday Behari v. Prag Tiwari* (12), that s. 6 (h) and (i) of the Transfer of Property Act had no application. Clause (i) refers to interests created by Statute, and not to interests created by a decree. The question was then discussed of the force to be attributed to the condition against alienation. A distinction was drawn, as in the previous case, between a statutory prohibition and one founded on contract or decree. It was laid down that an alienation which violated a statutory prohibition would be totally void, and that it would be open to the grantor to take the plea that his own grant was illegal, but that a prohibition contained in a contract or decree merely regulates the relation of the parties. The party for whose benefit the condition is inserted may waive the condition, and in that case the transfer will be valid. It is not open to the transferor in a suit between himself and the transferee to raise a plea that the transfer is void. This decision will not help the respondent. The *talukdar* has not waived the condition. There has been no transfer to which he could consent. There is only a money decree, and an attempt to execute it by sale of the property, contrary to the decisions of this Court in *Nand Ram v. Amanat Fatima Begam* (5) and *Mohammad Abdul Karim Khan v. Niwaz Singh* (6).

The law is, therefore, quite clear, and it is a special law relating to a special tenure granted by the Settlement Courts of Oudh. Decisions of other High Courts will not help us. The learned District Judge laid down two entirely correct propositions of law, namely, that the condition against alienation is inserted for the benefit of the superior proprietor and that it is not competent to the transferor of the interest, in a suit between himself and the transferee, to raise the plea that the transfer is void. But this is not a suit between a transferor and a transferee. The condition may be for the benefit of the superior proprietor, but it is the right, and indeed the duty, of the lessee to enforce it against an attempt to sell the property under a decree.

For these reasons, I allow the appeal and set aside the orders of the Courts below. I allow Musammam Mohan Dei's objection. I declare that the property in question

Cannot be sold in execution of this decree. Musammatt Mohan Dei will get her costs in all three Courts.

Z. K.

Appeal allowed.

PATNA HIGH COURT.

CIVIL REVISION No. 60 OF 1925.

May 21, 1925.

Present:—Mr. Justice Adami and
Mr. Justice Kulwant Sahay.

BAIJULAL MARWARI AND ANOTHER—
PETITIONERS

versus

THAKUR PRASAD MARWARI AND
OTHERS—OPPOSITE PARTY.

Sonthal Parganas Settlement Regulation (III of 1872), s. 5—Area declared under settlement—Officer appointed under sub-s. (2) of s. 5—Execution proceedings, pending, disposal of—Procedure.

An execution proceeding is merely a continuation of the suit and proceedings in execution are proceedings in the suit. Therefore, an application in a pending execution proceeding is a "suit" within the meaning of s. 5 of the Sonthal Parganas Settlement Regulation III of 1872. [p. 263, col. 1.]

Where an officer has been appointed under sub-s. (2) of s. 5 of the Sonthal Parganas Settlement Regulation III of 1872, an Execution Court must transfer a pending execution proceeding to the officer so appointed and ought not to dismiss the proceeding on the ground of want of jurisdiction. [p. 263, col. 2.]

Appeal from an order of the Subordinate Judge, Godda, dated the 11th December 1924.

Messrs. S. M. Mullick and L. K. Jha, for the Petitioners.

Mr. Juggernath Prasad, for the Opposite Party.

JUDGMENT.

Kulwant Sahay, J.—This is an application against an order of the Subordinate Judge, Godda, dismissing the petitioners' application under O. XXI, r. 100 of the C. P. C. The facts stated in the petition are shortly these:—

The petitioner brought a money suit against one Gurudeyal Baram and obtained a decree, and in execution thereof purchased 5 annas 6 pies share in two properties belonging to the judgment-debtor, namely, in *Ghat Lachmipur* bearing *Touzi* No. 494 and in *Ghat Fauzdar* bearing *Touzi* No. 485. The petitioner's purchase is dated the 9th July 1918, the property having been attached on the 26th March 1917. The opposite party Nos. 1 to 4 had also obtained a money decree against Gurudeyal Baram

and they also applied for execution of their decree and in execution thereof they purchased the remaining 10 annas 6 pies share in each of the two *ghats*. The petitioner got delivery of possession of the share purchased by him on the 16th November 1919. In the meantime it appears that the opposite party Nos. 1 to 4 had taken an assignment of an 8-annas share in a certain mortgage-bond executed by Gurudeyal Baram in favour of the opposite party Nos. 5 to 7. A mortgage suit was brought on the basis of that mortgage-bond to which the petitioners were not parties. It is to be remembered that the attachment in execution of the decree of the petitioners had taken place on the 26th March 1917 and the mortgage suit was brought on the 1st December 1918. It was, therefore, necessary under O. XXXIV, r. 1 of the C. P. C., to make the petitioners parties to the mortgage suit inasmuch as under s. 91, cl. (f) of the Transfer of Property Act they had a right to redeem. A mortgage-decree was obtained on the 18th December 1918, and in execution of the mortgage-decree, the opposite party No. 1 to 4 purchased the whole of the two *ghats* mentioned above on the 28th May 1923. They obtained a sale certificate and applied for delivery of possession and possession was delivered to them in respect of *ghat Lachmipur* on the 21st December 1923 and in respect of *Ghat Fauzdar* on the 23rd December 1923. As a result thereof the petitioners say that they were dispossessed of the shares purchased by them. They accordingly made an application under O. XXI, r. 100 on the 19th January 1924. After various adjournments, this application came on for hearing before the Subordinate Judge on the 11th December 1924. On that date an application was made on behalf of the petitioners for time. This application was refused. The learned Subordinate Judge then rejected the application under O. XXI, r. 100 on the ground that he had no jurisdiction to entertain the application on account of the provisions of s. 5 of the Regulation III of 1872.

It appears that under a Government Notification dated the 27th October 1923, the area within which the property in dispute is comprised was declared to be under settlement from the 1st of November 1923, and the learned Subordinate Judge held that under the provisions of s. 5 of

the Regulation he had no jurisdiction to entertain the present application under O. XXI, r. 100, C. P. C. He accordingly rejected that application. Against this order, the petitioners have come up in revision to this Court; and it is contended that the Subordinate Judge was wrong in holding that he had no jurisdiction to entertain the application, and further he was wrong in rejecting the application without giving the petitioners an opportunity to substantiate their case. In my opinion the contention of the petitioners is sound and ought to prevail.

As regards the first point, namely, the application for time it is clear that because the petitioners' application for time was rejected, the learned Subordinate Judge was not right in rejecting their application under O. XXI, r. 100 without calling upon them to adduce evidence to substantiate their case. As regards the question of jurisdiction, the learned Subordinate Judge, relies on the provisions of s. 5 of the Regulation III of 1872. Now this section provides that, "from the date on which the Lieutenant-Governor declares under s. 9 by a notification in the *Calcutta Gazette*, that a settlement shall be made of the whole or any part of the Sonthal Parganas until the date on which such settlement is declared by a like notification to have been completed, no suit shall lie in any Civil Court established under the Bengal, Agra and Assam Civil Courts Act, 1887, in regard to any land or any interest in, or arising out of land in the area covered by such notification; nor shall any Civil Court proceed with the hearing of any such suit which may be pending before it."

It has been contended that an application in a pending execution proceeding is not a suit within the meaning of s. 5. This contention does not appear to be sound, because execution is merely a continuation of the suit and proceedings in execution are proceedings in the suit. The question, however, is whether the application of the petitioners ought to have been rejected on the ground that a notification as contemplated by the section had been issued by the Government. Sub section (2) of s. 5 provides that "between the dates referred to in sub-s (1), all suits of the nature therein described shall be filed before or transferred to an officer appointed by the Lieutenant-Governor under s. 2 of the

Sonthal Parganas Act, 1855 or s. 10 of the Regulation III of 1872."

In the present case if an officer had been appointed under sub-s. (2) of s. 5, then the Subordinate Judge ought to have transferred the application to that officer. It was a pending execution proceeding at the time when the notification was issued, and under sub-s. (2) the Court could only transfer such applications to the officer appointed under sub-s. (2) of s. 5, and it ought not to have rejected the application on the ground of want of jurisdiction.

The order of the learned Subordinate Judge will, therefore, be set aside and he will proceed according to the provisions of sub-s. (2) of s. 5 of the Regulation III of 1872.

There will be no order for costs.

Adami, J.—I agree.

Z. K.

Order set aside.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 472 OF 1922.

February 8, 1924.

Present :—Mr. Kinkhede, A. J. C.

BEHARILAL—PLAINTIFF—APPELLANT
versus

GORELAL AND OTHERS—DEFENDANTS—
RESPONDENTS.

Practice—Pleadings and proof—Both parties failing to prove case set up—Procedure.

Where A comes into Court with an allegation that certain property is exclusively his by reason of its allotment to his share at a partition effected between him and his other co-parcener B, and that it is not, therefore, liable to attachment and sale in execution of a money-decree obtained by a creditor against B, but fails to prove the allotment, and the attaching creditor who similarly contended that the said item of joint property had become the exclusive property of his judgment-debtor by virtue of its allotment to his share, also fails to prove the alleged allotment, and the Court finds that the property is the joint property of the family, it is open to the Court to grant to the plaintiff such relief as flows from the finding and if the Court adopts this procedure it cannot be successfully impeached in second appeal. [p. 264, col. 1.]

Lola v. Pyare, 33 Ind. Cas. 497; 12 N. L. R. 57 at p. 60, followed.

In such a case the plaintiff may be given a decree that the attachment and sale would not affect his undivided interest in the property in dispute. [p. 264, col. 2.]

Second appeal against a decree of the District Judge, Hoshangabad, in Civil Appeal No. 30 of 1922, dated the 11th August 1922

Mr. J. Sen, for the Appellant.

Mr. S. B. Gokhale, for the Respondent.

JUDGMENT.—This second appeal raises a novel point of law. Where A comes into Court with an allegation that certain property was exclusively his by reason of its allotment to his share at a partition effected between him and his other co-parcener B, and that it was not, therefore, liable to attachment and sale in execution of a money-decree obtained by a creditor against his debtor B, but fails to prove the allotment and the attaching creditor who similarly contended that the said item of joint property had become the exclusive property of his judgment-debtor by virtue of its allotment to his share, also fails to prove the alleged allotment and the Court finds that the property was the joint property of the family, is it open to the Court to grant to the plaintiff any lesser relief on the footing of the findings arrived at by it as regards the actual state of facts? I find that this question has been discussed by this Court in *Loola v. Pyare* (1). The following quotation will show that plaintiff could be given such relief as flows from the findings and if the Court does it, it cannot be successfully impeached in second appeal:—

“The tendency now is not to dismiss suits on purely technical grounds. In the present suit the facts admitted and found fell between, as it were, the cases of both parties. The plaintiff claimed possession of the land as an ordinary tenant thereof against the defendant as the trespasser. The defendant admitted the tenure of the plaintiff but set up a perpetual sub-tenure under a contract with the plaintiff. The Court of Appeal below found that the defendant is neither a trespasser nor a perpetual sub-lessee but a licensee, and has given the plaintiff what it held to be the relief to which he is legally entitled on that finding. This procedure cannot successfully be impeached in second appeal. Whether the Court was justified in giving the relief it did, without further trial, is a separate question to be decided hereafter. For the present it is enough to say that the lower Appellate Court was entitled to apply the law to the facts actually proved by the evidence, even though they showed the allegations of both parties to be untrue, incorrect or incapable of proof and judicial recognition.”

(1) 33 Ind. Cas. 497; 12 N. L. R. 57 at p. 60.

It is contended by the plaintiff-appellant before me that the lower Appellate Court ought to have under the prayer for general relief given him a decree declaring that the attachment and sale does not affect his undivided half interest in the plaint property, or in other words, it should have been held that the auction-purchaser's title related, only, to the right, title and interest of his judgment-debtor in, and not to the whole of, the premises attached and sold. It is contended on behalf of the respondents that the decision of this question depended upon the nature of the debt for which the decree was passed and that as it was the plaintiff's duty to set up an alternative case from the beginning so as to give them a full opportunity for contesting it, and whereas he has not done so he cannot blame the lower Appellate Court for not granting him that relief. On the other hand the appellant contends that it was for the creditor or for the matter of that for the auction-purchaser to plead and prove facts which would support the attachment and sale of the larger interest of the family, rather than of the individual co-parcener sued by him, in the property sought to be proceeded against. The question is not quite free from difficulty.

The present is a suit by an unsuccessful claimant to set aside the summary decision of the Executing Court, under O. XXI, r. 63, C. P. C., and it is arguable that it was for the plaintiff to take his stand on an alternative case from the very outset, if he wanted to make that a ground of attack on the auction-purchaser's title, relying on the fact that a decree was obtained against a minor son of the debtor Ramprasad or more correctly against the assets of Ramprasad in his hands. The plaintiff, on the other hand, contends that he was entitled to presume that the creditor did not intend to proceed against the other members of the family so as to make them also liable for the debt incurred by Ramprasad on the ground that it was a family debt and as such bound the other members and that the decree was, therefore, one in respect of a personal debt of Ramprasad for which only his interest would be liable to be sold in execution. It is further contended that if the defendants-respondents thought that Ramprasad acted in the matter of borrowing the debt in question as manager, or after borrowing the debt utilized it for proper

and necessary purposes of the family, or that the family has derived benefit from the borrowing, it was their duty to set up such a case, because even assuming that Ramprasad was the manager, there is no presumption that a debt contracted by a manager is one for the benefit of the family: *vide Ganpat Rai v. Munni Lal* (2).

I am also referred by the plaintiff-appellant to the following elaborate exposition of the law bearing on this point, by Mr. Mayne in his learned treatise on Hindu Law and Usage, para. 350, 9th Edition:—

"One point as to which there seems at first to be a conflict of decisions, is as to the amount of proof incumbent upon a purchaser under a decree, or upon one who lends money to the manager of an estate to pay off a decree, or who purchases a part of an estate from the manager to supply him with funds for that purpose. Is the production of a *bona fide* decree sufficient of itself to establish a case of necessity, or is it incumbent upon the purchaser or creditor to go further, and to show that the decree was passed for a purpose which would bind the estate? The result of the decisions appears to be, that the party who relies on the decree is entitled to assume that it was properly passed, and that everything done under it was properly done. But the extent to which this will benefit him depends upon the nature of the decree, and the person against whom it was given, and upon the form of the proceedings taken in execution of the decree. It is evident that a decree may be one which upon its face, and by the mere fact that it was passed, binds the person against whom it is enforced. Or it may be one which will not bind him unless something was proved in the course of the case, and that something may or may not have been proved. Again, the form of the decree, and of the proceedings taken under it, may show that the creditor, while only suing his debtor by name, sued him as the representative of the family, in order to bind its property. Or, conversely, it may appear that, although the creditor had a remedy, which he might have enforced, against the whole family and its property, he chose to restrict his claim to his original debtor and the interests

of that debtor: *Radha Krishna Chanderjee v. Ram Bahadur* (3)..... It would be otherwise where the decree was given against a simple co-parcener. It would be a perfectly valid decree against him, and might during his life be enforced by execution and sale of his interest in the property. But as his debt would not bind his co-parceners or their share in the property, unless it was contracted by their consent or for their benefit, so a decree against him can create no higher liability. It ascertains his debt, but does no more. If it is intended to procure payment of the debt, directly or indirectly, out of the shares of the other members, the creditor must show that the debts themselves were such as to be properly binding upon those who have not personally incurred them. This proof must be given in a suit to which the joint members of the family are parties, and in which they can resist the allegations made against them. If the managing member of the family executes a document which would bind the other members, the proper course is to sue them all. If the creditor chooses, he may sue only the person who executed the document to enforce his liability as executant. But if he adopts this course his execution will only take effect upon the share of the execution debtor. He cannot enforce it against the other members (not being the sons of the debtor) merely by proving that the transaction was entered into for the benefit of the family. This only shows that he had a larger remedy, of which he did not avail himself: *Deendyal Lal v. Jugdeep Narain Singh* (4), *Armugam Pillai v. Sabapathy Padiachi* (5), *Subramaniyayan v. Subramaniyayan* (6), *Dorasami Vayappayya v. Atiratra Dikshatar* (7), *Viraragamma v. Samudrala* (8), *Gururappa v. Thimma* (9), *Abilak Roy v. Rubbi Roy* (10),

(3) 43 Ind. Cas. 268; 34 M. L. J. 97; 16 A. L. J. 33; 23 M. L. T. 26; 4 P. L. W. 9; 7 L. W. 149; 22 C. W. N. 330; 27 C. L. J. 191; (1918) M. W. N. 163; 20 Bom. L. R. 502 (P. C.).

(4) 4 I. A. 247; 3 C. 198; 1 C. L. R. 49; 3 Sar. P. O. J. 730; 3 Suth. P. C. J. 468; 1 Ind. Jur. 604; 1 Ind. Dec. (N. S.) 715 (P. C.).

(5) 5 M. 12; 2 Ind. Dec. (N. S.) 9.

(6) 5 M. 125; 6 Ind. Jur. 297; 2 Ind. Dec. (N. S.) 87.

(7) 7 M. 136; 2 Ind. Dec. (N. S.) 680.

(8) 8 M. 208; 3 Ind. Dec. (N. S.) 144.

(9) 10 M. 316; 3 Ind. Dec. (N. S.) 973.

(10) 11 O. 993; 9 Ind. Jur. 425; 5 Ind. Dec. (N. S.) 955.

Maruti Narayan v. Lilachand (11), *Kisan-sing Jivansing Pardesi v. Moreshwar Vishnu Joshi* (12) and *Doolar Chand Sahoo v. Lall Chabeel Chand* (13).

Finally, there is a class of cases in which it has been held that a suit against one member of the family must be taken as a proceeding against the family represented by him, so that the decree binds them, and may be enforced by execution against the shares of all: *Hari Saran Moitra v. Bhubaneswari Debi* (14) and *Sheo Shankar Ram v. Jaddo Kunwar* (15)."

It will thus be seen that the question as to which of the two parties to this suit ought to have set up the alternative case appears to me to depend upon the circumstances of each case and the view one takes of them.

As both the parties seem to me to have laboured under an erroneous impression as to which of them ought to have set up the alternative case and as I think that this relief cannot be granted by me in the present state of the record and that further trial of several important questions of law and fact, is necessary, I must, as justice demands it, grant to the parties one chance to have the matter thrashed out in this litigation itself and thus avoid the necessity of a fresh litigation between the parties.

The appeal is, therefore, allowed and the decrees of the lower Courts are set aside and the case is remanded to the First Court for a fresh decision with advertence to the above remarks after taking the necessary pleadings and framing the necessary issues and giving the parties an opportunity to prove their respective cases. As to costs I direct that there will be no refund of Court-fees in this or in the lower Appellate Court. Costs here will be borne by the party incurring them. As regards the costs hereto incurred in Courts below they will be in the discretion of the Trial Court with due regard to the circumstances that both

parties have failed to establish the cases pleaded by them.

Z. K.

Appeal allowed;
Case remanded,

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 972 OF 1925.

July 7, 1925.

Present:—Mr Justice Sulaiman.

FIRM MANGAL CHAND-PARAMSUKH
DAS—DEFENDANT—APPELLANT

versus

Musammât ZAINAB BIBI AND ANOTHER—
PLAINTIFFS—RESPONDENTS.

Attachment, wrongful—Damages, suit for—Malice—Reasonable and probable cause, absence of, whether necessary.

Where a decree-holder attaches property belonging to a third party and wrongfully deprives the latter of the use of the property attached in consequence of such attachment, the third party is entitled to damages on account of the loss which it suffers by the wrongful attachment without proving any malice or any absence of reasonable and probable cause on the part of the decree-holder. [p. 267, col. 1.]

Thakdi Hajji v. Budrudin Saib, 29 M. 208, *Surajmal v. Manekchand*, 6 Bom. L. R. 704 and *Nanjappa Chettiar v. Ganapathi Gounden*, 12 Ind. Cas. 507; 35 M. 593; 10 M. L. T. 365; (1911) 2 M. W. N. 414; 21 M. L. J. 1052, distinguished.

Raynor v. Sungheer Singh, 5 N. W. P. H. C. R. 211, *Soobjan Beebee v. Shaikh Shureutoollah*, 12 W. R. 329; 3 B. L. R. A. C. 413, *Kanaye Pershad Bose v. Hur Chand Manoo*, 14 W. R. 120; 5 B. L. R. App. 71 and *Kissorimohun Roy v. Harsukh Das*, 17 C. 436; 17 I. A. 17; 13 Ind. Jur. 452; 5 Sar. P. C. J. 472; 8 Ind. Dec. (N. S.) 830 (P. C.), relied on.

Second appeal from a decree of the District Judge, Ghazipur, dated the 16th of February 1925.

Mr. U. S. Bajpai, for the Appellant.

JUDGMENT.—This is a defendant's appeal arising out of a suit for damages. The plaintiff's case was that the defendant in execution of a decree against her husband Abdul Rashid and others attached a hand-loom belonging to her on the 24th of May 1924 and thereby deprived her of its use till the 1st of September 1924 when on objection being raised by her the attachment was released. She alleged that she could not work the hand-loom for three months and eight days and suffered a loss of Rs. 94. The defence was an assertion that the hand-loom belonged to the judgment-debtor and a plea that the attachment was *bona fide* and the damage claimed was remote and excessive. The denial of the plaintiff's ownership of the hand-loom does

(11) 6 B. 564; 3 Ind. Dec. (N. S.) 821.

(12) 7 B. 91; 7 Ind. Jur. 264; 4 Ind. Dec. (N. S.) 61.

(13) 6 I. A. 47; 3 C. L. R. 561; 3 Sar. P. C. J. 885.

(14) 16 C. 40; 15 I. A. 193; 12 Ind. Jur. 373; 5 Sar. P. C. J. 198; 8 Ind. Dec. (N. S.) 27 (P. C.).

(15) 24 Ind. Cas. 504; 36 A. 383; 18 C. W. N. 968; 16 M. L. T. 175; (1914) M. W. N. 593; 1 L. W. 615; 20 C. L. J. 282; 12 A. L. J. 1073; 16 Bom. L. R. 810; 41 I. A. 216 (P. C.).

not appear to have been seriously pressed in the Courts below, both of which have assumed that the hand-loom belonged to the plaintiff. In the grounds of appeal before me there is no suggestion that that was not so.

The main contention on behalf of the defendant now is that inasmuch as he had acted in a *bona fide* manner and the plaintiff has failed to prove any malice or any want of reasonable and probable cause her claim for damages should not have been allowed. The learned Advocate for the appellant relied on the cases of *Thakdi Hajji v. Budrudin Saib* (1), *Surajmal v. Manekchand* (2) and *Nanjappa Chettiar v. Ganapathi Gounden* (3). In the last mentioned case it was remarked: "There is no reason for departing, when a suit is filed for damages, from the well-established rule that when the plaintiff's grievance arises directly from the order of a Judicial Tribunal though it is moved thereto by a private party, the defendant would not be responsible in damages unless he had acted with malice as well as without reasonable and probable cause."

All these three cases, however, were cases where damages were claimed against a person who was not a party to the proceeding.

In my opinion there is a clear distinction between cases of that kind and the cases where a decree-holder attaches property belonging to a third party and wrongfully deprives him of its use in consequence of such attachment. The innocent third party would be entitled to damages on account of the loss which he suffers by the wrongful attachment without proving any malice or any absence of reasonable and probable cause.

This was the view expressed by this Court as early as 1873 in the case of *Raynor v. Sungheer Singh* (4). The learned Judges remarked "a judgmentt-creditor is responsible in damages to any person whose property he wrongfully causes to be attached in execution of his decree without proof of *mala fides*."

A similar view was expressed by Calcutta High Court in the case of *Soobjan Beebee v. Shaikh Shvreeutoollah* (5) and in the case

of *Kanaye Pershad Bose v. Hur Chand Manoo* (6).

The case of *Kissorimohun Roy v. Harsukh Das* (7) is an authoritative pronouncement by their Lordships of the Privy Council on this point. In that case the decree-holder had attached properties belonging to persons who were no parties to the decree. In a suit for damages brought by the persons whose properties had been attached it was contended before their Lordships that the defendants were not responsible unless the plaintiffs alleged and proved that they had litigated maliciously and without probable cause. Their Lordships repelled this contention and remarked at page 442* "That is a rule which obtains between the parties to a suit when the defendant suffers loss through its institution and dependence. It does not apply to proceedings taken by the injured party, after the wrong is done, in order to obtain redress...The summary proceeding under s. 278 was taken by the respondent for the purpose of getting the release of an attachment issued in a suit to which he was not a party; and it does not appear to their Lordships that in order to entitle him to recover full indemnity for the wrongful attachment of his goods, the respondent is bound to allege and prove that the appellants resisted his application maliciously, and without probable cause."

In face of such a clear pronouncement by the highest Tribunal there can be no room for any controversy.

The appeal is dismissed under O. XLI, r. 11.

Z. K. *Appeal dismissed.*

(6) 14 W. R. 120; 5 B. L. R. App. 71.

(7) 17 C. 436; 17 I. A. 17; 13 Ind. Jur. 452; 5 Sar. P. C. J. 472; 8 Ind. Dec. (N. S.) 830 (P. C.).

*Page of 17 C.—[Ed.]

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 207 OF 1924.

March 6, 1925.

Present:—Justice Sir Ewert Greaves, Kt.,
and Mr. Justice Cuming.

Kumar SURENDRA NARAIN DEB

—APPELLANT

versus

PRINCE VICTOR NITYENDRA NARAIN

AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 10
—Assignment of interest pending suit—Assignment
challenged—Substitution—Court, power of.

(1) 29 M. 208.

(2) 6 Bom. L. R. 704.

(3) 12 Ind. Cas. 537; 35 M. 598; 10 M. L. T. 385; (1911) 2 M. W. N. 414; 21 M. L. J. 1052.

(4) 5 N. W. P. H. C. R. 211.

(5) 12 W. R. 329; 3 B. L. R. A. C. 413.

The Court has power to decide the question as to the validity or otherwise of an assignment of interest pending suit, when an application for substitution is made to the Court under O. XXII, r. 10 of the C. P. C. The power of the Court to effect substitution is not confined to cases where the assignment is unchallenged. [p. 268, col. 2.]

Appeal against an order of the Subordinate Judge, First Court, 24-Pergunnahs, dated the 13th of May 1924.

Mr. Basak, Babus Prokash Chandra Pak-rasi and Promatha Nath Mukerjee, for the Appellant.

Mr. D. N. Mitter, Babu Kanai Dhan Dutta, Messrs. H. D. Bose and Amarendra Nath Bose, Babus Palit Paban Chatterjee, Surendra Nath Guha and Ambika Pada Choudhuri, for the Respondents.

JUDGMENT.

Greaves, J.—This appeal arises from an order of the 13th of May 1924 made in a suit by the Subordinate Judge and relating to two applications made for substitution in place of the deceased plaintiff No. 2, Kumar Udai Narain. The two applications were made by the only surviving son of Kumar Uday Narain and by Prince Victor Narain, who claims as an assignee of the interest of the deceased plaintiff, to be substituted in the suit in place of Kumar Udai Narain. The suit relates to the *Bijni Raj* and it was commenced by two persons, the present plaintiff and by deceased plaintiff No. 2. On the 14th of February 1922 Udai Narain who was then plaintiff No. 2 in the suit executed a deed of conveyance of his interest whatever he had in the *raj* to Prince Victor. Subsequently a dispute arose between plaintiff No. 1 and plaintiff No. 2 by an order of the 19th September, 1922, the conduct of the suit was given to plaintiff No. 1 and plaintiff No. 2 Udai Narain was made a defendant in the suit. There was some order made with regard to costs which is not material for the purposes of this appeal. Prior to that order, namely, on the 10th March 1922 Prince Victor applied for substitution of his name in the suit in place of Udai Narain by virtue of his purchase of the 14th February 1922. Udai Narain consented to the substitution asked for by plaintiff No. 2 and the other defendants opposed it and on the 22nd April 1922 Prince Victor applied to the Court for leave to withdraw his application and this was allowed. The learned Subordinate Judge by his order of the 13th May 1924 allowed both the applications to which I have re-

ferred. He added Prince Victor as a defendant by virtue of the assignment and he added Kumar Surendra Narain by virtue of some small interest which remained vested in Udai Narain after his conveyance to Prince Victor which interest is now vested by reason of the death of Udai Narain in the present appellant Kumar Surendra Narain. The appeal is by Kumar Surendra Narain who objects to the substitution of Prince Victor by virtue of the conveyance and it was urged before us that under the provisions of O. XXII, r. 10, the order for the adding of Prince Victor as a party should not have been made for it was suggested that O. XXII, r. 10 only applied to a case where the assignment or the devolution was not challenged and not to a case like the present where the assignment to Prince Victor was challenged on various grounds. It was sought to support this argument by a reference to O. XXII, r. 5 which provides that where it is necessary to substitute a representative and question arises as to who is the legal representative the Court is bound to determine the question before effecting a substitution and it was suggested that owing to the absence of these words from O. XXII, r. 10 and as there was no obligation on the Court so to decide O. XXII, r. 10 must only apply to a case of assignment where the assignment was not disputed. A similar argument was raised in the case of *Enday Ali v. Binodini Dutt* (1) and the Division Bench which decided the case were against the contention which I have indicated and came to the conclusion that under the provisions of O. XXII, r. 10, the Court had a power to decide the question as to the validity or otherwise of the assignment when an application for substitution was made to the Court under O. XXII, r. 10. We agree with that decision and we do not think that it is possible to confine the provisions of O. XXII, r. 10 to a case where the assignment is not disputed. Then it was sought to urge that by reason of the previous withdrawal of the application for substitution Prince Victor is now debarred from making the application on which the order of the Subordinate Judge was made. We do not think, however, that this is so. At the time the withdrawal was made the interest of Udai Narain and Prince Victor was practically identical and they were friendly. Now Udai Narain is dead and

(1) 51 Ind. Cas. 233; 29 C. L. J. 362.

Prince Victor Narain and the present appellant are at arms length and we do not think that Prince Victor can be debarred from making the application upon which the learned Judge passed the order complained of. We think, therefore, that the order was right and that the suit should proceed in the presence of both the added parties namely, Kumar Satyendra Narain and Prince Victor. The order substituting Prince Victor does not decide the validity of his assignment. This is a question that ultimately may have to be decided in other proceedings. On the other hand the question may never arise if the decision in the present suit goes on one way.

For the reasons we have indicated we think that the order was a correct one and that the learned Judge has rightly confined Prince Victor to the case of Udai Narain in whose stead he has been substituted. Under the circumstances of this case we think that the Court was justified in adding Prince Victor without going into the various allegations that are made with regard to the assignment to him.

The appeal accordingly fails and is dismissed with costs to be paid to Prince Victor Nityendra Narain represented by Mr. H. D. Bose. We assess the hearing-fee at three gold mohurs.

Cuming, J.—I agree.

N. H.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION NOS. 98 TO 101
OF 1924.

February 17, 1925.

Present:—Mr. Justice Spencer.

CHAKIRI SUBAYYA—DEFENDANT No. 1
—PETITIONER

versus

YERADODDI MAL REDDY AND OTHERS—
DEFENDANTS AND ANOTHER—PLAINTIFF
—RESPONDENTS.

Madras Estates Land Act (I of 1908), ss. 3, (2) (d), 189
—Shrotriendar, suit by, for rent—Shrotriem, whether
estate—Grant of melvaram only to person not owning
kudivaram—Jurisdiction of Civil and Revenue Courts
—Appeal, second—Mixed question of fact and law.

Where in a suit instituted in the Civil Court for arrears of rent by a shrotriendar, the tenants raise the plea of want of jurisdiction of the Civil Court, on the ground that the shrotriem is an estate, the point for decision is whether at the time of the grant the shrotriendar had not the kudivaram, right also. In

other words whether it is proved by evidence that at the time of the grant there were any tenants in the village holding lands with any right of occupancy by custom or otherwise. It is immaterial that at the date of suit the shrotriendar may have only the melvaram right. [p. 270, cols. 1 & 2.]

If the shrotriendar was originally the kudivaramdar and the melvaram also was granted to him, but he subsequently divested himself of the kudivaram right, the village is not an "estate" since on a proper construction of s. 3 (2) (d) of the Madras Estates Land Act, the words "to a person not owning the kudivaram thereof" refer to the time when the inam was granted. [p. 270, col. 2.]

Under the Madras Estates Land Act not all shrotriendars and inamdars are landholders but only those who at the time of the grant did not own the kudivaram, in other words, the share of a tenant with a right of occupancy. [p. 269, col. 2.]

The question whether a grant was of the melvaram only to a person not owning the kudivaram within the meaning of s. 3 (2) (d) of the Madras Estates Land Act is a mixed question of fact and law. [p. 270, col. 1.]

Petition, under s. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif, Madanapalli, dated the 25th June 1923, in S. C. S. Nos. 721, 876, 878 and 879 of 1920.

Mr. V. C. Seshachariar, for the Petitioner.

Mr. N. S. Rangasami Iyengar, for the Respondent.

JUDGMENT.—These civil revision petitions raise a question of jurisdiction. The connected suits were brought by a shrotriendar to recover rent for Faslis 1327, 1328 and 1329 and were filed in the District Munsif's Court of Madanapalli. The defendants, who are the petitioners in the High Court contend that these suits, being suits brought by a land-holder of an estate to recover arrears of rent, are exclusively cognizable by a Revenue Court. Under Act VIII of 1865, s. 1, shrotriendars fell under the category of "land-holders" and could proceed against their tenants before the Collectors for recovery of rent provided that they had taken written leases or *muchalikkas* from them, but they might also be the tenants of a superior landlord [*vide Rama v. Venkatachalam* (1) and *Suryanarayana v. Appa Rau* (2).] Under s. 87 suits for arrears of rent could also be instituted in Civil Courts. Under Act I of 1908, not all shrotriendars and inamdars are landholders, but only those who at the time of the grant did not own the kudivaram, in other words, the share of a tenant with a right of occupancy.

(1) 8 M. 576; 9 Ind. Jur. 460; 3 Ind. Dec. (N. S.) 395.

(2) 16 M. 40; 2 M. L. J. 249; 5 Ind. Dec. (N. S.) 736.

Under s. 189 the jurisdiction of Civil Courts to try suits by land-holders to recover arrears of rent is taken away. After this Court's order of remand the District Munsif has now found on re-consideration that the suits are cognizable by his Court and he has granted decrees to the plaintiff. In revision the question of jurisdiction of the Civil Court is again mooted in this Court. The District Munsif found upon such evidence as the parties produced before him that the original grant was not shown to be a grant of the *melvaram* only. He should have added "to a person not owning the *kudivaram*." I am not satisfied, after hearing arguments, that this finding which is a mixed one of law and fact is wrong and should not stand.

The plaintiff has acquired by purchase the rights of certain *vrittidars* or sharers in the village of Shrotriem Chinnarao Kottapalli alias Mahal. The original grant which was made 400 or 500 years ago, is not available. But we know from Ex. 9 that at the time of the Inam Settlement in 1865, the village was divided into 30 *vrittis* and was then under the management of Government, that under the grant half of the revenue went to the *shrotriemdars* and the other half to Government, that the *vrittidars* were in possession of their *vrittis* and shares and that there was then no cultivable waste land but that much of the land had been encroached upon by the river and covered with tombs of Muhammadans. The plaint speaks of "cultivating tenants" and the written statement alleges that the *shrotriemdars* sold away their lands long ago and gave possession to the *raiya*s. Exhibits D, BB, CC, and DD are specimens of such sale-deeds. The plaintiff's sale-deed (Ex. C) mentions that the land was in the vendor's possession and enjoyment with independent rights. It may be that at the present time the *shrotriemdars* have only the *melvaram* right, but for the purpose of jurisdiction it has to be decided whether at the time of the grant they had not the *kudivaram* right also. In the words of the Judicial Committee in *Suryanarana v. Patanna* (3) is it "proved or is there any evidence to suggest that at the time of the grant there were any tenants in the village

holding lands with any right of occupancy by custom or otherwise."

The evidence rather suggests that originally the *shrotriemaars* or *vrittidars* were themselves in possession with powers of alienation which they were exercising. At any rate it may be confidently said that it has not been shown in this case that the *kudivaram* interest was at the time of the grant in the hands of someone else than the donees. If the *shrotriemdars* were originally the *kudivaramdars* and the *melvaram* also was granted to them, but they divested themselves of the *kudivaram* right, the village is not an estate, for on a proper construction of s. 3 (2) (d), the words "to a person not owning the *kudivaram* thereof" evidently refer to the time when the *inam* was granted (cf. page 52 of Mr. V. Ramadoss' Commentary on this Act).

The District Munsif, therefore, had jurisdiction to try these suits. The Civil Revision Petitions are dismissed with costs.

V. N. V.

Petition dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS PETITION No. 17 OF 1924.

July 18, 1924.

Present:—Mr. Baker, J. C.

JAGESHWAR TUKARAM—DEFENDANT
No. 1—APPLICANT

versus

PANDURANG—PLAINTIFF—NON-APPLICANT.

Civil Procedure Code (Act V of 1908), s. 110—Leave to appeal to Privy Council—Substantial question of law—Sufficiency of evidence to prove custom—Difference of opinion.

Although the question whether the evidence produced to establish a custom is sufficient is a question of law, it is not a substantial question of law within the meaning of s. 110 of the C. P. C., i. e., a question of law in respect of which there may be a difference of opinion. [p. 271, col. 2.]

Gokal Chand v. Sanwal Das, 78 Ind. Cas. 417; 5 L. 260; 6 L. L. J. 180; (1924) A. I. R. (L.) 473, *Parshotam Saran v. Hargu Lal*, 63 Ind. Cas. 837; 19 A. L. J. 462; 43 A. 513, referred to.

Application for leave to appeal to the Privy Council against a decree of the

(3) 48 Ind. Cas. 689; 41 M. 1012 at p. 1020; 25 M. L. T. 30; (1918) M. W. N. 859; 23 C. W. N. 273; 9 L. W. 126; 29 C. L. J. 153; 1 U. P. L. R. (P. C.) 11; 36 M. L. J. 585; 21 Bom. L. R. 547; (1919) M. W. N. 463; 45 I. A. 209 (P. C.).

Judicial Commissioner's Court, Nagpur, in First Appeal No. 88 of 1922, dated 26th November 1923.

Mr. W. H. Dhabe, for the Applicant.

Mr. A. D. Mande, for the Non-Applicant.

ORDER.—This is an application for leave to appeal to the Privy Council against the judgment and decree of a Bench of this Court, confirming the decree of the lower Court in First Appeal No. 85 of 1922, decided on 26th November 1923.

It is admitted that the value of the property in suit is above Rs. 10,000, but as the decree appealed from affirms the decision of the Court below the appeal must under s. 110 of the C. P. C. involve some substantial question of law.

The application is opposed.

The appeal out of which this application arises was from the decree in a suit in which the non-applicant Pandurang sued his father (the applicant) Jageshwar and others for partition of his share in the property of the joint Hindu family of which they were members.

The plea raised by Jageshwar was a peculiar one. He had been adopted by his mother's father Tukaram, from whom he inherited the property in dispute. He contended that the adoption was invalid, as the adoption of a daughter's son is expressly forbidden by the Mitakshara, and as his first wife belonged to the same *gotra*, as his natural father, his marriage was not legal and his son the plaintiff is illegitimate.

On behalf of the plaintiff it was contended that in the Maharashtra Brahmin community of Nagpur the prohibition, under the Hindu Law, of the adoption of a daughter's son or sister's son has been abolished by custom. It was held by this Court that the custom had been proved.

It is contended on behalf of the present applicant that the question of whether the evidence is sufficient to prove a custom contrary to the Hindu Law is one of great importance and should be determined by the highest Tribunal.

If this was the only point in the case we are of opinion that it would not amount to a substantial question of law within the meaning of s. 110 of the C. P. C. It was recently held by the Lahore High Court in *Gokal Chand v. Sanwal Das* (1), where the question was of a custom of pre-emption in

(1) 78 Ind. Cas. 417; 5 L. 260; 6 L. L. J. 180; (1924) A. L. R. (L.) 473.

the city of Delhi, that although the question whether the evidence produced to establish a custom is sufficient is a question of law, it is not a substantial question of law within the meaning of s. 110 of the C. P. C., i. e., a question of law in respect of which there may be a difference of opinion. This case follows a recent case of the Allahabad High Court, *Faisholam Saran v. Hargu Lal* (2). If, therefore, the only question in this case were whether the evidence produced to establish the custom of the adoption of a daughter's son in the city of Nagpur amongst the class to which the parties belong was sufficient, we should not be justified in holding that that amounted to a substantial question of law within the meaning of s. 110 of the C. P. C.

There are, however, other points in the case. It was held by this Court that even supposing the adoption to be invalid, Jageshwar could not claim to have acquired, merely by possession, an interest in the property of his adoptive father different from that which he would have taken if the property had rightly passed to him as the son and heir of the adoptive father. This view, which is based on the English case of *Dalton v. Fitzgerald* (3) cited by the Madras High Court in *Appa Rao v. Gopala Rao* (4), was with reference to the appellant's contention that if the adoption was invalid he must be regarded as being in possession of the property of Tukaram, the alleged adoptive father, as a trespasser, and hence he was his property self-acquired by adverse possession.

Another question of adverse possession also arose. It was held that the plaintiff Pandurang at his birth came into actual possession of his father Jageshwar's undivided half share in the whole of the property which was subsequently reduced to a third share on the birth of his half brother, and that even if the property could be regarded as self-acquired property of his father Jageshwar the plaintiff would still be in adverse possession as a tenant-in-common of an undivided third share in the property for more than the statutory period, and he was entitled to claim partition of that share. This view has been attacked in the grounds of appeal to the Privy Council, it being argued that no question of adverse posses-

(2) 63 Ind. Cas. 837; 19 A. L. J. 462; 43 A. 513.

(3) (1897) 2 Ch. 86 at p. 93; 66 L. J. Ch. 604; 76 L. T. 700; 45 W. R. 685.

(4) 18 M. L. J. 409; 4 M. L. T. 5; 31 M. 321.

sion arises. This, in our opinion, is a question of law in respect of which there may be a difference of opinion, and it, therefore, fulfils the conditions laid down as to what constitutes a substantial question of law in the cases, above quoted, of the Lahore and Allahabad High Courts.

We are, therefore, of opinion that a certificate should be granted and it is granted accordingly.

G. R. D.

Certificate granted.

ODDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 41 OF 1924.

July 22, 1925.

Present:—Nr. Simpson, A. J. C.

DEBI CHARAN—PLAINTIFF—APPLICANT

versus

Musammatt DEO MUKHI WIFE OF RAM

NARAIN—DEFENDANT—OPPOSITE

PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. IX, r. 13—Ex parte decree—Application by one of several defendants to set aside decree—Decree, whether can be set aside as against all defendants—Revision—Interference by High Court.

The general rule is that an *ex parte* decree should be set aside only as against the party making an application to set aside the decree. Under the proviso to r. 13 of O. IX of the C. P. C., however, the Court has power in a case in which the decree is of such a nature that it cannot be set aside against the applicant only, to set it aside against all or any of the other defendants also. Where a Court acting under this proviso sets aside an *ex parte* decree not only against the defendant applying to set it aside but as against all the defendants, the High Court will not interfere with the order in revision. [p. 272, col. 2.]

Where a person alleging himself to be the representative of a mortgagee obtains a decree for foreclosure as against the mortgagor and also against a rival claimant to the mortgagee right, the decree against the latter being *ex parte*, and the decree is set aside at the instance of the latter, it should also be set aside as against the mortgagor, inasmuch as if the decree is allowed to stand as against the mortgagor but is set aside as against the rival claimant, this might result in the mortgagor being compelled to pay the amount of the mortgage twice over. [p. 273, col. 1.]

Application for revision against the judgment and decree of the Munsif, Safipur at Unao, dated the 25th January 1924.

Mr. Moti Lal Saksena, for the Appellant.

Mr. S. Roy, for the Opposite Party.

ORDER.—This is an application under s. 115 of the C. P. C. for revision. The

applicants were plaintiffs in a suit for foreclosure. They sued as heirs of Ram Adhar, the mortgagee. The contesting defendants made it one of their chief pleas that Ram Adhar had left three daughters, who were his heirs, and consequently the plaintiffs had no right to sue. With the consent of the plaintiffs, these three daughters were impleaded as defendants No. 9, 10 and 11. They put in no appearance, and a decree was passed which was *ex parte* as regards them. A principal issue had been directed to a custom of exclusion of daughters from inheritance, and this was decided against the daughters. Plaintiffs and defendant No. 7, (who was co-plaintiff impleaded as a defendant) obtained a decree for foreclosure against defendants Nos. 1, 2, 3, 9, 10 and 11. The meaning of this decree is that the decree-holders are entitled to foreclose the property now in the possession of the defendants Nos. 1, 2, and 3, and that defendants Nos. 9, 10 and 11 are barred from contesting the rights of the decree-holders to be the true representatives of the mortgagee. It will be seen that it is a decree against the defendants Nos. 9, 10 and 11 also, although the decree-holders cannot foreclose any property of theirs. This decree was passed on 28th September 1923. Nearly three months later, on 19th December 1923, the defendant No. 10 put in an application under O. IX, r. 13. She satisfied the Court that the summons had not been duly served on any of the defendants Nos. 9, 10 and 11, and she claimed to have the *ex parte* decree set aside. The decree-holders were notified. Their Pleader stated: "I oppose the application, but I agree that the decree so far as it affects the rights of the applicant be set aside." This admission is of importance with regard to the present application. I am not prepared to hear these decree-holders in revision upon any point which they gave up in the Court below. Accordingly, their first point that the application was beyond time cannot be raised now. On the face of it the application was within time, for it sets forth that the applicant did not come to know of the decree till 24th November 1923. The second point is that the applicant was not entitled to apply under O. IX, r. 13, because she was only a *pro forma* defendant, and there was no decree against her. In the face of the admission I refuse to take up this point either. Lastly, it is said that the decree ought not to have been set aside in

its entirety. It will be remembered that the decree-holders acquiesced in the decree being set aside, so far as it regarded defendant No. 10 but the Court went further and set the decree aside altogether. Order IX, r. 13, lays down that the decree is to be set aside as against the applicant. That is the general rule. The rule, however, contains a proviso that where the decree is of such a nature that it cannot be set aside against such defendant only, it may be set aside against all or any of the other defendants also. The learned Munsif has acted under the proviso. He had power to do so. I should feel reluctant in proceedings in revision to interfere with such an order. But I am further of opinion that his decision was right. It would produce an awkward state of things if the applicants were allowed to hold a decree for foreclosure, valid against the mortgagor, but not valid against a rival claimant of the mortgagee right. The mortgagor might be made to pay twice over. For these reasons, this application in revision is dismissed with costs.

Z. K.

Application dismissed.

PATNA HIGH COURT.

APPEALS FROM APPELLATE DECREES Nos.
44 to 49 of 1923.

April 15, 1925.

Present:—Mr. Justice Kulwant Sahay.

Lala CHAKAURI LAL—PLAINTIFF—
APPELLANT

versus

DEO CHAND MAHTON AND OTHERS—
DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 48, 49—Ejectment of under-raiyat—Occupancy rights, acquisition of—Custom, proof of—Long occupation and planting of trees, whether sufficient to prove custom.

A custom must be established independently of and apart from the case in dispute. [p. 274, col. 1.]

The mere fact that an under-raiyat has occupied certain lands for over 40 years and has planted trees upon portions of the land and has been granted printed receipts by the landlord is not sufficient in law to establish a custom whereby the under-raiyat becomes entitled to occupancy rights in the land. [ibid.]

Appeals from a decision of the District Judge, Shahabad, dated the 14th December 1923, reversing that of the Munsif, Arrah, dated the 29th March 1922.

Messrs. Rai G. S. Prasad and Anand Prasad, for the Appellant.

Messrs. Ramanugrah Narain Sinha and N. S. Rai, for the Respondents.

JUDGMENT.—These are appeals by the plaintiff and arise out of suits in ejectment upon a declaration that the defendants are under-raiyats of the plaintiff who is an occupancy tenant of the land in dispute. The plaintiff served notice upon the defendants under s. 49 of the Bengal Tenancy Act asking them to give up possession, but they have failed to vacate the land. The plaintiff, therefore, brought the present suits for recovery of possession. The defence was that the land in dispute was the *gujasta kasht* of the ancestors of the defendants and that the plaintiff was a tenure-holder and not an occupancy tenant. The defendants assert that they are not *sikmidars* or under-raiyats of the plaintiff, and, therefore, are not liable to ejectment.

The Munsif found that the plaintiff was an occupancy tenant and the defendants were under-raiyats under him, and that the land in dispute was not the *kasht gujasta* of the defendants, and that the plaintiff was not the tenure-holder. It was further stated by the defendants in their written statement that even as under-raiyats they had by custom acquired the right of occupancy in the land. The learned Munsif in dealing with this point observed that no evidence had been adduced about such a custom and that the defendants had failed to prove that they had acquired occupancy right in the land in suit. He, therefore, made a decree in the plaintiff's favour and awarded mesne profits to the extent of $\frac{2}{3}$ rds of what the plaintiff claimed.

On appeal by the defendants the learned District Judge has upheld the findings of the Munsif as regards the title of the plaintiff. He is of opinion that the Munsif was right in his finding regarding the status of the parties, namely, the status of the plaintiff being that of an occupancy tenant and that of the defendants being under-raiyats. The learned District Judge, however, has come to the conclusion that as under-raiyats the defendants have acquired a right of occupancy in the land in dispute. With reference to the observation of the Munsif that no evidence had been produced to prove the custom set up by the defendants the learned Judge says that this is so and having regard to the nature of the case made by the defendants, namely, that they were occupancy tenants and not under-raiyats of the land in dispute no such evi-

dence could be expected on their behalf. The learned District Judge has, however, considered the fact that the defendants, who are nine in number, assert that they possess occupancy rights and he says that if the assertion of all these tenants regarding their possession of occupancy rights is accepted, then the usage in question, namely, the usage under which the under-raiyats acquire the right of occupancy is established. He refers to the evidence of the defendants themselves to the effect that occupancy rights have accrued to them by virtue of their long possession and by virtue of the fact that some of them have planted trees upon the holding and by virtue of the fact that the plaintiff has been in the habit of granting them printed receipts. These three facts are, in the opinion of the learned Judge, sufficient to establish a custom under which *sikmi* tenants or under-raiyats acquire the right of occupancy in a land. He refers further to the fact that the defendants and their ancestors have been in possession for periods varying from over 40 to 50 years and that the holding in question had been handed down from father to son. In my opinion the facts found by the learned District Judge are not sufficient in law to establish a custom of under-raiyats acquiring occupancy rights in the village. The nine cases referred to by the District Judge are cases in dispute and they by themselves cannot go to establish a custom. A custom must be established independently of and apart from the cases in dispute. Admittedly there is no other evidence in this case to prove such a custom; and, in my opinion, in the absence of such evidence the mere fact of the defendants having occupied the lands in dispute in the present cases for over 40 years and the fact of their having planted trees upon portions of the land and of their being granted printed receipts would not establish in law a custom as set up by the defendants.

In my opinion the decision of the learned District Judge cannot be supported and must be set aside and the decree of the Munsif restored. These appeals are, therefore, allowed with costs here and in the Court below. Hearing fee in this Court will be assessed in each case at half the usual rate.

Z. K.

Appeal allowed.

ALLAHABAD HIGH COURT.
EXECUTION FIRST CIVIL APPEAL No. 421 of 1924.

July 1, 1925.

Present:—Mr. Justice Lindsay and
Mr. Justice Sulaiman.

Musammât BEGAM SULTAN—
DECREE-HOLDER—APPELLANT

versus

Musammât SARVI BEGAM—
JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 48, application of—Execution of decree—Decree passed before operation of Code—Limitation Act (IX of 1908), Sch. I, Art. 182—Decree for sale—Properties situated in different Districts—Transfer certificate, application for—Step-in-aid of execution.

The Law of Limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding, unless there is a distinct provision to the contrary. [p. 275, col. 2.]

Soni Ram v. Kanhaiya Lal, 19 Ind. Cas. 291; 35 A. 227; 13 M. L.T. 437; 17 C. W. 605; 11 A.L.J. 389; (1913) M. W. N. 470; 17 C. L. J. 483; 15 Bom. L.R. 489; 25 M. L. J. 131; 40 I. A. 74 (P. C.), dissented from.

Kosilla v. Ishri Singh, 6 Ind. Cas. 188; 7 A. L. J. 420; 32 A. 499, relied on.

Section 48 of the C. P. C. of 1908 prescribing a period of 12 years for execution of a decree applies to an execution application made after the operation of the said Code, notwithstanding that the decree itself was passed under the old Code of 1882, wherein there was no such bar of 12 years. [*ibid.*]

In the case of a decree for sale of two sets of properties situated in different districts, an application for grant of a certificate of transfer of the decree from one district to the other cannot operate to save limitation in respect of an application for execution relating to the properties in the other district. [p. 276, col. 1.]

Execution first appeal from a decree of the Subordinate Judge, Meerut, dated the 10th May 1924.

Mr. Panna Lal, for the Appellant.

Dr. K. N. Katju, for the Respondent.

JUDGMENT.—This is a decree-holder's appeal arising out of an execution matter. The respondents took the objection, *inter alia*, that the application for execution was barred by the three years' rule under Art. 182 of the Limitation Act as well as by the 12 years' rule under s. 48 of the C. P. C.

The objection is based on the following circumstances:—A decree for sale was obtained against two sets of properties situated in Bulandshahr and Meerut in the year 1907. Before the final decree was passed part of the property situated in the Meerut District was sold at an auction and purchased by Sarvi Begam on the 25th of March 1908. An order absolute under the old Code was passed on the 10th of August 1908. Sarvi Begam, the purchaser, was, however, not impleaded till then. Subse-

quently Sarvi Begam made a gift of a portion of her interest in favour of Taimur Ali Shah sometime in the year 1325 *Fasli* corresponding to 1918.

The decree-holder first proceeded to execute his decree in respect of the properties situated in Bulandshahr. These execution proceedings went on for several years and part of the decretal amount was realized by sale of the properties situated in that district. Ultimately on the 13th of October 1922 the decree-holder put in an application, which, however, is not on the record of this case, for execution, or rather for grant of a certificate of transfer of the decree to the District of Meerut. On the 22nd of December 1922 a certificate was granted and the decree was ordered to be transferred to the Court of the Subordinate Judge at Meerut. When the case went to the Meerut Court the present application for execution was made on the 10th of January 1923. Objection was raised by Sarvi Begam that, the present application, not having been made within three years of the last application for execution or any step-in-aid of execution as against her, was barred, and further that the decree being more than 12 years old the application was not maintainable.

The learned Subordinate Judge has disallowed the objection so far as the bar of the 12 years' rule is concerned, but has entertained the other objection and dismissed the application.

The decree-holder comes in appeal and on her behalf it is contended that there can be no bar of three years' rule inasmuch as execution proceedings were going on against persons interested in the other part of the mortgaged properties which were jointly liable for the mortgage-debt. In the view which we have taken of the other point it is not necessary to go into this matter.

It is clear to us that the present application is barred under the provisions of s. 48 of the C. P. C. The learned Subordinate Judge, who disallowed the objection relied on the case of *Konsilla v. Ishri Singh* (1). That case was certainly in favour of the view which he took but for reasons which we proceed to mention that authority is now no longer binding on us.

It cannot be doubted that although the decree was passed at a time when the old C. P. C. was in force the application for

execution of it is made at a time when the new Code is in force. The law of procedure and limitation applicable to an application for execution would be the law actually in force at the time when the application is made. This application is undoubtedly under O. XXI, r. 11 of the new Code and there seems to be no good ground for holding that s. 48, which is a part of that very Code, is inapplicable to this application.

The argument on behalf of the appellant is that as the decree was passed under the old Code, the decree-holder acquired a vested right to apply for execution and that inasmuch as under the old Code there was no such bar of 12 years his right is in no way affected by the coming into force of the new Code. This contention cannot be accepted. The new Code did not in any way affect his right to execute the decree which he had obtained. It has in no way curtailed his right; it has merely placed a bar of limitation as to the period of time during which he can apply. There was no vested right in the decree-holder to wait for an indefinite period of time in order to apply for execution. The learned Judges, who decided the case above mentioned were led away by the supposition that the decree-holder acquires a vested right not only to apply for execution but also in the period within which he can apply. Their attention was not drawn to an earlier case of this Court reported in the same volume at page 33 * [*Shah Shankar Lal v. Soni Ram* (2)] where a Bench of this Court pointed out at page 43*, that the Law of Limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding unless there is a distinct provision to the contrary. This view was affirmed by their Lordships of the Privy Council in a case between the same parties reported as *Soni Ram v. Kanhaiya Lal* (3). Their Lordships accepted the view expressed by this Court and held that the law of limitation applicable to a suit or proceedings is the law in force at the date of the institution of the suit or proceedings unless there is a distinct provision to the contrary. In view of this authoritative pronouncement we are no longer bound by

(2) 3 Ind. Cas. 725; 32 A. 33; 6 A. L. J. 931; 6 M. L. T. 348.

(3) 19 Ind. Cas. 291; 35 A. 227; 13 M. L. T. 437; 17 C. W. N. 605; 11 A. L. J. 349; (1913) M. W. N. 470; 17 C. L. J. 488; 15 Bom. L. R. 489; 25 M. L. J. 131; 40 I. A. 74 (P. C.).

*Pages of 32 A. 33,--[Ed.]

(1) 6 Ind. Cas. 188; 32 A. 499; 7 A. L. J. 420.

the views expressed in the case of *Konsilla v. Ishri Singh* (1). We may further point out that this view has been accepted by the High Courts at Calcutta, Bombay and Patna; *vide Bisseshur Sonamat v. Jasoda Lal* (4), *Gopaldas Ganpatdas v. Tribhoran Jethiram* (5) and *Krishna Dayal v. Gir Sakina Bibi* (6).

The next argument advanced on behalf of the appellant is that the present application is not a fresh application for execution at all but that it is really a continuation of the execution proceedings which had been started by the application of the 13th of October 1922, and inasmuch as that application was within 12 years the present application being a mere continuation of it is not barred. This argument also has no force. The previous application for grant of a certificate was not an application in the nature of an execution and, therefore, the present application for execution cannot be deemed to be a continuation of it. The execution proceedings pending in the Bulandshahr District related to property situated in that District and could not relate to the property in the Meerut District. The prayer in the present application is for sale of other properties situated in Meerut. That such an application for execution is not a continuation of the original application for grant of certificate of transfer is well settled by the authorities of this Court. We may refer in this connection to the cases of *Sundar Singh v. Doru Shankar* (7) and *Khetpal v. Tikam Singh* (8).

We accordingly affirm the decree of the Court below and dismiss this appeal with costs including in this Court fees on the higher scale.

N. H. *Appeal dismissed.*

(4) 19 Ind. Cas. 391; 40 C. 704; 17 C. W. N. 622.

(5) 59 Ind. Cas. 790; 45 B. 365; 22 Bom. L. R. 1420.

(6) 34 Ind. Cas. 27; 1 P. L. J. 214; 20 C. W. N. 952; 2 P. L. W. 370.

(7) 20 A. 78; A. W. N. (1897) 168; 9 Ind. Dec. (N. S.) 409.

(8) 14 Ind. Cas. 172; 34 A. 396; 9 A. L. J. 335.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 75 OF 1924.

April 6, 1925.

Present :—Justice Sir B. K. Mullick, Kt.,
and Mr. Justice Ross.

Tikait GAYAN NATH SAHI AND
ANOTHER—APPELLANTS

versus

Pandit MALHIJI VAIDYA AND OTHERS—
RESPONDENTS.

Hindu Law—Son's liability to pay father's debt—
Antecedent debt—Res judicata in execution proceedings.

Under Hindu Law a son is bound to satisfy the debts of his father out of the ancestral property provided they are neither illegal nor immoral and a son cannot avoid this liability on the ground that there was no necessity for borrowing or that the transactions were reckless and extravagant in that the money could have been borrowed at a cheaper rate of interest. [p. 277, col. 2.]

Case-law referred to.

The sons are liable not only to pay their fathers' debt upon a mortgage but also the interest due thereon. [p. 278, col. 1.]

Lachman Das v. Khunnu Lal, 19 A. 26; A. W. N. (1896) 183; 9 Ind. Dec. (N. S.) 17, followed.

A person who holds a mortgage decree against a deceased Hindu has two remedies open to him. He may either bring a fresh suit for enforcement of his charge against the interest of the sons in the property or he may seek out execution against the property of the deceased in the hand of the sons and leave it to them to take whatever objections they choose to take. [p. 277, col. 2.]

Case-law referred to.

The principle of *res judicata* applicable to suits upon a party's failure to raise an issue which he might have raised, is not applicable to execution cases. [p. 278, col. 2.]

Obiter.—The doctrine of "antecedent debt" is a compromise between the rule that the father cannot alienate ancestral property for his own purposes and the rule that the son is under a pious obligation to discharge his father's debts. [p. 277, col. 2; p. 278, col. 1.]

Appeal from an order of the Subordinate Judge, Daltonganj, dated the 24th March 1924.

Messrs. R. C. Bhaduri and C. S. Banerji,
for the Appellants.

Mr. S. Saran, for the Respondents.

JUDGMENT.

Mullick, J.—The facts out of which this appeal arises seem to be as follows. In or about 1314 F.s. Tikait Koshalesh Nath Sahi Deo, the father of the appellants Tikait Gyan Nath Sahi and Pertap Nath Sahi became liable for a sum of Rs. 15,000 to one Hiramba Nath Banerji of Benares under a decree with the result that his ancestral properties were brought to sale in execution. The debtor thereupon on the 8th November 1913 borrowed Rs. 20,000 from the respondent Pandit Malhiji Vaidya by a mortgage of the ancestral joint family property and got the sale set aside. The appellants who were born after the mortgage were not parties to the transaction, although it appears that they were at that time members of the joint family. Whether the debtor's brother Dina Nath Sahi was also a member of the joint family is not clear.

Thereafter the debtor borrowed more money from the respondent and having defaulted in the payment of the same as well as the interest for two years upon the mortgage, a suit was brought against him

by the mortgagee in 1915 and on the 29th January 1917 a decree was obtained for a sum of Rs. 9,162-4-0. Neither the brother Dina Nath Sahi nor the two sons of the debtor were parties to this decree. Execution was taken out against the debtor in the Court of the Subordinate Judge of Daltonganj; but the case, which was registered as No. 45 of 1917, was struck off on the 8th March 1918 without any realisation being made. The second execution case was registered as Case No. 7 of 1919 and the debtor having died Dina Nath Sahi, Pertap Nath Sahi and Gyan Nath Sahi were impleaded in it as his representatives. That case was dismissed on the 30th March 1920.

An appeal was taken against the order to the High Court and on the 28th May, 1923 it was ordered by that Court that the name of Dina Nath Sahi should be struck off the record as a party to the execution and that the execution should proceed against the mortgagor's two sons who had raised no objection to the execution proceedings.

The present execution case, which has been registered as No. 106 of 1923, was filed on the 4th August 1923 against the two minor sons, who preferred an objection on the 22nd December 1923 denying their liability for the decretal amount and objecting to the valuation put upon the properties. That objection was disposed of on the 24th March, 1924, it being held by the Deputy Magistrate Subordinate Judge that as the debts were neither illegal nor immoral the objectors were under a pious obligation to pay them.

Against this decision the present appeal was filed on the 24th April 1924.

In the meantime the execution proceedings continued. On the 24th March 1924 an order was made for the issue of sale proclamations fixing the 15th May 1924. On the 14th May 1924 an objection was filed contesting the valuation of the properties. The Court held that the objection was made too late and on the 21st May the sale was completed and the decree-holder with the permission of the Court was declared to be the purchaser for a total sum of Rs. 7,610. In consequence of the present appeal it does not appear that the sale has yet been confirmed.

It is to be noticed at the outset that Dina Nath Sahi is not a party to the present execution proceeding and we are not

concerned to inquire what will be the rights of the auction-purchaser against him. All that we are concerned with in the present appeal is to see whether the appellants by reason of their not having been parties to the mortgage-decree of the 29th January 1917, are entitled in the execution proceedings to deny liability.

If their father was sued in a representative capacity, then they are certainly bound. If he was not sued in a representative capacity, then by reason of the doctrine of pious obligation they are bound to satisfy the decree provided it was not for an illegal or immoral debt. The creditor might have brought a fresh suit for the enforcement of his charge against their interest in the property or he might have, as he has done in the present case, left it to them to take whatever objections they chose in the execution proceedings. This has been settled by a long series of cases of which it is necessary only to cite the following: *Suraj Bansi Koer v. Sheo Persad Singh* (1), *Luchman Das v. Giridhur Chowdhry* (2), *Hira Lal Sahu v. Parmeshar Rai* (3), *Lal Singh v. Pulandar Singh* (4), *Chander Pershad v. Sham Koer* (5), *Ran Singh v. Sobha Ram* (6), *Amar Chandra Kundu v. Sebak Chand Chowdhury* (7), *Kishun Pershad Chowdhry v. Tipan Pershad Singh* (8), *Indar Pal v. Imperial Bank* (9), *Kuldip Sahay v. Rambhujhawan Mahto* (10). This last named authority which is a recent judgment of this Court clearly lays down that if the sons and the grandsons of the mortgagor cannot show the debt to be illegal or immoral they are bound to satisfy the claim out of the ancestral properties in their hands. It further decides that it is not sufficient to show that the transaction was extravagant or reckless or that the money might have been got at a cheaper rate of interest. Indeed as the doctrine of antecedent debt

(1) 5 C. 148; 6 I. A. 88; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 4 C. L. R. 226; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705 (P. C.).

(2) 5 C. 856; 6 C. L. R. 473; 3 Shome L. R. 143; 2 Ind. Dec. (N. S.) 1152 (P. C.).

(3) 21 A. 356; A. W. N. (1899) 100; 9 Ind. Dec. (N. S.) 936.

(4) 28 A. 182; 2 A. L. J. 647; A. W. N. (1905) 248.

(5) 33 C. 676; 3 C. L. J. 131.

(6) 29 A. 544; A. W. N. (1907) 159; 4 A. L. J. 424.

(7) 31 C. 642; 11 O. W. N. 593; 5 C. L. J. 491; 2 M. L. T. 207.

(8) 34 C. 735; 11 O. W. N. 613; 5 C. L. J. 569.

(9) 28 Ind. Cas. 593; 37 A. 214; 13 A. L. J. 211.

(10) 83 Ind. Cas. 385; 5 P. L. T. 115; 3 Pat. 425; (1924) A. I. R. (Pat.) 454.

is a compromise between the rule that the father cannot alienate ancestral property for his own purposes and the rule that the son is under a pious obligation to discharge his father's debts, it is difficult to see how any objection could be taken by the sons on the ground that the interest was excessive. He might perhaps take an objection that the stipulation for interest was in the nature of a penalty ; but that is not the case before us here.

It is contended before us now that the appellant should have been permitted to show that there was no necessity for the debt covered by the decree of 1917. It appears that this debt was composed of a sum of Rs. 5,348 on account of interest for two years and Rs. 3,204-10-7 for a loan taken to pay *mukarrari* rent on certain properties and the interest thereupon. How a mortgage decree was passed with regard to the latter loan is not known ; but we have to take the decree under execution as it stands and it is clearly a mortgage decree and as no appeal was made against it, the decree must be executed as a mortgage decree.

It is open to the appellants to show that Heramba Nath's debt was for an immoral consideration but this they did not do. They have confined their attack to the sum of Rs. 5,000 left over out of the Rs. 20,000 borrowed from the respondent after Heramba had been paid off.

Secondly, it is open to the appellants to take the ground that the sum of Rs. 3,000 odd borrowed for paying *mukarrari* rent was not in fact borrowed ; but it is not open to them to show that there was no necessity for the borrowing.

Thirdly, it is open to them to contend that the sum of Rs. 5,348 on account of interest on the respondents' bond was not in fact due ; but it is not open to them to contend that the rate of interest was too high and that it was not necessary to borrow at this rate from the respondents in order to pay off Heramba Nath Banerji's decretal amount.

The appellants have failed to give any evidence in support of the last two grounds. But it is contended before us that the sons are liable to pay the father's debt upon the mortgage but not the interest thereupon. This position cannot be maintained in view of the Full Bench decision in the Allahabad High Court in *Lachman Das v. Khunnu Lal* (11).

Turning now to the evidence adduced in the case, I can find nothing to indicate that the debt incurred to Hiramamba Nath Banerji was illegal or immoral ; therefore, in regard to the respondent's mortgage the sum of Rs. 15,000 which went to pay off Hiramamba Nath Banerji, cannot be challenged. There remains a sum of Rs. 5,000 which is said to have been spent by Koshalesh Nath Sahi, on liquor and women. Three witnesses were called to prove this ; but I agree with the Subordinate Judge that their evidence cannot be accepted because they are all interested persons and their statements are of the vaguest kind. They cannot give any details showing what particular sums were spent by Koshalesh Nath Sahi on dancing girls nor can they fix the times and the places for this expenditure.

The result, therefore, is that the objection that the appellants are not liable for the judgment-debt has been rightly dismissed.

With regard to the objection made on the day before the sale repeating in part the objection taken on the 22nd December 1923 as regards the valuation of the properties, no appeal lies against the order of the Subordinate Judge declining to re-open the valuation. If the appellants have any grievance, it may be open to them to have the sale set aside on the ground of material irregularity in publishing the sale notifications and consequent inadequacy of price.

A point has been taken as to *res judicata*. It was argued that as in the last execution the appellants did not take the point that they were not liable for the debt they cannot take it in the present execution. The answer to this is that the former execution was dismissed for default. There was no adjudication which could even by implication be held to constitute a decision adverse to the appellants. In my opinion the principle, which is applicable to suits upon a party's failure to raise an issue, which he might have raised, is not applicable to execution cases ; but even if it were, the final order in the last execution case was made not in consequence of the conduct of the appellants but in spite of it. The doctrine of *res judicata* does not apply.

The result, therefore, is that the appeal is dismissed with costs.

Ross, J.—I agree.

S. D.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 133 OF 1923.

March 25, 1924.

Present:—Mr. Baker, J. C.

Seth GANESHDAS—PLAINTIFF—
APPELLANT

versus

HARILAL—DEFENDANT—RESPONDENT.

C. P. Tenancy Act (I of 1920), s. 106—Suit for arrears of rent against trespasser—Jurisdiction of Civil and Revenue Courts—Plaintiff, admission of, that defendant is tenant, effect of—Interpretation of Statutes.

An Act by which the jurisdiction of the ordinary Courts of Judicature is taken away must be construed strictly. [p. 280, col. 2.]

Ganpat v. Trimbak, 19 Ind. Cas. 759; 9 N. L. R. 54 and *Prosunno Coomar Paul Chowdhury v. Koylash Chunder Paul Chaudhury*, 8 W. R. 428; B. L. R. Sup. Vol. 759; 2 Ind. Jur. (N. S.) 827, relied on.

The jurisdiction of Additional Munsifs or Subordinate Judges who are Revenue Officers should be strictly confined to suits for arrears of rent under s. 106 of the C. P. Tenancy Act. Such an officer has no jurisdiction to try a suit for rent brought against a defendant who is described as a trespasser. [p. 281, col. 1.]

Where, however, during the pendency of such a suit, the plaintiff admits that the defendant is a tenant the admission converts the suit into one for arrears of rent under s. 106 of the C. P. Tenancy Act and gives a Revenue Officer jurisdiction to try it. The suit must be deemed to have been properly instituted against the defendant on the date of such admission and if this date happens to be after the coming into force of the C. P. Tenancy Act, the arrears can only be recovered for a period of three years. [*ibid.*]

Appeal against a decree of the District Judge, Nimar, dated the 22nd January 1923, in Civil Appeal No. 184 of 1922.

Mr. G. L. Subhedar, for the Appellant.

Mr. J. Sen, for the Respondent.

JUDGMENT.—The facts of this case are simple but raise a difficult point of law. The plaintiff, who is the mortgagee in possession of certain absolute occupancy lands and may be considered as a landlord for the purposes of this case, sued two persons, one alleged to be a tenant and the other a trespasser, for 10 years arrears of rent, under s. 132, Limitation Act.

The suit was brought within one year from the coming into force of the new Tenancy Act and was thus within the exception given by s. 104, cl. (2) of that Act.

The original defendant No. 1 was the absolute occupancy tenant, and defendant No. 2 was joined as his name appeared in the *jamabandis* though plaintiff did not recognize him as tenant. Defendant No. 2, who was nephew of defendant No. 1, claimed to have been a tenant since 1910 under

a transfer from her and tendered the rent from that year, which was refused by plaintiff. Defendant No. 1 claimed to have surrendered her interests to defendant No. 2 and pleaded that she was not liable. The suit was brought in the Court of the Additional Munsif, the Tahsildar, being a suit for rent. That Court held that defendant No. 2 was a tenant from 1968 Sambat and that the rent had been rightly tendered by him. Hence interest was disallowed but the rest of the plaintiff's claim was awarded. On appeal the District Judge, Nimar, held that the suit was bad because defendant No. 2 was not described as a tenant, and no suit would lie against him and so the suit was remanded.

After remand the defendant No. 2 again pleaded that he was a tenant. Defendant No. 1 died three months after the suit was instituted and to save further dispute on 11th April 1922, the plaintiff after remand admitted that the defendant No. 2 was a tenant. The same decree was passed as before but on appeal the District Judge held that the suit was time-barred as regards the arrears of 1968-74, as the suit against defendant No. 2 as tenant must be taken to have been instituted when his tenancy was admitted.

The plaintiff makes a second appeal against this finding.

The period of grace given by s. 104 (2) of the new Tenancy Act had expired by the date the suit was instituted against the present defendant as a tenant; which must be taken to be the date on which plaintiff admitted him to be a tenant. (11th April 1922).

It is contended on behalf of the appellant that the District Judge has overlooked the fact that the plaintiff claimed a charge on the land. The suit was a combined suit against defendant No. 1 for a personal decree and against defendant No. 2 for a charge. No personal decree was claimed against defendant No. 2. As defendant No. 1 was out of possession no decree for sale of the holding would lie against her. The learned Counsel for appellant relies on *Singai Murlidhar v. Lala Premnarin* (1) in which it was held that under the Tenancy Act of 1898 a landlord has two distinct forms of relief for the purposes of recovering rent, viz., (1) a personal remedy against the tenant, based on contract, and

enforceable by a suit for rent as such, which can only be maintained against the tenant and is governed by Art. 110, Limitation Act; and (2) a real remedy in form of a charge, based on the Statute, and enforceable by a suit for sale under the Transfer of Property Act. Such a suit lies against any person who for the time being may have an interest in such land irrespective of any representation of the defaulting tenant. Such a suit is governed by Art. 132 of the Limitation Act.

It is further contended that the learned District Judge has overlooked the fact that the suit was brought in the Court of the Tahsildar, who was Additional Munsif. Although the Civil Courts who are not also Revenue Courts cannot try rent suits, there is no decision that Revenue Officers who are Additional Munsifs have limited jurisdiction.

Plaintiff could only bring the suit in the Court of the Revenue Officer because it was a suit for arrears of rent. If the view of the District Judge was correct the suit against defendant No. 2 was bad and the suit ought not to have been tried by the Tahsildar and the plaint returned for presentation to the proper Court. The defendant No. 2 claimed throughout that he was a tenant and the Court found so.

For the respondent it is contended that both under the old and the new Tenancy Acts the period of limitation for arrears of rent was 3 years and in *Gourishankar v. Laxmanprasad* (2) it was held that a suit to enforce the charge created by s. 43 of the old Tenancy Act is governed by Art. 110 of the Limitation Act. That decision was dissented from in *Singai Murlidhar v. Lala Premnarain* (1) quoted above, but assuming that the limitation applicable was 12 years, defendant No. 2 was treated by the plaintiff as a pure trespasser and so the suit was not one against a tenant. The suit against him should have been dismissed. It was open to the landlord to ratify the transfer and accept defendant No. 2 as a tenant, or refuse to accept him and treat him as a trespasser. Reference is made to *Bijoy Gopal Mukerji v. Krishna Maheshi Debi* (3) quoted in *Bapu v. Temsa* (4).

As the landlord elected to treat defendant

No. 2 as a trespasser, the suit did not lie in the Tahsildar's Court as originally brought and must be deemed to have been brought on the day when the plaintiff admitted that the defendant No. 2 was a tenant.

There was no prayer in the memorandum of appeal that the plaint should be returned for presentation to the proper Court and there are no equities in favour of such a course.

I have given the substance of the arguments at some length, as the case is not without difficulty.

It is necessary to consider the question of the Article of the Limitation Act applicable to a suit for a charge, as to which there are two conflicting decisions of this Court referred to above.

This suit was brought under the new Tenancy Act and under s. 106 of that Act suits for arrears are to be heard by a Judge who is also a Revenue Officer. The suit against defendant No. 2 as originally brought was not a suit for an arrear, as it was expressly denied that he was a tenant. It was held in *Singai Murlidhar v. Lala Premnarain* (1) that a suit for money charged on land is not a suit for arrears of rent. In a properly framed suit the landlord may claim both reliefs in the alternative or as a supplement. Thus a suit against the tenant for arrears of rent may be one, subject to the law of limitation, to obtain a personal decree as well as one for sale of the holding. That decision is under the old law, under which all suits between landlords and tenants had to be tried by Revenue Officers, while under the new Act only suits for arrears are triable. The suit as originally framed against defendant No. 2 not being a suit for arrears was not triable by a Revenue Officer.

In *Ganpat v. Trimbak* (5) it was held that the venue in a case is determined by the nature of the claim as brought. That it is a well known rule of construction that an Act by which the jurisdiction of the ordinary Courts of Judicature is taken away must be construed strictly [*Prosunno Coomar Paul Chowdhury v. Kolash Chunder Paul Chowdhury* (6)] and it is exceedingly doubtful whether when a landlord is sued as an alienee the Legislature intended his

(2) 3 N. L. R. 81.

(3) 34 C. 329; 11 C. W. N. 424; 5 C. L. J. 334; 9 Bom. L. R. 402; 2 M. L. T. 133; 17 M. L. J. 154; 4 A. L. J. 329; 31 I. A. 87 (P. C.).

(4) 13 Ind. Cas. 982; 8 N. L. R. 29 at p. 33.

(5) 19 Ind. Cas. 759; 9 N. L. R. 54.

(6) 8 W. R. 428; B. L. R. Sup. Vol. 759; 2 Ind. Jur. (N. S.) 827.

special position to affect the jurisdiction. It will appear, therefore, that the jurisdiction of Additional Munsifs or Subordinate Judges, who are Revenue Officers should be strictly confined to suits for arrears under s. 106 of the new Tenancy Act. The Tahsildar, therefore, had no jurisdiction to try the suit as originally brought against defendant No. 2.

The plaintiff, however, by admitting that the defendant No. 2 was a tenant converted the suit into one for arrears of rent which gave the Tahsildar jurisdiction. The suit must be deemed to have been properly instituted against defendant No. 2 on the date of that admission which is more than a year after the coming into force of the new Tenancy Act, and, therefore, under the limitation under that Act only 3 years' arrears of rent can be claimed. The question of returning the plaint for presentation to the proper Court does not arise, as the plaint must be considered to have been amended by converting the suit into one for arrears of rent against a tenant.

The view of the lower Appellate Court is, therefore, correct. The appeal is dismissed with costs.

Z. K.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 95
OF 1924.

May 15, 1925.

Present:—Justice Sir Ewart Greaves, Kt.,
and Mr. Justice Mukerji.

NAGENDRA NATH AND OTHERS—

DEFENDANTS—APPELLANTS

versus

JUGAL KISHORE ROY AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), ss. 69, 70—Contribution, suit for—Bona fide claim to property—Person depositing money, if entitled to recover—"Interested in payment of money," meaning of—Implied request, origin of—"Lawful payment," meaning of.

Where payment is made by a person who puts forward a bona fide claim to the property in dispute, he is entitled to the protection afforded under s. 69 of the Contract Act, even though it ultimately transpires, as a result of litigation, that he had no interest for the protection whereof the payment was made. [p. 283, col. 1.]

Bindubashini Dassi v. Harendra Lal Roy, 25 C. 305; 2 C. W. N. 159; 13 Ind. Dec. (N. S.) 205, *Radha Madhub Samanta v. Sasti Ram Sen*, 26 C. 826; 13 Ind. Dec.

(N. S.) 1129, *Sarafat Ali v. Issar Ali*, 12 Ind. Cas. 30; 45 C. 691 at p. 695; 22 C. W. N. 347; 27 C. L. J. 607. *Nobin Krishna Bose v. Mon Mohun Bose*, 7 C. 573; 9 C. L. R. 183; 3 Ind. Dec. (N. S.) 917, *Smith v. Dinonath Mookerjee*, 12 C. 213; 6 Ind. Dec. (N. S.) 145, *Upendra Chandra Mitter v. Tara Prosanna Mukerjee*, 30 C. 794; 7 C. W. N. 609 and *Chandra Sekhar Kar v. Nafar Chandra Kundu*, 4 C. L. J. 555, referred to.

The expression "interested in the payment of the money" in s. 69, Contract Act, is comprehensive enough to include cases of apprehension of any kind of loss or inconvenience, and is not restricted to cases of individuals who are sure to suffer actual detriment assessable in money value. [*ibid.*]

Tulsha Kunwar v. Jageshwar Prasad, 28 A. 563; A. W. N. (1906) 114; 3 A. L. J. 372, *Subramania Iyer v. Vengappa Reddi*, 4 Ind. Cas. 1083; 33 M. 232; 19 M. L. J. 750 and *Pankhabati Chaudhurani v. Nonihal Singh*, 21 Ind. Cas. 207; 18 C. W. N. 778; 19 C. L. J. 72, referred to.

In a suit under s. 69 of the Contract Act it is essential that there should be, firstly, a person who is bound by law to make a certain payment, secondly, another person who is interested in such payment being made, and thirdly, a payment by such last mentioned person. [*ibid.*]

A debt for money paid arises where a person has paid money for another under circumstances and upon occasions which make it just and equitable that it should be re-paid; a debt or promise to pay is then implied in law without any actual agreement to that effect. [*ibid.*]

Section 70 of the Contract Act is not limited to persons standing in particular relations to one another and except in the requirement that the act shall be lawful, no condition is prescribed as to the circumstances under which it shall be done. The section does not justify the officious interference of one man with the affairs or property of another or to impose obligations in respect of services which the person sought to be charged did not wish to have rendered. [p. 284, cols. 1 & 2.]

Damodara Mudaliar v. Secretary of State for India, 18 M. 88; 4 M. L. J. 205; 6 Ind. Dec. (N. S.) 410 and *Chedi Lal v. Bhagwan Das*, 11 A. 234; A. W. N. (1889) 67; 6 Ind. Dec. (N. S.) 577, referred to.

The word "lawfully" in s. 70 is not a mere surplusage and it must be considered in each individual case whether the person who made the payment had any interest in making it, and if not, the payment cannot be said to have been made lawfully. [p. 284, col. 2; p. 285, col. 1.]

Raja Baikunto Nath Dey Bahadur v. Uday Chand Maiti, 2 C. L. J. 311, *Panchkori Ghosh v. Hari Das Jati*, 31 Ind. Cas. 311; 25 C. L. J. 325; 21 C. W. N. 394, *Ram Tuhul Singh v. Biseswar Lal*, 2 I. A. 131; 23 W. R. 305; 15 B. L. R. 208; 3 Sar. P. C. J. 477; 3 Suth. P. C. J. 136 P. C.) and *Mohendra Ghoshal v. Bhuvan Mardana*, 6 Ind. Cas. 810; 38 C. 1; 14 C. W. N. 945; 12 C. L. J. 566, referred to.

The existence of an interest is generally a test as to the lawful character of a payment, but even if an interest were not shown to exist, payments on account of another, if lawfully made, would generally be provided for by s. 70 of the Contract Act. [p. 285, col. 1.]

Appeal against a decree of the Subordinate Judge, Asansole, Burdwan, dated the 15th January 1924.

Mr. Bankim Chandra Mukherji and Babu Charu Chandra Ganguli, for the Appellants.

Babus Surendra Nath Ghosal and Krishna Kishore Basak, for the Respondents.

JUDGMENT.

Mukerji, J.—This appeal arises out of a suit for contribution instituted on the allegation that the plaintiff and the defendants who are governed by the Mitakshara Law were the lessees of a colliery named the Palashdiha Colliery that the landlords obtained a decree for arrears of rent in respect of the said colliery and brought to sale another colliery named the Lachipur Colliery belonging to them in execution of the said decree, that the father of the appellants, that is to say, the defendant No. 1 Asutosh Roy, purchased the same in the name of his son Nagendra Nath Roy, the first appellant; that the plaintiff's mother, as guardian of the plaintiff in order to save the property deposited Rs. 3,771-0 6 with the permission of the Court and had the sale set aside, and that, therefore, the plaintiff is entitled to recover the said amount, together with costs of the deposit and interest amounting in all to Rs. 6,081 8 6.

The defendants Nos. 2 and 3 who are the father and the uncle of the plaintiff admitted the plaintiff's claim and the defendants Nos. 4 to 6 compromised the case with him. The only contesting defendant was the defendant No. 1, the father of the present appellants. The defence of this defendant was that the parties were not governed by the Mitakshara Law, that the plaintiff had no share in the property and so was not interested in making the payment, that the defendants Nos. 2 and 3 really made the payment in the name of the plaintiff and that the payment was a voluntary one, and consequently the plaintiff was not entitled to be re-imbursed.

The learned Subordinate Judge has granted the plaintiff a decree as against the appellants for a half of the amount of Rs. 3,571-0 6 and also of Rs. 50, together with interest and costs, the said half representing the appellants' 8 annas share in the property. He has also passed a decree against the defendants Nos. 2 and 3 on their own admission for an amount proportionate to their share. Against this decree the present appeal has been preferred.

The first objection urged on behalf of the appellants is to the effect that the learned Subordinate Judge was wrong in holding that the parties are governed by

the Mitakshara Law. On this point the evidence is very scanty on either side and what is there on the record is exceedingly conflicting. All that is proved in the case is that the parties are Chhatris by caste; and it follows from this fact that at some time or other they must have migrated from outside Bengal. When this migration took place or where the ancestors of the parties came from, it is not possible to ascertain. It is proved that the parties are related to the Roys of Palashdighi and it is said that the latter claimed to be governed by the Mitakshara Law, but it has been shown on the other hand that they failed to establish the claim. An up-country Misra Brahmin is said to be the priest of the family, but his services are availed of only on more important occasions and on other occasions Bengali priests officiate. This is all the evidence and, in my opinion, it is wholly insufficient for discharging the burden which undoubtedly lies on the plaintiff, who as well as the defendants are inhabitants of Bengal, to prove that they are governed by the Mitakshara Law. The respondent urges that the appellants are not entitled to re-open and re-agitate the question in view of the fact that when the respondent put in the money, the pleader for the auction-purchaser Nagendra Nath Roy, who is the appellant No. 1, stated that he had no instruction to oppose the making of the deposit. To this, however, the answer is that the appellant Nagendra Nath Roy has been brought on the record of this case, not in his capacity as auction-purchaser but as one of the heirs of Asutosh Roy who was one of the judgment-debtors in the decree in execution of which the sale took place, and Nagendra Nath Roy was not present in those proceedings in his present capacity as representative of the deceased judgment-debtor and moreover it does not appear that any of the judgment-debtors under the said decree had notice of the deposit that was about to be made. Under the circumstances I am of opinion that the appellants are not precluded from urging that the parties are not governed by the Mitakshara Law. In my judgment the plaintiff has failed to prove that he had in fact any interest in the property. The learned Subordinate Judge has allowed the plaintiff's claim under s. 69 of the Contract Act on the ground that he had an interest in

[90 I. C. 1925]

the payment of the money as he had a share in the property that had been sold, but in this finding of fact I am unable to agree. This, however, does not dispose of the question as to the applicability of s. 69 for it has been laid down in a series of cases that where payment is made by a person who puts forward a *bona fide* claim to the property in dispute he is entitled to the protection afforded by s. 69 of the Contract Act even though it ultimately transpires, as a result of litigation, that he had not in fact or in law the interest for the protection whereof the payment was made [*Bindubashini Dassi v. Harendra Lal Roy* (1) and *Radha Madhub Samanta v. Sasti Ram Sen* (2).] This extended view of the expression "interested in the payment of the money" has been adopted in consonance with the exposition of the law embodied in s. 69 of the Contract Act to the effect that the expression is comprehensive enough to include cases of apprehension of any kind of loss or inconvenience and is not restricted to cases of individuals, who are sure to suffer actual detriment assessable in money value. Section 69 of the Indian Contract Act lays down that "A person who is interested in the payment of money which another is bound by law to pay, and who, therefore, pays it, is entitled to be re-imbursed by the other." In a suit under this section it is essential that there should be, firstly, a person who is bound by law to make a certain payment, secondly, another person who is interested in such payment being made, and, thirdly, a payment by such last mentioned person. If these circumstances exist, the fiction of an implied request from the defendant to the plaintiff to make the payment may be properly imported into the case so as to bring it within the section and thus the right to re-imbursement is created. A debt for money paid arises where a person has paid money for another under circumstances and upon occasions which make it just and equitable that it should be repaid; a debt or promise to pay is then implied in law, without any actual agreement to that effect. Sir Frederick Pollock in his book on the Indian Contract Act expressed an opinion that s. 69 of the Act lays down in one respect a wider rule

than appears to be supported by an English Authority, and that the words "interested in the payment of money which another is bound by law to pay" might include the apprehension of any kind of loss or inconvenience or at any rate of any detriment capable of being assessed in money, while that was not enough in the common law, to found a claim to re-imbursement by the person interested, if he makes the payment himself. This view has been judicially adopted by Stanley, C. J., in the case of *Tulsha Kunwar v. Jogeshwar Prasad* (3) and by the Madras High Court in the case of *Subramania Iyer v. Vengappa Reddi* (4) and by this Court in the case of *Pankhabati Chaudhurani v. Nonihal Singh* (5).

Now what are the facts in the present case? The plaintiff claiming to have a share in the properties sold under the decree of the landlords applied for permission to deposit the decretal dues and compensation for setting aside the sale. There is nothing to indicate that he did not *bona fide* believe at the time that he had such a share. The pleader for the auction-purchaser intimated to the Court that he had no instructions in the matter. The plaintiff adduced evidence and proved to the satisfaction of the Court that he had the interest he claimed and that he was entitled to have the sale set aside on deposit of the decretal amount and compensation. The Court granted the permission and the plaintiff thereupon made the deposit and it does not appear that any objection was taken at any subsequent stage to the plaintiff's assertion of the right that he claimed. Under these circumstances it may fairly be held that the plaintiff should succeed on the provisions contained in s. 69 of the Contract Act. This view is in accord with what was said with regard to that section in the case of *Sarafat Ali v. Issar Ali* (6).

Assuming, however, that s. 69 is not applicable, the question arises as to whether the claim can be supported on the principles contained in s. 70 of the Contract Act. This section lays down three circumstances as necessary to found the right of demand, viz., first that the act should be lawfully

(3) 28 A. 563; A. W. N. (1906) 114; 3 A. L. J. 372.

(4) 4 Ind. Cas. 1083; 33 M. 232; 19 M. L. J. 750.

(5) 21 Ind. Cas. 207; 18 C. W. N. 778; 19 O. L. J. 72.

(6) 42 Ind. Cas. 30; 45 O. 691 at p. 695; 22 O. W. N. 347; 27 O. L. J. 607.

(1) 25 C. 305; 2 C. W. N. 150; 13 Ind. Dec. (N. S.) 205.

(2) 26 C. 826; 13 Ind. Dec. (N. S.) 1129.

done for another, second, that it should not be the doer's intention to do it gratuitously, and, third, that the other party should enjoy the benefit of it.

Now as regards the first of the above-mentioned three circumstances, the word 'lawfully' has been the subject of judicial interpretation in several cases in which some points of diversity are noticeable. In the case of *Damodara Mudaliar v. Secretary of State for India* (7) the Government had repaired a tank from which were irrigated lands in the *zemindari* of the defendants and also *raiayatwari* villages held under the Government which had been severed from the *zemindari* and it was not found that there was any request either express or implied on the part of the defendants to the Government to execute the repairs, but it was found that the defendants knew that the repairs which were necessary for the preservation of the tank were being carried out and did not wish to execute them themselves except as contractors and that they had enjoyed the benefit of the work done. Sir Arthur Collins, C. J., and Shephard, J., pointed out that the statement of the law as contained in this section is derived from the notes to *Lampleigh v. Braithwait* (8) and perhaps indirectly from the Roman Law and goes further than what is justified by the English cases. They held in that case that there certainly may be difficulties in applying a rule stated in such wide terms as is expressed in s. 70, that according to the section it was not essential that the act should have been necessary in the sense that it was done under circumstances of pressing emergency or even that it should have been necessary to be done for the preservation of property, and that the section could, therefore, be extended to cases in which no question of salvage arises, and, further observed thus: "It is not limited to persons standing in particular relations to one another, and except in the requirement that the act shall be lawful, no condition is prescribed as to the circumstances under which it shall be done;" and also "It is plain that the section ought not to be read so as to justify the officious interference of one man with the affairs or property of another, or to impose obligations in respect of services which the person sought to be

charged did not wish to have rendered. In the present case there can be no doubt that the Government acted lawfully in repairing the tank. The act was lawful whether done with a view of benefiting all the villages under the tank or the Government villages only, and whether or not done with the intention of charging the *zemindars*. Having regard to the fact that the *zemindars* knew of the intention to execute the repairs and did not disapprove, we think that if the repairs were done for the *zemindars*, they were done lawfully for them". This decision has been considered in several later decisions of the same Court, but its authority in so far as the aforesaid propositions are concerned has remained unchallenged. In the case of *Chedi Lal v. Bhagwan Das* (9) which was a case of satisfaction of a mortgage-decree by a person not subject to any legal obligation thereunder, Straight, J., observed. "But I presume that the Legislature intended something when it used the word 'lawful' and that it had in contemplation cases in which a person held such a relation to another as either...to justify an inference that by some act done for another person the party doing the act was entitled to look for compensation for it to the person for whom it was done. Here there was in my opinion no such relation between the parties as would create any such right or from which it could be reasonably inferred. If the plaintiffs, as mere volunteers, chose to put their hands into their pockets and to pay a sum of money not for the defendants but for themselves, that was their own look out and they cannot now claim the benefit of s. 70." In the same case Mahmud, J., remarked "I need only add that any other view of the law would amount to saying that the effect of s. 70 of the Contract Act is to enable a total stranger, without any express or implied request on behalf of a debtor to put himself into the shoes of the creditor by the simple fact of paying the debts due by such debtor. I do not think that the section could have been intended to involve such results". In the case of *Raja Baikunto Nath Dey Bahadur v. Uday Chand Maiti* (10) Mookerjee, J., observed that the word 'lawfully' in s. 70 is not a mere surplusage, and it must be considered in each individual case whether the person who made the payment had any interest in

(7) 18 M. 88; 4 M. L. J. 205; 6 Ind. Dec. (N. S.) 410.

(8) (1724) 1 Sm. L. C. 135 (11th Ed. p. 141); Hobart 105; 80 E. R. 255.

(9) 11 A. 234; A. W. N. (1889) 67; 6 Ind. Dec. (N. S.) 577.

(10) 2 C. L. J. 311.

making it, and if not, the payment cannot be said to have been made lawfully. In the case of *Panchkori Ghose v. Hari Das Jati* (11) Lancelot Sanderson, C. J., with the concurrence of Mookerjee, J., qualified the above proposition by stating that "any interest" must be a "lawful interest", and held that deposit of money by a person as a mortgagee on the strength of a forged mortgage bond with an ulterior object of subsequently getting hold of the land of the person for whom the payment was made was not a lawful payment within the meaning of s. 70. In a later case, viz., that of *Sarafat Ali v. Issar Ali* (6) Mookerjee and Walmsley, JJ., held that s. 73 was applicable to the case of a person who is wrongly made a party to a mortgage suit, as one of the representatives of a mortgagor, and a decree being obtained therein, satisfies the decree in full, and in the suit for contribution which he institutes it is found that he had no interest in the property, and observed that the exposition of the law as laid down in the cases of *Rajah Baikunto Nath Dey Bahadur v. Uday Chand Maiti* (10), *Panchkori Ghosh v. Hari Das Jati* (11) was not in conflict with the view that was now taken. In the case of *Gopeswar Banerjee v. Braja Sundari Debi* (12) where a Hindu reversioner made a payment to stop a sale under the Public Demands Recovery Act of property then in possession of a Hindu widow to whom he was reversioner, it was held that the payee had no such interest as might make the payment a lawful payment within the meaning of s. 70. It may perhaps be doubted as to whether in the last mentioned case too limited a meaning has not been given to the word 'lawful'. In some of these cases stress has been laid upon the dictum of the Judicial Committee in the case of *Ram Tuhul Singh v. Biseswar Lal Sahoo* (13) which runs in these words "It is not in every case in which a man has benefited by the money of another that an obligation to re-pay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied, to re-pay". This dictum it should be remembered was pronounced in a very

special case in which the facts were very peculiar, and in connection with a suit which came into existence before the law was codified in the Indian Contract Act.

In the case of *Mohendra Ghoshal v. Bhuban Mardana* (14), where a tenant whose interest in a holding had not been affected by certain sales, he not having been a party to the decrees, deposited money to set aside the sales, without protest from any party or the Court, Sir Lawrence Jenkins, C. J., observed that as the plaintiff in making the deposits acted with the approval of the Court, what he did was done lawfully and further observed thus:—"The terms of s. 70 are unquestionably wide, but applied with discretion they enable the Courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations actually created by contract. It is, however, especially incumbent on final Courts of fact to be guarded and circumspect in their conclusions and not to countenance acts or payments that are really officious."

In the present suit, of course, we are not satisfied that the plaintiff has been able to prove that parties are governed by the Mitakshara Law. That, however, does not matter, for his right to make the deposit was expressly gone into and found in his favour by the Court and he made the deposit under the permission of the Court. The payment made was thus a lawful payment according to the dictum of Sir Lawrence Jenkins, C. J., in the case of *Mohendra Ghoshal v. Bhuban Mardana* (14), quoted above. It is not a case in which the deposit was allowed to be made without an adjudication of the plaintiff's right as was the case in *Panchkori Ghosh v. Hari Das Jati* (11), (see the observations of Coxe, J., at the bottom of page 327*). The position of the plaintiff in this case is very much like that of a person who obtains a decree declaring his right to deposit the money and then makes the deposit and subsequently the decree is found to be unfounded or wrongly passed as was the case in *Bindubashini Dassi v. Harendra Lal Roy* (1), and is entirely different from that of a person who has merely a claim which is subsequently found to be without foundation.

It was not a payment made by a wrongdoer simply for his own purposes as in

(11) 34 Ind. Cas. 341; 25 C. L. J. 325; 21 C. W. N. 394.

(12) 67 Ind. Cas. 40; 49 C. 470; 25 C. W. N. 1029; (1922) A. I. R. (C.) 353.

(13) 2 I. A. 131; 23 W. R. 305; 15 B. L. R. 208; 3 Sar. P. O. J. 477; 3 Suth. P. O. J. 136 (P. C.).

(14) 6 Ind. Cas. 810; 38 C. 1; 14 C. W. N. 945; 12 C. L. J. 566.

*Page of 25 C. L. J.—[Ed.]

the case of *Binda Kuar v. Bhonda Das* (15), nor made fraudulently or for the purpose of manufacturing evidence of title to the land as in the case of *Jinnat Ali v. Fateh Ali* (16), *Desai Himatsingji Joravarsingji v. Bhavabhai Kayabhai* (17) and *Bama Sundari Dasi v. Adhar Chundar Sarkar* (18), nor a mere voluntary or officious payment as was the case in *Yoyambal Boyee Ammani Ammal v. Naina Pillai Markayar* (19) and *Gordhanlal v. Darbar Shri Surajmalji* (20), nor are there any materials on the record upon which it can be said that the payment was made with a sinister object such as was the case in *Janki Prasad Singh v. Baldev Prasad* (21).

In my opinion the existence of an interest is generally a test as to the lawful character of a payment, but even if an interest were not shown to exist payments on account of another, if lawfully made, would generally be provided for by s. 70 of the Act.

As regards the other two requisites of the section it is sufficient to state that there is nothing to indicate that the plaintiff intended to make the payment gratuitously, but all the circumstances point to his having made the deposit in order to save the property and to his having intended to look to the defendants for contribution proportionate to their interest. It has been urged that the plaintiff has not been able to prove that he had any separate funds. There is, however, some evidence that he has his own funds and what is more important is the undisputed fact that the payment was made by the plaintiff. It has not been contended, and on the authorities it cannot be contended, that the word 'does' in the s. 70 does not include payment of money. As regards the appellants having enjoyed the benefits of this payment, there can hardly be any question for there is the fact that Asutosh Roy in his capacity as judgment-debtor did, in fact, get back his share in the properties which had been lost to him by the sale. Beyond the fact that at the sale the property was purchased in the name of the

appellant No. 1 there is nothing upon which it may be held that the deposit was made against the wishes of the judgment-debtors or that they ever repudiated it as having been made against their interest.

This, in my opinion, is a case in which it may very well be said that the payment was a lawful one; that it was not gratuitous or the result of an officious interference of a person who had no reason to think that he had an interest in making it, and that the appellants have admittedly enjoyed the benefits of the payment, that it was lawfully made at the time he made it, that he did so in good faith in the belief that he had an interest and not only that, he was also able to satisfy the Court under whose permission he was to act that he had such an interest. The case comes well within the principles laid down in a series of cases in which the right to be reimbursed in similar circumstances has been recognised; of which reference may be made to those of *Nobin Krishna Bose v. Monmohun Bose* (22), *Smith v. Dinonath Mookerjee* (23), *Upendra Chandra Mitter v. Tara Prosanna Mukerjee* (24) and *Chandra Sekhar Kar v. Nafar Chandra Kundu* (25). Some of these cases were decided without reference to s. 70 of the Contract Act; and in the last mentioned case it was observed that it is consistent with general principles of equity that those whose funds are used to meet the legitimate demands of others, when the latter have the benefit of such payments, are entitled to ask the latter to pay to the extent of the benefit, that they cannot retain the benefits and plead non-liability, and that where the codified law does not cover the case, the Court should apply the general law, legal and equitable. It is no doubt necessary to be very circumspect in the application of this general principle of justice, equity and good conscience, but the terms of s. 70 are wide enough to afford ample room for the application of this principle in a fit case. Upon the facts, to which I have already referred, the present case seems to me to be one in which it will be just to apply the provisions of that section.

One other argument deserves notice. It has been said that there are suits pending

(15) 7 A. 660; A. W. N. (1885) 176; 4 Ind. Dec. (N. S.) 850.

(16) 9 Ind. Cas. 219; 15 C. W. N. 332; 13 C. L. J. 616.

(17) 1 B. 613 at p. 653; 2 Ind. Dec. (N. S.) 935.

(18) 22 C. 28; 11 Ind. Dec. (N. S.) 20.

(19) 3 Ind. Cas. 110; 33 M. 15; 6 M. L. T. 162; 19 M. L. J. 489.

(20) 26 B. 504; 4 Bom. L. R. 299.

(21) 30 A. 167; A. W. N. (1908) 58; 5 A. L. J. 163.

(22) 7 C. 573; 9 C. L. R. 182; 3 Ind. Dec. (N. S.) 917.

(23) 12 C. 213; 6 Ind. Dec. (N. S.) 145.

(24) 30 C. 794; 7 C. W. N. 609.

(25) 4 C. L. J. 555.

between the plaintiff's father and uncle, viz., the defendants Nos. 2 and 3 on the one hand and the appellants on the other, as to the liabilities of the former in respect of joint family funds in their hands and as the money which the plaintiff advanced was not his own money, plaintiff should not be allowed a decree, but that all the liabilities should be adjusted in the said suits. I do not, however, see any reason why the plaintiff should not be given a decree in the present case on the strength of the findings at which I have arrived. This decree will not stand in the way of the appellants showing, if they may, in these suits that the money which the plaintiff advanced as being his own, really belonged to the joint family, and getting credits therefor in the usual way if they succeed in showing the same.

The result is that while I do not agree in the reasons given by the learned Subordinate Judge I hold that the decree passed by him is substantially correct. The appeal therefore, fails and is accordingly dismissed with costs (one set). The hearing fee is assessed at 5 gold mohurs.

Greaves, J.—I agree.

M. B.

Appeal dismissed.

N. H.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1138 OF 1925.

July 10, 1925.

Present:—Mr. Justice Lindsay and
Mr. Justice Kanhaiya Lal.

JAGAT NARAIN LAL AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus

Sheik HAWALDAR AND OTHERS—
DEFENDANTS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. XX, r. 14—
Pre-emption decree, form of—Date of payment, specification of.*

The proper form of a decree for pre-emption is laid down in O. XX, r. 14 of the C. P. C. The date by which the purchase-money should be paid must be specified in the decree. It is not a compliance with this direction of the law to say that the money is to be paid within a certain period from the date on which the decree becomes final.

Second appeal from a decree of the Subordinate Judge, Gorakhpur, dated the 6th March 1925.

Mr. K. Verma, for the Appellants.

JUDGMENT.—We have heard the learned Counsel in this appeal. We think

it must fail. The dispute between the parties was as to the amount of consideration, the vendee pleading that it was Rs. 3,493 and the plaintiffs asserting that the price was only Rs. 1,500. The Court of first instance found in favour of the plaintiffs, but the lower Appellate Court has directed the pre-emptors to pay the full purchase money of Rs. 3,493. The finding of the Court below regarding the amount of consideration is final. There is only one point to be noticed. The decree of the Court of first instance which the lower Appellate Court has affirmed was not a proper decree in a pre-emption suit. The Munsif directed the pre-emptors to pay the pre-emption money within 60 days of the date of the decree becoming final. The proper form of a decree for pre-emption is laid down in O. XX, r. 14 and the date by which the purchase money should be paid must be specified. It is not a compliance with this direction of the law to say that the money is to be paid within 60 days of the date on which the decree becomes final.

In the circumstances, while dismissing this appeal we think it right to say that the plaintiffs are entitled to deposit the pre-emption money of Rs. 3,493 odd within 60 days from to-day's date.

A point has been taken here before us on behalf of the appellants. It is said that the appeal to the lower Appellate Court was valued at Rs. 1,693 whereas under the lower Court's decree the plaintiffs pre-emptors have now to pay Rs. 1,993 more than the sum directed to be paid by the First Court. We think that this is an error for in the original memorandum of appeal the appeal is valued not at Rs. 1,693 but Rs. 1,993. Obviously the error is due to a misprint in the copy of the lower Appellate Court's judgment.

Z. K.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 7 of 1925.

June 25, 1925.

Present:—Mr. Justice Mukerji and
Mr. Justice Boys.

A. S. DE MELLO AND ANOTHER—PLAINTIFFS
—PETITIONERS

THE NEW VICTORIA MILLS CO., LD.—
DEFENDANT—OPPOSITE-PARTY.

Civil Procedure Code (Act V of 1908), ss. 24,

115—Transfer of case—Notice to other side, absence of—Illegality—Revision.

A District Judge has no jurisdiction to make an order transferring a pending suit from one Court to another at the instance of a party without giving notice to the other side.

Lachmi Narayan v. Balmakund, 81 Ind. Cas. 747; (1924) A. I. R. (P. C.) 198; 35 M. L. T. 143; 47 M. L. J. 441; 20 L. W. 491; (1924) M. W. N. 707; 10 O. & A. L. R. 1033; 5 P. L. T. 623; 40 C. L. J. 439; 26 Bom. L. R. 1129; 22 A. L. J. 990; 51 I. A. 321; L. R. 5 A. (P. C.) 171; 29 C. W. N. 391; 1 O. W. N. 629; 4 Pat. 61 (P. C.), followed.

A revision is competent against an order of a District Judge transferring a pending suit from one Court to another at the instance of a party without giving notice to the other side.

Fatima Begam v. Imdad Ali, 58 Ind. Cas. 560, 18 A. L. J. 351; 2 U. P. L. R. (A.) 83, followed.

Farid Ahmed v. Dulari Bibi, 6 A. 233; A. W. N. (1884) 45; 3 Ind. Dec. (N. S.) 842, dissented from.

Buddhoo Lal v. Mewa Ram, 63 Ind. Cas. 15; 19 A. L. J. 558; 43 A. 564 (F. B.), distinguished.

Civil revision from an order of the District Judge, Cawnpore, dated the 22nd December 1924.

Mr. N. P. Ashthana, for the Applicants.

Mr. J. M. Banerji, for the Opposite Party.

JUDGMENT.—This is a petition in revision against an order of the learned District Judge of Cawnpore transferring a certain suit pending in the Court of one Subordinate Judge of Cawnpore to the Court of another Subordinate Judge at the same place. The complaint is that this order was passed at the instance of one of the parties without issuing a notice to the other.

A preliminary objection has been taken to the effect that no revision lay and the case of *Farid Ahmed v. Dulari Bibi* (1) has been cited as an authority. On behalf of the applicants the case of *Fatima Begam v. Imdad Ali* (2), has been cited. For the respondents it has been urged that the earlier case is a two Judges case and the later case is a single Judge case and, therefore, the earlier case is of greater weight than the later case. We have examined the case in *Farid Ahmad v. Dulari Bibi* (1) but have been unfortunately (with respect) unable to appreciate the grounds of the decision. The learned Judges appear to say that the ultimate decree was an appealable one and, therefore, no revision lay. But the decree that could be passed by the second Court would practically have nothing to do with the question of transfer. It is true that a question

of jurisdiction might be raised after the transfer in the Second Court. But if that be so, the anomalous position would arise, viz: the subordinate Court would be sitting to decide whether the superior Court which made the order of transfer was right or not in making it. We prefer to follow the later case, we being also in agreement with it. The Full Bench case of *Buddhoo Lal v. Mewa Ram* (3) was also cited on behalf of the respondents, but that case is clearly distinguishable. Here the District Judge so far as the "case" was before him decided it altogether. This distinguishes the present case before us from the case before the Full Bench.

We are of opinion that a revision does lie on account of the provisions to be found in cl. (c) of s. 115 of the C. P. C. The learned Judge having acted illegally or with material irregularity in the exercise of his jurisdiction. We may also say that the learned Judge could not acquire jurisdiction to make the order of transfer at the instance of a party without giving notice to the other side; [see *Lachmi Narayan v. Balmakund* (4)].

The preliminary objection fails and the application succeeds. We set aside the order of the learned District Judge and remand the petition of the respondents for transfer to him for disposal after issuing notice to the opposite party, viz: the petitioners in this Court. Costs in this Court to abide the result, and will include Counsel's fees on the higher scale.

N. H.

Application accepted.

(3) 63 Ind. Cas. 15; 19 A. L. J. 558; 43 A. 564 (F. B.).

(4) 81 Ind. Cas. 747; (1924) A. I. R. (P. C.) 198; 35 M. L. T. 143; 47 M. L. J. 441; 20 L. W. 491; (1924) M. W. N. 707; 10 O. & A. L. R. 1033; 5 P. L. T. 623; 40 C. L. J. 439; 26 Bom. L. R. 1129; 22 A. L. J. 990; 51 I. A. 321; L. R. 5 A. (P. C.) 171; 29 C. W. N. 391; 1 O. W. N. 629; 4 Pat. 61 (P. C.).

(1) 6 A. 233; A. W. N. (1884) 45; 3 Ind. Dec. (N. S.) 842.

(2) 58 Ind. Cas. 560; 18 A. L. J. 351; 2 U. P. L. R. (A.) 83.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 353 OF 1925.

July 10, 1925.

Present:—Mr. Justice Suhrawardy and
Mr. Justice Panton.**E. J. JUDAH AND OTHERS—ACCUSED—**
PETITIONERS*versus***EMPEROR—OPPOSITE-PARTY.***Penal Code (Act XLV of 1860), ss. 23, 24, 378, ill. (j), 380—Article given for repairs—Repairs not finished within fixed or reasonable time—Owner's right to take back article before completion of repairs—Workman's lien for repairs done in part—Removal of article by owner without paying for incomplete repairs—Theft—Contract Act (IX of 1872), ss. 55, 170.*

Where a certain sum is fixed for the repair of an article and there is nothing to indicate that the repairer would be entitled to receive remuneration for a part of the repair, he has no right to retain the article until he receives his remuneration for the amount of work done. [p. 290, col. 1.]

A person who is entrusted to repair a certain article is not entitled to claim lien or to refuse to part with it after doing a certain amount of work which makes no improvement thereupon, and the owner is entitled to recover it from him without paying for such work. [*ibid.*]

The owner of a kettle gave it to a workman for repairing it within 6 or 7 days for Rs. 6. After 11 or 12 days when the owner demanded return of the kettle the workman said that he had not completed repairs but that he would return the kettle if he was paid Rs. 5 for the part of the work he had already done. The owner refused to pay the amount, took away the kettle from the almirah and walked out of the shop:

Held, (1) that s. 170 of the Contract Act had no application to the case and that the workman had no lien over the kettle; [*ibid.*]

(2) that even if the owner acted improperly in demanding and taking back the kettle, he was not guilty of an offence under s. 380, Penal Code, as his object was not to cause wrongful loss to the workman or wrongful gain to himself but to recover his kettle after the lapse of reasonable time. [p. 290, col. 2.]

Rule against an order of the Chief Presidency Magistrate, Calcutta, dated the 27th April 1925.

Mr. Pugh and Babu Promode Kumar Ghose,
for the Petitioners.

Mr. Khundkar, Deputy Legal Remem-
brancer, for the Crown.

JUDGMENT.

Suhrawardy, J.—The three accused in this case have been convicted under s. 380, Indian Penal Code and sentenced to imprisonment till the rising of the Court and to pay a fine of Rs. 75 each or in default to one month's rigorous imprisonment. The case for the prosecution is that the accused No. 1 gave a kettle for repairs to the complainant who has an electric repair-shop at 7/1, Middleton Street, 11 or 12 days before the occurrence (as stated by the

complainant) or on the 28th March as stated by the accused in the petition filed in this Court. The complainant promised to finish the repairs within 6 or 7 days. On the 18th April the accused went to the shop and demanded return of the kettle. The complainant refused to part with it as the repairs were not complete and ultimately agreed to return it to the accused if he was paid Rs. 5 for the repairs already done. I may mention here that the amount fixed for the repair of the kettle was Rs. 6. The accused refused to pay the amount, took away the kettle from the almirah and walked out with it. He was accompanied by the other accused and all of them were tried and found guilty as stated above. In order to sustain a conviction under s. 380, Indian Penal Code, it must be found that the accused dishonestly took the property out of the possession of the complainant, and "dishonestly" has been defined as meaning "with intent to cause wrongful gain to one person and wrongful loss to another person." It is necessary, therefore, to prove in this case, all the other facts being admitted, that the accused took away the article from the possession of the complainant with the intention of causing wrongful gain to himself or wrongful loss to the complainant. The matter stands thus: The complainant took the article for repairs on promise to finish them within 6 or 7 days. Not having done the work within the time stipulated, the accused went to his shop and took, admitting for argument's sake, forcible possession of the article. Did he, in these circumstances, commit the offence of theft? My answer to the question is in the negative. It is argued on behalf of the prosecution that the complainant had a lien on the kettle and the accused having removed it from his possession has committed an offence as defined in s. 378, Indian Penal Code, and illustrated in illustration (j) to that section. The learned Trial Magistrate also relied upon illustration (j) to find dishonest intention of the accused. Illustration (j) runs thus:—"If A owes money to Z for repairing the watch, and if Z retains the watch lawfully as a security for the debt, and A takes the watch out of Z's possession with the intention of depriving Z of the property as a security for his debt, he commits theft, inasmuch as he takes it dishonestly." Apparently the framers of the Code had in their mind the provisions of the law of contract

as embodied in s. 170 of the present Contract Act, which creates a lien in favour of the bailee over goods on which he has spent labour or skill and for which he is entitled to remuneration. The learned Deputy Legal Remembrancer in support of the conviction argues that the complainant had a lien of Rs. 5 on the kettle for the amount of work done. This raises the intricate question of civil law relating to "*quantum meruit*." In the first place who has to determine that the complainant is entitled to Rs. 5? In the second place, as has been held in the case of *Skinner v. Jager* (1), where a certain sum is fixed for the repair of an article and there is nothing to indicate that the repairer would be entitled to receive remuneration for a part of the repair, he has no right to retain the article until he receives his remuneration for the amount of work done. There is no evidence in this case that there was any agreement or understanding, implied or express, between the parties, that if the kettle is repaired even in such a way as to be useless (the complainant admits it is useless in its present state), the complainant will be entitled to remuneration for the amount of work done. I am of opinion that complainant had no lien over the kettle and s. 170, Contract Act, does not apply.

We have been referred to the case of *Queen-Empress v. Gangaram Santram* (2), and upon the authority of that case it is argued that in order to constitute theft it is enough if the property is removed from the possession of a person who has an apparent title or colour of a right to it. On the facts of that case, though scantily reported in the report, the decision may be justifiable. But on the plain reading of the section of the Indian Penal Code, I think it must be clearly established that the accused did not commit the act with the intention as defined in s. 24, Indian Penal Code. It will be preposterous to lay down as a general rule of law that a person who is entrusted to repair a certain article is entitled to claim lien or to refuse to part with it after doing a certain amount of work which makes no improvement thereupon and the owner is not entitled to recover it from him without paying for such work as has been done. If I give a piece of cloth to a tailor to make

a coat and he sends only a sleeve but does not do the rest of the work within the time stipulated or within a reasonable time, I have no right, according to the view urged on behalf of the Crown, to take back the cloth until I have paid for the work done. In the present case the complainant failed to perform his part of the contract, namely, to do the work within 6 or 7 days and the accused was justified in asking for a return of the article if the work was not done within a reasonable time. The learned Deputy Legal Remembrancer refers to certain sections of the Contract Act which deal with certain circumstances where time is of the essence of the contract. In a case where time is not of the essence of the contract, it must be performed within a reasonable time. In simple every day transaction like the present it is not inconsistent with law to look to the common sense side of the matter. Kettle is an article of every day use. A man may require to have this household article repaired with as little delay as possible. According to the accused it was retained by the complainant for 20 days and according to the complainant for 11 or 12 days. Conceding that the accused acted improperly in demanding and taking back the article, they have not certainly acted dishonestly. Their intention was not to cause wrongful loss to complainant or wrongful gain to themselves but to recover their thing after lapse of reasonable time. In my opinion the conviction cannot stand. I hold that the conviction of the petitioners under s. 380 is bad in law. I must express, however, my strong disapproval of the conduct attributed to the petitioners—conduct unworthy of gentlemen which they claim to be. The conviction of the petitioners and the sentences passed upon them are set aside. The fines, if paid, will be refunded.

Panton, J.—I agree.

S. D.

Rule made absolute.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 84 of 1925.

July 22, 1925.

Present:—Mr. Justice Daniels.

Babu DWARKA PRASAD—APPLICANT
—APPELLANT

versus

MAKUND SARUP—OPPOSITE PARTY
—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 195,

(1) 6 A. 139; A. W. N. (1883) 263; 3 Ind. Dec. (N. S.) 746.

(2) 9 B. 135; 9 Ind. Jur. 313; 5 Ind. Dec. (N. S.) 90.

476—Penal Code (Act XLV of 1860), ss. 193, 471—Perjury—Using forged document as genuine—Complaint by Court—Preliminary enquiry, whether necessary—Complaint, whether must specify false statement.

Section 195 of the Cr. P. C. is a restrictive section and there is nothing in that section or in s. 476 of the Code to prevent a Court from making a complaint under the ordinary law in respect of an offence under s. 471 of the Penal Code which it finds to have been committed before it. [p. 292, col. 1.]

The finding of a competent Court that a document produced before it is a forgery or that a witness has committed perjury before it, is sufficient *prima facie* ground for a complaint under s. 476 of the Cr. P. C., and no preliminary enquiry is necessary in such a case before making a complaint. [*ibid.*]

In making a complaint of an offence under s. 193 of the Penal Code, a Court should quote the passages in the statement of the accused in respect of which the complaint is made. Where, however, there is no doubt as to what is the statement complained of the complaint is not rendered invalid by the mere omission to specify therein the statement complained of. [*ibid.*]

Revision from an order of the District Judge, Bulandshahr, dated the 13th February 1925.

Mr. Kumuda Prasad, for the Appellant.

Mr. U. S. Bajpai, for the Respondent.

JUDGMENT.—This is an application for revision of an order of the learned District Judge of Bulandshahr upholding a complaint of an offence under s. 471, Indian Penal Code, made by the Munsif of Ghaziabad against the applicant Dwarka Prasad. The learned District Judge in upholding the Munsif's order also added a charge under s. 193, and the applicant asks that his application be treated as an appeal.

Three points have been urged:—

(1) That s. 476, Cr. P. C., is inapplicable to the offence under s. 471, Indian Penal Code, because the alleged offence was not committed by a party to the suit but by a witness;

(2) that the order should not have been passed without a preliminary enquiry; and

(3) that the order under s. 193 is bad because the passages in the applicant's evidence alleged to be false are not quoted in the judgment.

The first point is one on which there was a difference of opinion between the different High Courts prior to the amendment of the Code in the year 1923. The Madras High Court in *Govinda Iyer v. Rex* (1) took the view that s. 476 in speaking of "any offence referred to in s. 195" incorporated the condition laid down in s. 195. As regards the offences enumerated in cl.

(c) of s. 195, namely forgery, and knowingly producing a forged document, this section was only applicable where the offence was committed by a party to any proceeding. These words were not repeated in s. 476, but the Madras view was that they were implied, and the Calcutta High Court took the same view. On the other hand the Bombay High Court in *Waman Dinkar Kelkar v. Emperor* (2), the Oudh Court in *Ejaz Ali Khan v. Emperor* (3) and this Court in *Ganga Ram v. Emperor* (4) took the view that the conditions of s. 195 were not incorporated in s. 476, and that the latter section applied to any of the offences enumerated in s. 195 whether committed by a party to a proceeding or not. The question is whether the position is affected by the extensive amendment of these two sections made by the Amending Act of 1923. Prior to the amendments s. 195 and s. 476 referred to two different things. Section 195 required a sanction or complaint by the Court for the prosecution of certain offences; s. 476 gave the Court a quite independent power to direct a prosecution of its own authority and send the case for trial on the merits to a First Class Magistrate. As the Code now stands, both the sanction by a Court and the direct order by a Court directing a prosecution are done away with, and the procedure in all cases is one of complaint by the Court. Section 195 describes the offences in respect of which a complaint is necessary, and s. 476 prescribes the procedure under which a complaint is to be made. It seems to me that this has modified the situation very materially, and that there is now strong ground for holding that the Legislature intended s. 476 to be co-extensive in its scope with cls. (b) and (c) of s. 195 (1). (Clause (a) of s. 195 is not concerned with Courts, and s. 476 does not refer to it). This, however, does not conclude the matter. The case is almost precisely parallel to *Ganga Ram v. Emperor* (4) and as Mr. Justice Piggott pointed out in that case, the question so far as the proceeding before him was concerned was

(1) 50 Ind. Cas. 824; 42 M. 540; 36 M. L. J. 448; 9 L. W. 422; 20 Cr. L. J. 344; (1919) M. W. N. 459; 26 M. L. T. 92 (F. B.).

(2) 51 Ind. Cas. 257; 43 B. 300; 20 Bom. L. R. 998; 20 Cr. L. J. 433.

(3) 66 Ind. Cas. 68; 24 O. C. 367; 23 Cr. L. J. 228; (1922) A. I. R. (O.) 220.

(4) 42 Ind. Cas. 927; 40 A. 24; 15 A. L. J. 817; 19 Cr. L. J. 15.

mainly academical. Section 195 is a restrictive section, and there is nothing in that section and s. 476 to prevent the Munsif from making a complaint under the ordinary law in respect of the offence under s. 471, Indian Penal Code, which he found to have been committed before him.

As regards the second ground argued before me, this was not a case in which a preliminary enquiry was absolutely essential before a complaint could be filed. The charge against the applicant is that he filed a forged receipt in a suit in the Munsif's Court brought by Mukand Sarup against Musammatt Parbati and others to support the defence taken by the defendants, and asserted that he had paid to the plaintiff a sum of Rs. 1,035 on behalf of the defendants which, in fact, he had not paid. The finding of a competent Court that a document is a forgery, or that a witness has committed perjury before it, has always been considered sufficient *prima facie* ground for an order under s. 195 or s. 476. It is urged that the applicant being a witness in the case had no opportunity of cross-examining the witnesses on the other side. This is no doubt true, but the witnesses were cross-examined on behalf of the defendants in the case who had exactly the same interest as the applicant in upholding the genuineness of the receipt.

As regards the third ground, I think it would have been better if the learned Judge had quoted the passages in respect of which he made a complaint in his judgment instead of merely saying that they were evident on an examination of the applicant's evidence. There is, however, no doubt as to what those statements were. They are in the first place the statement that the applicant paid Rs. 1,035 to Mukand Sarup at various times, and, secondly, the statement that in the end after all these payments Mukand Sarup gave the applicant a receipt, and that this was the receipt which he produced in Court in Suit No. 13-5 of 1923.

There is, therefore, no ground for interfering with the order of the Court below, and the present application is accordingly dismissed with costs.

Z. K.

Application dismissed.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 182 OF 1925.

March 13, 1925.

Present:—Mr. Justice Scott-Smith.
GOPAL DASS—ACCUSED—PETITIONER
versus
MAGHI RAM—COMPLAINANT—
RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 436, 439—Discharge of accused—Subsequent trial on same facts, legality of—Pending proceedings—Interference by High Court—Revision, powers of.

The High Court has jurisdiction to interfere in a proceeding pending before a Magistrate in the exercise of its revisional powers and to pass an order of discharge in favour of the accused person if it considers such an order to be in the interests of justice. [p. 293, col. 2.]

When a Magistrate has passed an order discharging an accused person it is competent to the same Magistrate or to another Magistrate of co-ordinate jurisdiction to take fresh proceedings against the accused upon the same facts, although the order of discharge has not been set aside by a higher authority. Such a re-trial, however, should only be allowed under very special circumstances, and where such circumstances do not exist it is improper to allow the accused to be re-tried on the same charge. [*ibid.*]

Criminal revision from an order of the Additional District Magistrate, Amritsar, dated the 9th December 1924.

Lala Fakir Chand, for the Petitioner.

Lala Gobind Ram Khanna, for the Respondent.

JUDGMENT.—On the 9th July 1923 Maghi Ram lodged a complaint against Gopal Das, petitioner, under s. 458, Indian Penal Code, in the Court of Sardar Sundar Singh, Honorary Magistrate. The Magistrate took cognizance of the complaint and issued summons to the accused under s. 448. Several adjournments were granted to the complainant in order to enable him to produce evidence and he finally closed his case after examining various witnesses on the 15th November 1923, and on the 20th November the Magistrate passed orders discharging the accused. From this order the complainant applied to the District Magistrate on the revision side asking that further enquiry should be ordered. The Additional District Magistrate passed the following order: 'The lower Court has thoroughly sifted the evidence produced by the complainant in this case and has discharged the accused for want of sufficient proof. With this finding I have no reason to differ and I, therefore, reject the petition for revision.'

This order is dated the 13th February

1924, and on the 16th February the complainant filed a fresh complaint against the accused on the same facts which was made over for disposal to the Bench of Honorary Magistrates. Objection was there taken that having regard to s. 403, Cr. P. C., the case could not be re-tried. The Bench decided, however, that there could be a re-trial and directed the complainant to produce his proof. An application for revision of this order was made to the Additional District Magistrate who declined to interfere. Gopal Das has come up to this Court on the revision side and it is contended on his behalf that, having regard to the previous order of discharge and refusal of the District Magistrate to set aside that order, it is improper if not illegal to try him *de novo* on the same facts. Lala Gobind Ram Khanna for the respondent raised a preliminary objection that this Court has no power to interfere on the revision side in exercise of the powers conferred upon it by s. 439 of the Cr. P. C. He referred in support of his argument to *Azim Khan v. Empress* (1), where it was held that the revisional powers conferred on the Chief Court by s. 439 of the Cr. P. C. do not include the power of setting aside, while the trial of the accused is still pending, interlocutory orders by which no penalty is imposed on the accused, *e. g.*, an order overruling an objection taken on behalf of the accused to the jurisdiction of the Magistrate to entertain the charge, on the ground that a similar complaint had been previously made against the accused and dismissed.

This authority, no doubt, supports the contention of Mr. Gobind Ram Khanna but it has not been followed in later years certainly by the Chief Court or by this Court. In a recent case reported as *Khairati Ram v. Malawa Ram* (2), this Court interfered on the revision side and held that the Magistrate had no jurisdiction to start certain proceedings against a certain person for an offence under s. 465 of the Indian Penal Code, except on the complaint in writing of the Court in which the forged document was produced in evidence and quashed the proceedings taken by the Magistrate as having been taken without jurisdiction. Similarly in other cases this Court has on the revision side set aside charges framed in the course of a trial under the Cr. P. C.

(1) 45 P. R. 1885 Cr.

(2) 85 Ind. Cas. 377; 5 L. 550; 26 Cr. L. J. 537; (1925) A. I. R. (L.) 266.

Moreover the new s. 561 (a), Cr. P. C., lays down that "Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice." Section 439 of the Cr. P. C., gives this Court the power to exercise any of the powers conferred on a Court of Appeal by ss. 195, 423, 425, 427 and 428 of the Code. Section 423 empowers an Appellate Court to pass an order of discharge and, therefore, I can see no reason why this Court should not in exercise of its revisional jurisdiction pass an order of discharge if it considers such an order to be in the interest of justice.

In *Emperor v. Kiru* (3), it was held that when a Magistrate has passed an order discharging an accused person it is competent to the same Magistrate or to another Magistrate of co-ordinate jurisdiction to take fresh proceedings against the accused upon the same facts although the order of discharge has not been set aside by higher authority. It must, therefore, be held in accordance with this ruling that there is nothing absolutely illegal in the present proceedings. It was, however, further held by the same Full Bench that "Generally speaking further enquiry after discharge is improper unless the order of discharge was manifestly perverse or foolish; or was based upon a record of evidence which was obviously incomplete." Now in the first case against the petitioner the complainant produced all the evidence which he had to produce and finally closed his case. The order of discharge was, therefore, passed after full enquiry and the Additional District Magistrate when application was made to him refused to set that order of discharge aside. Under these circumstances I consider that it would be manifestly improper to allow the accused to be re-tried. I think that such a re-trial should only be allowed under very special circumstances and no such circumstances have been alleged in the present case. I, therefore, quash the proceedings before the Bench of Honorary Magistrates and direct that the petitioner be discharged.

Z. K.

Proceedings quashed.

(3) 11 Ind. Cas. 132; 10 P. R. 1911 Cr.; 24 P. W. R. 1911 Cr.; 12 Cr. L. J. 361; 205 P. L. R. 1911 (F. B.).

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 237 of 1924.

June 24, 1924.

Present:—Justice Sir Babington Newbould, Kt., and Mr. Justice Chakravarti.REZ MUHAMMAD AND OTHERS—
APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 342—
Examination of accused, nature of.*

What is necessary for the purpose of s. 342, Cr. P. C., is that the accused should be brought face to face solemnly with an opportunity given to him to make a statement from his place in the dock in order that the Court may have the advantage of hearing his defence of he is willing to make one with his own lips. The section must not be interpreted so as to give the Court the power to cross-examine the accused. [p. 294, col. 2.]

Where a Court asks an accused, "What is your defence", and he replies, "I am innocent", it is sufficient compliance with s. 342, Cr. P. C. [p. 294, col. 1.]

Mr. Narendra Kumar Bose (for Sir Provas Chandra Mitter), Messrs. Debendra Narain Bhattacharjee and Nisitha Nath Ghattak, for the Applicants.

Mr. Khondkar, for the Crown.

JUDGMENT.—This Rule has been granted on two grounds. The first is that the Magistrate who tried the case did not comply with the mandatory provisions of s. 342 of the Cr. P. C. In this case the Trial Magistrate did in fact question the accused after the witnesses for the prosecution had been examined and cross-examined and before they were called on for their defence. It is, however, contended that the questions put to the accused at this time were not such as required by s. 342, Cr. P. C. Five accused were tried and one was acquitted. To all the accused the same question was put, "what is your defence." Two of them replied, "I am innocent. I will file a written statement." The other two replied, "I am innocent." It is argued that the questions put to these accused were not of the nature contemplated by the section, that is to say, the Court did not question the accused generally on the case for the purpose of enabling them to explain any circumstances appearing in the evidence against them. In support of this contention reliance is placed on the decision of a Bench of this Court in the case of *Sailendra Chandra Singh v. Emperor* (1). In that

case the record of the examination of the accused after examination of all the prosecution witnesses was in the following words only, "Plea?—Not guilty." The learned Judges who decided that case were not prepared to say that there had been in that case substantial compliance with the provisions of s. 342. But we do not think that that case is sufficient to support the point that is urged before us now. There is a great difference between asking an accused person, what is his plea and asking him, what is his defence. It has been for many years the more usual practice to interpret the s. 342 as requiring the Court to give the accused an opportunity of stating his defence, if he wishes to do so. It has been repeatedly held that this section must not be interpreted so as to give the Court the power to cross-examine the accused. The result is that in the majority of criminal cases that come to this Court in fact in nearly all of them we find that the questions put to the accused under this section are of a formal nature in words similar to those which have been used in the present case. The only reported case in which the plea now urged has been decided in the petitioners' favour is the decision of a single Judge of the Patna High Court in the case of *Bhokhari Singh v. Emperor* (2) from the view expressed in that judgment we must respectfully differ. The maxim of *optimus legis interpretes consuetudo* is applicable to the point we have to decide and there can be no doubt that the usual practice has been followed in the present case. The object of the section has been pointed out by Mr. Justice Rankin in *Promotha Nath Mukhopadhyaya v. Emperor* (3). We are in agreement with the view there expressed that what is necessary is that the accused should be brought face to face solemnly with an opportunity given to him to make a statement from his place in the dock in order that the Court may have the advantage of hearing his defence, if he is willing to make one with his own lips. In the present case the accused were given an opportunity of making their defence with their own lips if they wished to do so, and they clearly showed that they did not wish to do so. For the above reasons we hold that this

(1) 77 Ind. Cas. 812; 38 C. L. J. 175; (1924) A. I. R. (C.) 153; 25 Cr. L. J. 460.

(2) 81 Ind. Cas. 199; (1924) Pat. 198; 5 P. L. T. 445; 25 Cr. L. J. 711; (1924) A. I. R. (Pat.) 791.

(3) 71 Ind. Cas. 792; 27 C. W. N. 389 at p. 406; (1923) A. I. R. (C.) 470; 24 Cr. L. J. 248; 50 C. 518.

ground on which the Rule has been issued must fail.

As regards the second ground we think the petitioners have a good case. The learned Sessions Judge who heard the appeal thought it necessary to have a map of the locality prepared by a competent surveyor. This map was prepared and forwarded to him. Though no reference is made to the map in the judgment it seems incredible that after the map had been prepared it should not have been used by the Court of Appeal; nor can we accept the contention raised on behalf of the Crown that it was not used as evidence. If it was used it must have been used as showing the relative position of certain plots, that is to say as evidence of the positions of these plots.

We accordingly make this Rule absolute on this ground only. We set aside the judgment of the Appellate Court and direct that the appeal be re-heard. If in the view of the Appellate Court it is necessary to make use of the map evidence, it should be taken under the provisions of s. 428, Cr. P. C. to prove it properly.

s. D.

Application allowed.

PATNA HIGH COURT.

CRIMINAL REVISION No. 108 OF 1925.

May 6, 1925.

Present :—Mr. Justice Macpherson.

Babu HARBANS NARAIN SINGH AND

OTHERS—PETITIONERS

versus

MOHAMMAD SAYEED AND OTHERS—

OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 107, 144, 145, 439—Dispute regarding land—Order confirming possession of one party without following procedure laid down in s. 145, legality of—Revision.

The Police submitted a report to a Magistrate recommending action under s. 144 followed by proceedings under s. 145 of the Cr. P. C. in respect of a plot of land against certain parties. On this report the Magistrate passed an order directing that the parties should appear before him on a certain date and that in the meantime they should not commit a breach of the peace by going to the land in dispute. On the parties appearing before him the Magistrate heard the lawyers and passed an order to the effect that one of the parties was in possession of the land and that the others were forbidden to interfere with the former's possession. The order wound up by saying that in case of interference with such possession the parties guilty of interference would

be proceeded against under s. 107 of the Cr. P. C., and that if they had any right they had better go to the Civil Court. On revision:

Held, that the order passed by the Magistrate was, in substance though not in form, an order under s. 145 of the Cr. P. C., and that having been passed without observing the formalities indispensable under that section was passed without jurisdiction and must be set aside. [p. 236, col. 2.]

Criminal revision from a decision of the District Magistrate, Monghyr, dated the 14th February 1925, affirming that of the Sub-Divisional Magistrate, Monghyr, dated the 14th January 1925.

Messrs. K. B. Dutt and P. C. Rai, for the Petitioners.

Mr. Neyamatullah, for the Opposite Party.

JUDGMENT.—This is an application against an order dated the 14th January 1925 of the Sub-Divisional Magistrate of Monghyr.

On 19th November 1923 an order under s. 144 of the Cr. P. C. was made absolute by a Deputy Magistrate of Monghyr against the petitioner Harbans Narain Singh and also the opposite party Rita Singh with the result that the opposite party Muhammad Ishaq was directed to be retained in possession of an area of 30 *bighas* which was the land in dispute between the parties or a part of it. The Magistrate added that if the parties to the proceeding created trouble after the expiry of two months, action under s. 107 or s. 145 of the Cr. P. C. would be taken. Harbans Narain moved the High Court and on 1st February 1924 this Court set aside the order on the view that it was not one which could be properly made under s. 144. The learned Judge further directed as follows:

"If there is any apprehension of a breach of the peace it will be open to the Magistrate to take proper proceedings according to law."

On the 2nd December 1924 the Police submitted a report recommending action under s. 144 followed by proceedings under s. 145 in respect of a plot of 40 *bighas* (out of a large area of about 163 *bighas*) which apparently includes the area of 30 *bighas* already mentioned, and showing the petitioners as first party, Muhammad Saiyid and others as second party, Fazal Karim and Ishaq, already mentioned, as third party and Rita Singh as fourth party. On that report the Sub-Divisional Magistrate passed the following order on 9th December.

"All parties should appear before me with their documentary evidence on 20th

December. Meantime they should not commit a breach of the peace by going to the lands in dispute."

On 12th January he "heard the lawyers for the first three parties" and two days later passed the order of which revision is sought. It runs as follows:—

"The first party claim the land as *bakast*, but there is no documentary evidence in support of their claim that this particular land is *bakast*. The second party claimed settlement of 40 *bighas* of the disputed land from the previous *maliks* and produced rent receipts in support of their claim. He was also sued by the late *maliks* of 12-annas, etc., share for arrears of rent. The third party claims 30 *bighas* out of the disputed land as his *rai-yati* but the rent receipts filed do not seem to be reliable. The fourth party claim to be sub-tenants of the second.

I consider that the second party are in possession 40 *bighas* of the disputed land. The others are forbidden not (*sic*) to interfere with their possession. If they do, they will be proceeded against under s. 107, Cr.P. C. They had better go to the Civil Court if they have any rights."

Mr. K.B. Dutt on behalf of the petitioners contends that the order is a judicial one and that this Court has jurisdiction to set it aside. On behalf of the opposite party it is suggested that the order is a judicial one under s. 144 which should not be set aside as it has spent its force.

In his explanation the Sub-Divisional Magistrate claims that his order was an executive one, and states that he thought it necessary before taking action under the Cr. P. C. to hear the parties but that after hearing them he did not consider that any action under the Code was necessary. Some support for the view that the order is an executive one might be derived from the fact that in the copy of the order filed with the petition the designation "S. D. O." is appended to the initials of the Magistrate but those letters do not appear in the original.

If the order was passed by him as a Court, the Magistrate manifestly could not avoid responsibility now by saying that he passed the order in an executive capacity. It is, however, difficult to say what the order really is. It does not indeed purport to be passed under s. 144 or s. 145 and the Sub-Divisional Magistrate apparently desired to avoid issuing orders under s. 144 be-

cause this Court had set aside a similar order, and also to avoid taking proceedings under s. 145 to which the order of this Court pointed but which besides being troublesome too often lead to nothing, as they have to be set aside on technical grounds. But actually the order passed differs little from the previous order which was set aside by this Court (except in the fact that it does not purport to be made under s. 144) and that order was set aside on the ground that though passed under s. 144 it was actually one contemplated by s. 145 which was passed without observing the formalities indispensable under the provision. It is difficult to see that the order now challenged is anything else than a thinly disguised order under s. 145. In substance though not in form the Sub-Divisional Magistrate took action under the Cr.P.C. and once again passed an order under s. 145. He decided a question of disputed possession and forbade interference with the possession of the party in whose favour he decided, directing the opposite parties to the Civil Court. He could not do this executively. The mere fact that he proposed to enforce his order by action under s. 107 of the Cr. P. C. instead of by a prosecution under s. 188 of the Penal Code hardly affects the matter. A similar reference to s. 107 had been made in the illegal order under s. 144 which this Court had set aside. I am constrained to the conclusion that the Sub-Divisional Magistrate acted judicially and passed without jurisdiction an order which he could only pass under s. 145.

The Rule is made absolute and the order of the 14th January is set aside. It is of course open to the Magistrate to take any proceedings to keep the peace which are warranted by law, but he must face the position squarely and realise that an order contemplated by s. 145 cannot be passed by a short cut such as was taken in the present instance.

Z. K.

Rule made absolute.

MADRAS HIGH COURT.

REFERRED TRIAL No. 47 OF 1924

AND

CRIMINAL APPEALS NOS. 297 AND 337
OF 1924.

October 23, 1924.

Present:—Mr. Justice Krishnan.

[On a difference of opinion between
Mr. Charles Gordon Spencer, Officiating
Chief Justice, and Mr. Justice Reilly.]*In re* GAM MALLU DORA *alias*
MALLAYA AND OTHERS—ACCUSED—
APPELLANTS.*Criminal Procedure Code (Act V of 1898), ss. 235,
239—Penal Code (Act XLV of 1860), s. 121—Waging
war against King—Various incidents on various dates
—Continuing offence—"Same transaction"—Joint trial
of persons accused of various acts, legality of.*

Six persons were jointly tried for the offence of waging war against the King, by attacking and looting a number of Police Stations on various dates and by attacking the forces of the Crown at various places on different occasions. It was shown that one of the accused joined the party waging war only long after some of the other accused had ceased to be members of that party. But all the accused were found to be followers of one leader animated throughout with the same motive of overthrowing the British Government:

Held, Per Spencer, Offg. C. J. and Krishnan, J., (Reilly, J., dissenting) that the various incidents which constituted the waging of war were parts of the same transaction and that the joint trial of the accused was justified under s. 239 (1) of the Cr. P. C. [p. 307, col. 2.]

Per Krishnan, J.—The question of the legality of a joint trial really depends upon the accusation made and not upon the result of the trial; provided that the accusation is a real one and not a mere excuse for a joinder of charges which cannot be otherwise joined. [p. 306, col. 2.]

Abdul Salim v. Emperor, 69 Ind. Cas. 145; 49 C. 573; 35 C. L. J. 279; 26 C. W. N. 680; (1922) A. I. R. (C.) 107; 23 Cr. L. J. 656, followed.

The waging of war is a continuing offence beginning with the first act of war and going on till the war is ended in some manner. [*ibid.*]

The various incidents in a war may be so disconnected as to form different transactions. But the question whether they form parts of the same transaction or must necessarily be held to be different transactions has to be judged on the facts of each case. [*ibid.*]

The usual tests applied to decide whether different acts are parts of the same transaction are proximity of time, unity of place, unity of purpose or design and continuity of action. It is not necessary that all of them should be present to make the several incidents parts of the same transaction. Unity of place and proximity of time are not important tests at all; but the main test is unity of purpose. If the various acts are done in pursuance of a particular end in view and as accessory thereto, they may be treated as parts of the same transaction. [p. 307, col. 1.]

Per Spencer, Offg. C. J.—When a series of acts are so connected by community of purpose and continuity of action as to form not only one transaction but a single offence, proximity of time between the performance of the various acts composing that offence not being the sole test of the unity of the transaction,

s. 235 of the Cr. P. C. authorizes persons accused of doing those acts to be charged and tried at one trial for them all. Section 239 (d) of the Cr. P. C. authorizes the trial of more persons than one on one charge and at one trial if they are accused of different offences committed in the course of the same transaction. [p. 299, cols. 1 & 2.]

Intervals of time between the commission of a series of acts do not necessarily import want of continuity when the aims of those jointly tried have throughout been directed to one and the same objective. [p. 299, col. 2.]

The waging of war is essentially a continuing offence, in which several incidents, which may in themselves be separate offences, may be comprised. [p. 299, col. 1.]

Rebellion implies a state of being rather than the doing of any act, although for a conviction it is necessary to prove that some overt act was committed by the offender. Rebellions and wars continue until they are suppressed by capture or destruction of the rebel forces or by the rebels laying down their arms and making their submission as subjects to their Sovereign and receiving his pardon. [*ibid.*]

Per Reilly, J. (dissentiente.)—The charge in a Sessions trial must be based on evidence given before the Committing Magistrate. A misjoinder of persons cannot be escaped by deliberately making the charge wider than the evidence produced to support it, in order to represent all the persons tried as accused of all the offences or incidents included, though there is no prospect nor intention of proving more than that each is guilty of some of them. [p. 303, col. 1.]

A non-continuing offence is necessarily one transaction: a continuing offence may or may not be so; persons accused of the same continuing offence may be tried together so far as their offence is confined to one transaction. [p. 304, col. 1.]

An offence cannot be treated as necessarily one transaction—merely because it is a continuing offence. On the contrary s. 239 of the Cr. P. C. implies that a continuing offence may embrace more than one transaction, but only so far as it is concerned with one transaction, can more persons than one be tried together for it. The section allows the Court to try several persons together for the same continuing offence of waging war within the limits of one transaction but not if the offence alleged covers more than one transaction. Under s. 239 (d) several persons may be charged and tried together when accused of different offences committed in the course of the same transaction; but "transaction" there must have the same meaning as in s. 239 (a). [*ibid.*]

The provisions of the Cr. P. C. regarding charges are designed to simplify and define within reasonable limits the charges that may be tried at one and the same time and so avoid the embarrassment of the accused. [p. 304, col. 2; p. 305, col. 1.]

It is very desirable that Public Prosecutors and the Courts should give full effect to the spirit of the provisions of the Cr. P. C. instead of straining them to cover doubtful cases. [p. 305, col. 1.]

The general rule is laid down in s. 233 of the Cr. P. C. that for every distinct offence there shall be a separate charge separately tried. The principle is that the accused person shall have a simple allegation to meet and the Court a clear issue to try. But to the general rule certain exceptions are made in ss. 234, 239. All these exceptions can, however, be interpreted so as not to conflict with the general principle that the accused should not be perplexed and the Court should not be confused by complicated or numerous or disconnected allegations. In interpreting these

exceptions it must never be forgotten that they are exceptions to the general rule and, therefore, to be interpreted with strictness and, so far as they affect the defence of accused persons, with the utmost strictness. [p. 304, col. 2.]

It is entirely wrong to approach the interpretation of the word "transaction" in s. 235 or s. 239 of the Cr. P. C. with the idea of ascertaining how far etymologically it will extend, how far the thread of continuity implied in it can be stretched, how far its meaning can be strained without an obvious break down. [*ibid.*]

The word "transaction" in ss. 235 and 239 of the Code must not be interpreted in any special or artificial or conventional or technical way but as it is ordinarily used by men of education and common-sense. If you cannot speak of a series of events as a transaction in the ordinary sense in which that word is used, you cannot try a number of persons together in respect of those events by attributing a special and unusual meaning to the word in s. 239 of the Code. [p. 305, col. 1.]

The ordinary meaning of the word "transaction" cannot be stretched so as to make it embrace all the incidents of a long continued rebellion spread over a wide area and extending over many months. [*ibid.*]

IN REFERRED TRIAL NO. 47 OF 1924.

Trial referred by the Court of the Agency Additional Sessions Judge, Waltair, for confirmation of the sentence of death passed upon the said 1st Accused in Case No. 10 of the Calender for 1924.

IN CRIMINAL APPEALS NOS. 297 AND 337 OF 1924.

Appeal by accused Nos. 2 to 6 against an order of the Court of the Agency Additional Sessions Judge, Waltair, in Case No. 10 of the Calendar for 1924.

These cases coming on for hearing on the 8th and 9th September 1924, respectively, after service of notice on all the accused, upon perusing the petitions of appeals and the record of the evidence and proceedings before the said Court of Session and upon hearing the arguments of Mr. P. Markandeyulu, engaged for the defence of the 1st Accused under Government order, dated the 17th December 1884, No. 3273, Judicial, and of the Public Prosecutor on behalf of the Crown, and Counsel not appearing on behalf of the appellants in Criminal Appeal No. 337 of 1924, and the cases having stood over for consideration till the 23rd of September 1924, the Court (Mr. Charles Gordon Spencer Officiating Chief Justice, and Reilly, J.) delivered the following

JUDGMENT.

Spencer, Offg. C. J.—The six appellants before us form the third batch of persons tried for complicity in the Vizagapatam-Godavari rebellion which broke out in August 1922. The Agency Additional Sessions Judge has convicted them all of offences punishable under ss. 121,

121-A, 122, 143, 147 and 148, Indian Penal Code, and he has convicted only the first and third appellants of an offence under s. 397, and the rest of offences under s. 395, Indian Penal Code, and has sentenced the 1st accused to death and the other five to transportation for life.

The first thing to be considered is whether the charge is in order both as regards the unrepresented appellants, accused Nos. 2 to 6, and as regards the first appellant, although his Vakil has not raised the defence that the conviction of his client is bad for misjoinder; nor does it appear that misjoinder of charges was made the ground of any objection when the appeals of the batches already disposed of were heard. There are eight counts in the charge. Of the first two counts one consists of a charge for waging war and another of a charge for attempting to wage war, which all form parts of s. 121 by the definition in the Code. It was unnecessary to have two counts for the same offence seeing that the dates and places are the same. Then the third count is that the accused conspired to wage war—an offence under s. 121-A—and the fourth is that they collected arms and ammunition—an offence under s. 122. It was unnecessary to have these counts in the charge as there was clear evidence that these men did much more than merely conspire and make preparations for war. The fifth charge relates to the murder of eight Police Officers. The accused have all been acquitted of this charge and it is unnecessary to consider it further. "The sixth count that 'you and others did loot the Police Stations above-mentioned'—(of which there are eight) on dates not specified—and that you 'did extract supplies of food and other articles by force or threats from the villagers of various villages' on dates not specified, is too vague. Each looting of a village or Police Station should have been treated as a separate offence if it was intended to try any or all of the accused for dacoity apart from waging war. The convictions of the 1st and 3rd accused under s. 397—dacoity armed with a dangerous weapon—and of accused Nos. 2, 4, 5 and 6 under s. 395 of dacoity, must be quashed, as the charges did not give them sufficient notice and particulars of what they had to meet: but the validity of the conviction under s. 121 is not affected by the striking off the convictions for other

offences forming component parts of the offence of waging war, and the accused cannot be said to have been prejudiced in their defence on the charge for waging war, as the acts of dacoity were all merely some of a series of incidents which went to make up the continuing offence of waging war within the meaning of s. 235 (3), Cr. P. C.

The Judge has not passed separate sentences for each offence. The combined sentence of transportation for life imposed for the offence under s. 121 cannot be reduced in the case of those accused against whom there is evidence of participation in that crime, as that sentence is the minimum prescribed by law under s. 121.

It was decided by Oldfield and Ramesam, JJ., in one of the appeals arising out of the Malabar rebellion, Referred Trial No. 80 of 1922, that the waging of war (or "adhering to the King's enemies" as treason is sometimes described in England) is essentially a continuing offence, in which several incidents, which may in themselves be separate offences, may be comprised. I see no reason to think it is otherwise. Rebellion implies a state of being rather than the doing of any act, although for a conviction it is necessary to prove that some overt act was committed by the offender. Rebellions and wars continue until they are suppressed by capture or destruction of the rebel forces or by the rebels laying down their arms and making their submission as subjects to their Sovereign and receiving his pardon. What was held by the Privy Council in *Subrahmanya Ayyar v. King-Emperor* (1) to vitiate a trial was the joinder of more than three offences of bribery and extortion extending over 2½ years at one trial without separate charges for each offence as that was a direct contravention of ss. 233 and 234, Cr. P. C. When a series of acts are so connected by community of purpose and continuity of action as to form not only one transaction but a single offence, proximity of time between the performance of the various acts composing that offence not being the sole test of the unity of the transaction, s. 235 authorizes persons accused of doing those acts to be charged and tried at one trial

for them all—*vide Emperor v. Sherufalli* (2) and *Emperor v. Datto Hanmant Shahapurkar* (3) which lay down the principle that intervals of time between the commission of a series of acts do not necessarily import want of continuity when the aims of those jointly tried have throughout been directed to one and the same objective, and *Choragudi Venkatadri v. Emperor* (4). *Subrahmanya Ayyar v. King-Emperor* (1) was not a case of misjoinder of persons. Section 239, Cr. P. C. (as amended), cl. (d), authorizes the trial of more persons than one on one charge and at one trial if they are accused of different offences committed in the course of the same transaction. If an offence is a continuing one, I do not find any real difficulty in regarding it as a continuous transaction. In the course of committing a continuing offence like waging war there may be many minor incidents which of themselves constitute different offences. To take the example of another offence of a continuing nature, the offence of being a member of an unlawful assembly (s. 143, Indian Penal Code), the members of it may commit several acts which amount of themselves to separate offences, and while s. 149 provides that they are not responsible for offences committed by the general body before those individual persons join or after they leave the body, I have never heard it suggested that all the members cannot be tried at one trial for the main offence under s. 143 as well as for those other offences which have been committed by any member in pursuance of the common object during the time when they were present in the assembly. To take another instance of a continuing offence—culpable homicide by starving a child to death by persons legally bound to maintain it illegally omitting to feed it—the acts or rather omissions might extend over a long period with occasional interruptions during which food might be given, closed by the culminating event of the child's death, and yet the whole would be one transaction with a single objective. It would be absurd to charge the guardians for withholding food from the child only on the day of its death when the cause of death was continuous and systematic starving.

(1) 25 M. 61; 28 I. A. 257; 11 M. L. J. 233; 3 Bom. L. R. 510; 5 O. W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 160 (P. O.).

(2) 27 B. 135; 4 Bom. L. R. 930.

(3) 30 B. 49; 7 Bom. L. R. 633; 2 Cr. L. J. 578.

(4) 5 Ind. Cas. 847; 33 M. 502; (1910) M. W. N. 65; 7 M. L. T. 299; 20 M. L. J. 220; 11 Cr. L. J. 258.

In the present case the matter is simplified by the fact that the accused are charged not merely for committing several offences in one transaction, but for the *same* offence, in which several other offences are combined, thus bringing the case within the scope of s. 235 (3). Accused Nos. 4 and 6, according to the evidence, only took part in the second campaign; the first incident of which was the looting of Anantagiri village on 10th March 1923 and the last the attack on Poderu Police Station on 22nd September 1923. There is no evidence that accused Nos. 4 and 6 took part in the first campaign which lasted from August 1922 to November 1922. There was an interval between November 1922 and March 1923 during which no overt acts on the part of the rebels were reported. These two accused were only seen in the company of other rebels after the 1st May 1923. The fifth accused was first seen by P. Ws. Nos. 61 and 62 at Chintalapooty on the 30th October 1922 upon which occasion constables were captured by the gang and Government rations looted. As the rebel gang led by Srirama Raju did not cease their operations or make their submission during the period in which these accused are charged with committing acts of waging war, I do not think that it was illegal to charge and try them simultaneously for the same offence of waging war under s. 121, Indian Penal Code, with other members of the gang who were inspired by a common object of subverting the Government and destroying its forces, "offence" being defined in s. 4 (1) (o), Cr. P. C., as an act made punishable by law, and, "act" being defined in s. 3 (2) of the General Clauses Act, as including a series of acts, so that an offence is really an act or series of acts made punishable by law. The charging of accused Nos. 1 and 2 with the attack on the Police Station at Paderu, which took place after these two accused had been arrested and kept in custody, and the charging of accused Nos. 4 to 6 with attacking Chintapalli and other Police Stations, which were looted before these men joined the rebel gang, were pieces of carelessness which should have been avoided; but I cannot hold that it vitiated their trial for waging war so long as there was evidence to prove that they took part in attacking other Police Stations and villages which were properly mentioned in the charges acts of waging war. I think, how-

ever, that accused Nos. 4 and 5, who looted no Police Stations and fought in no engagements with the forces of the Crown, must have been prejudiced by not being informed in the charge what acts of theirs constituted waging war specifically, and what charges they had to meet, and I consider that the conviction of these two accused should be quashed and that they should be re-tried by the Additional Sessions Judge upon properly drawn up charges, having reference to the part they took in specified incidents within the dates mentioned in the charge under s. 121.

The accused were all acquitted on the 8th count in the charge of mischief by fire by burning the Government rest-house at Koyyur and the sheds at Gudem. It is unnecessary to say more about that offence.

As regards the sixth accused the earliest incident about which there is any evidence of his participation in the rebellion is the attack on Paderu Police Station on the 22nd of September 1923, which occurred after the arrest of the first accused on the 18th September and the second accused on the 14th of September. As the continuance of the offence of waging war does not depend on the presence of particular rebels in the rebel band and as there is evidence that the gang continued under the leadership of Srirama Raju even after some of his adherents were killed and captured, I do not find the charge and trial of this accused along with other participators in the offence under s. 121 to be illegal—*vide* s. 239, cls. (a) and (d). If the leader, Srirama Raju, who was present throughout both campaigns, had been on his trial along with these accused, could it be said that any of those who joined his following at a later stage of the rebellion, could not be tried along with those who deserted him at an earlier stage, seeing that all were charged with having committed the same main offence of waging war under his leadership at one time or another? I think not. Then on what principle, it may be asked, does Srirama Raju's absence from the dock alter the position of those who are present? I do not understand cl. (a) of s. 239 as applying only to offences of a continuing nature. Supposing two murders were committed in the course of one transaction and that A took part in both but B in the first only, A and B could be tried jointly for the same offence, *viz.*, murder, but the

charge would contain two counts against A and only one against B.

As regards the merits of the conviction, there is overwhelming evidence against the first accused that he took part in the attacks on the Police Stations of Chintapalli, Krishnadevipeta, Rajavommangi, Adatigala, Chodavaram, Annavaram and Malkanagiri in the depositions of P. Ws. Nos. 6, 7, 9, 11, 36, 13, 43, 44, 49, 53, 54, 56, 71, 86 and of other acts of violence which are spoken to by P. Ws. Nos. 90, 91, 39, 41, 40, 48, 117, 59, 60, 72, 64, 82, 96, 100 and 65 and other witnesses. His name is mentioned in Exs. S, XX, ZZ, GGG, UUU (2), TT (1), BBB (1), T (12), VVV, XXX, but not in Exs. T, VV (1), SS (2), CCC and AAA. Of these witnesses some speak to the same occasion but most of them to different occasions. The cumulative effect of this evidence is very great and leaves no room for doubt that the first accused committed the offence of waging war. P. Ws. Nos. 6, 7, 9, 36, 49, 56, 62, 63, 39 and others say that the first accused was a leader or *sirdar* under Srirama Raju and carried a gun (some say a 303 rifle) and posted guards. P. Ws. Nos. 23 and 24 say that he was among those who fired at the Police at Onjeri ghat where a constable was killed. The school-master of Gudem, P. W. No. 8, says that he was one of the leaders who persuaded people to join the rebels. There is not much evidence that he organized the rebellion, but there is a large amount of evidence that he took a leading part in it including the cutting of P. W. No. 90's ear. In his appeal petition and his statement to the lower Court he pleaded that he remained with Srirama Raju under compulsion and that guards were set to prevent him from running away. Several of the accused in this case have excused themselves on the plea that they were made to help the rebels. If all these pleas were true the band could not have held together for one day. As observed in the judgments disposing of the appeals of those previously convicted, the nature of the country made escape easy. It is impossible to believe that the leader of the rebellion had enough staunch followers to spare to guard those in his band who were unwilling to remain with him if so many wished to desert.

There can be no doubt of the guilt of the first accused. His conviction should, in my opinion, be confirmed and seeing that

he was a ringleader among the rebels and probably was one of those who took life at Onjeri, if not at other places, the sentence of death imposed on him, I think, should also stand.

As regards accused Nos. 2, 3 and 6, we have been referred to the evidence connecting them with the offence which is tabulated at the end of the judgment. The 2nd accused was seen by P. W. No. 9 and another witness carrying an ammunition box but he was also seen by P. W. No. 11 patrolling with a gun and a sword; so it appears that he was found competent and willing and so was promoted to a post of greater trust under the leader of the band. I find that there is ample evidence to convict all these accused of the offence of waging war. The sentence imposed on them is the minimum allowed by the Code. Their appeal should, in my opinion, be dismissed, but as my learned brother is of opinion that the conviction of accused Nos. 1, 2, 3, 4, 5 and 6 is bad, the case will be laid before a Third Judge under s. 429, Cr. P. C.

Reilly, J.—With great respect I find myself unable to agree with my Lord in this matter. I regret this extremely, not only because I recognize that my Lord's opinion is likely to be of much more value than my own, but also because, if my view is adopted, it will involve throwing away the time and labour spent on this case in the Sessions Court for reasons not directly connected with the guilt or innocence of the accused.

Eight charges were framed against the six accused who are the appellants before us. On two of these charges all of them were acquitted. On the remaining six charges all of them were convicted, on charge No. 6 accused No. 1 and 3 being convicted of using deadly weapons in dacoity, punishable under s. 397, Indian Penal Code, and the rest being convicted of dacoity punishable under s. 395, Indian Penal Code.

Charge No. 1 is that all the six accused waged war against the King Emperor, an offence punishable under s. 121, Indian Penal Code. Seventeen separate incidents, said to have occurred within dates more than 15 months apart, are mentioned in the charge, and at first sight it might appear that the Sessions Judge intended to charge the accused with that number of successive offences of waging war, which

would offend against the rule that no one can be tried at one trial for more than three separate offences of the same kind nor even for three such offences if not committed within a year. But it was decided in Referred Trial No. 80 of 1922 that the offence of waging war, punishable under s. 121, Indian Penal Code, is a continuing offence, and I am content to follow that decision. I agree that charge No. 1 is not illegal by reason of contravening s. 234, Cr. P. C., by mentioning more than three offences spread over a period longer than a year.

But, in my opinion, there are other fatal defects in charge No. 1. The charge is to the effect that all the six accused between 22nd August 1922 and 18th December 1923 attacked and looted and attempted to loot eight specified Police Stations and attacked the forces of the Crown at nine specified places "and *did thereby wage war against the King-Emperor*, committing offences punishable under s. 121, Indian Penal Code." No date is given for any of the 17 incidents mentioned. It is clear from the wording of the charge that the waging of war with which the accused are charged is in respect of the 17 incidents specified. Mr. Adam urges that, as waging war is a continuing offence, it would have been quite legal to charge the accused with waging war within certain dates and in a certain area without mentioning any particular incident. That may be so. But in this case particular incidents have been specified, and the accused have been informed by the charge that is the accusation that they took part in those incidents which they have to meet. The incidents have not been mentioned in the charge as instances of their waging war or as illustrations of the way they did it: it is alleged against them that they took part in those incidents and thereby urged war. The prosecution have, therefore, to prove that the accused took part in those particular incidents or in some of them. If they fail to prove against any particular accused that he took part in any of those incidents, that accused must be acquitted on this charge. Evidence that he took part in other incidents of the rebellion might be used to corroborate evidence that he took part in these incidents or some of them but by itself cannot prove him guilty on the charge as framed. No evidence has been produced that accused No. 4 or accused No. 5

had anything to do with any of the 17 incidents mentioned in this charge. In my opinion, accused Nos. 4 and 5 must, therefore, be acquitted on this charge. It may be possible to try them again for waging war by taking part in other incidents of which evidence has been given but which are not included in this charge; but with that we are not now concerned.

A less simple question is whether it was legal to try accused No. 6 with accused Nos. 1, 2 and 3 on charge No. 1. The evidence against accused No. 1 on this charge is that he took part in attacks on six Police Stations, the earliest being the attack on the Chintapalli Station on 22nd August 1922 and the latest that on the Malkannagiri Station on the 11th June 1923, and that he also took part in the attacks on the forces of the Crown at Onjeri and Damapalli on 3rd September 1922 and 24th September 1922, respectively. The evidence against accused No. 2 is that he took part in the attacks on two Police Stations on 23rd August 1922 and 10th October 1922 respectively and in the two attacks on the forces of the Crown at Onjeri and Damapalli in September 1922. The evidence against accused No. 3 is that he took part in the attacks on three Police Stations between 23rd August 1922 and 11th June 1923 and in the attacks at Onjeri and Damapalli in September 1922. There is also evidence that accused No. 1 was arrested on 18th September 1923 and accused No. 2 on 14th September 1923. The earliest and only incident mentioned in charge No. 1 in respect of which there is any evidence against accused No. 6 is the attack on Paderu Police Station on 22nd September 1923. That attack was more than three months after the latest of the 17 incidents mentioned in the charge in which according to the evidence accused No. 1 or accused No. 3 took part and 11 months after the latest of the incidents in which accused No. 2 took part. It was also after the dates on which accused Nos. 1 and 2 had been arrested and had disappeared from the scene. The finding of the Sessions Judge is that accused No. 6 only joined the rebels about 29th August 1923. One witness, P. W. No. 112, mentions that accused No. 6 was present when rice was extorted by some rebels at Bodatharampalem in April 1923. But apparently neither the prosecution nor the Judge relies on that evidence. There is no suggestion that the prosecution at any stage

had evidence, which failed for any reason, that accused Nos. 1, 2, 3 or 6 took part in any of the 17 incidents other than those I have mentioned in respect of them. We must take it that the prosecution case was that they took part only in those of the 17 incidents respectively. The question is could accused No. 6 be tried legally for waging war at Paderu on 22nd September 1923 with accused Nos. 1 and 2, who by that date had been arrested and had disappeared from the scene, with accused Nos. 1 and 3, who were charged with committing other acts of war but none later than June 1923, and with accused No. 2, who was charged with none later than October 1922. I speak of accused Nos. 1 and 3 not being charged with any act later than June 1923, and accused 2 with none later than October 1922 because the mere inclusion in the charge framed by the Sessions Judge of allegations that accused Nos. 1, 2 and 3 took part in the attacks on Paderu and other Stations, etc., which the prosecution had no intention of proving and knew in respect of Paderu Station to be untrue so far as accused Nos. 1 and 2 are concerned, or of allegations that accused No. 6 took part in incidents earlier than the date when according to their case he joined the rebels cannot help the prosecution. If the prosecution has evidence and sets out to prove that A, B and C has each committed a separate murder, their joint trial cannot be made legal by framing a charge that all of them committed all three murders. The charge in a Sessions trial must be based on evidence given before the Committing Magistrate. A misjoinder of persons cannot be escaped by deliberately making the charge wider than the evidence produced to support it in order to represent all the persons tried as accused of all the offences or incidents included, though there is no prospect nor intention of proving more than that each is guilty of some of them. It may be noticed in passing that apart from any legal defect in it charge No. 1 has been framed with so little care that it includes one attack on a Police Station and 7 attacks on the forces of the Crown with which there is no evidence to connect any of the accused in this case. Remembering that waging war has been held to be a continuing offence, the utmost that charge No. 1 can be taken legally and effectively to allege against accused Nos. 1, 2, 3 and 6 is

that accused No. 1 waged war from 22nd August 1922 to 11th June 1923, that accused No. 2 waged war from 23rd August 1922 to 19th October 1922, accused No. 3 from 23rd August 1922 to 11th June 1923, and accused No. 6 only on 22nd September 1923. When the dates are set out like that, it is certainly a very surprising charge.

I think it is clear—and I understand that to be also my Lord's view—that the trial of accused No. 6 on charge No. 1 with accused Nos. 1, 2 and 3 can be legal only if the attack on the Police Station at Paderu on 22nd September 1923 can be treated as part of the same transaction as that in which accused Nos. 1 and 3 were engaged in June 1923 and earlier and accused No. 2 on and before 19th October 1922, the date of the attack on the Rampa Chodavaram Station, the last of the 17 incidents in which accused No. 2 is shown to have taken part—an incident which occurred 10 months before accused No. 6 is shown to have joined the rebellion. These widely separated incidents can only be treated as parts of one transaction within the meaning of s. 239, Cr. P. C., if the whole insurrection can be treated as one transaction in that sense. Is that a fair or reasonable interpretation of the word "transaction" as used in that section? If that interpretation is to be adopted, then 10 rebels might be tried together for 10 separate acts committed by them respectively at separate times and places over a period of many years if only they were all committed in furtherance of the same rebellion. In my opinion "transaction" as used in s. 239, Cr. P. C., must mean something less wide than that. It has been suggested that, if waging war is a continuing offence and that offence may continue for a long period, then, so long as it continues and, however, many incidents it embraces, it must be one transaction within the meaning of the section. I must admit that at first sight that argument attracted me. But, with respect, an examination of the section, I think, shows that it is unsound. The first class of persons whom the section allows to be charged and tried together are "persons accused of the same offence committed in the course of the same transaction." There is something rather curious about those words. What is the meaning there of the words "in the course of the same transaction"? The provision relates, not to persons accused of the same kind of offence, but to persons accused of the

same offence. Would it not have been enough to provide that persons accused of the same offence may be charged and tried together? What is the meaning of adding the qualification "committed in the course of the same transaction"? We cannot treat those words as meaningless or redundant—at least we are not at liberty to do so until we are satisfied that it is impossible to attach any significance to them. Now, if we apply this provision to non-continuing offences, that is, offences embracing only one incident, such as murder, we cannot reasonably speak of two persons being accused of the same murder committed in the course of the same transaction. If we do so, the words "committed in the course of the same transaction" are clearly redundant and add nothing to the meaning. But, if we apply the provision to a continuing offence, it is possible to give a meaning to those words. Applied to a continuing offence they will have a meaning if we read "committed in the course of the same transaction" as having a restrictive effect. A non-continuing offence is necessarily one transaction: a continuing offence may or may not be so. Persons accused of the same continuing offence may be tried together so far as their offence is confined to one transaction. If the provision is interpreted in that way, it has an intelligible and practicable meaning. In my opinion it must be so interpreted. If that interpretation is correct, an offence cannot be treated as necessarily one transaction—merely because it is a continuing offence. On the contrary the section implies that a continuing offence may embrace more than one transaction, but, only so far as it is concerned with one transaction, can more persons than one be tried together for it. If we apply this to waging war, the section allows us to try several persons together for the same continuing offence of waging war within the limits of one transaction but not if the offence alleged covers more than one transaction. Under s. 239 (d) several persons may be charged and tried together when accused of different offences committed in the course of the same transaction; but "transaction" there must have the same meaning as in s. 239 (a).

We must return to the question whether an insurrection including many different incidents and extending over a long period can be regarded as one transaction within the meaning of s. 239, Cr. P. C. I

can find no reported case in which "transaction" has been given so wide a meaning. It can hardly be denied that in ordinary parlance no one would think of speaking of a long-continued insurrection as a transaction. Is there anything in the section or the connected sections or the Code to justify us in giving the word so extended a meaning? The general rule is laid down in s. 233 of the Code—for every distinct offence there shall be a separate charge separately tried. The principle obviously is that the accused person shall have a simple allegation to meet and the Court a clear issue to try. But to the general rule certain exceptions are made. One person may be tried at one trial for three offences of the same kind committed within a year (s. 234); one person may be tried at one trial for several offences forming parts of the same transaction (s. 235); one person may be tried at one trial for several offences or for alternative offences if it is doubtful which of those offences the facts which can be proved will constitute (s. 236); and lastly more persons than one may be tried together at the same trial for the same offence committed in the course of the same transaction, for three offences of the same kind committed by them jointly within a year, for different offences committed in the course of the same transaction, etc., (s. 239). The object of introducing these exceptions to the general rule is to prevent unnecessary duplication of proceedings. On examination it will be seen that all these exceptions can be interpreted so as not to conflict with the general principle that the accused person should not be perplexed and the Court should not be confused by complicated or numerous or disconnected allegations. In interpreting these exceptions it must never be forgotten that they are exceptions to the general rule and, therefore, to be interpreted with strictness and, so far as they affect the defence of accused persons, with the utmost strictness. To my mind it is entirely wrong to approach the interpretation of the word transaction in s. 235 or 239 with the idea of "ascertaining how far etymologically it will extend, how far the thread of continuity implied in it can be stretched, how far we can strain its meaning without an obvious break down. In *Choragudi Venkata-driv. Emperor* (1944), Benson, J., remarked that the provisions of the Code regarding charges "are designed to simplify and define within reasonable limits the charges that may be

tried at one and the same time and so avoid the embarrassment of the accused * * *

* * It is very desirable that Public Prosecutors and the Courts should give full effect to the spirit of the provisions of the Code instead of straining them to cover doubtful cases." With those observations I respectfully agree. Can we consistently with the spirit of the Code stretch the ordinary meaning of the word "transaction" so as to make it embrace all the incidents of a long continued rebellion spread over a wide area and extending over many months? This case itself I think illustrates the mischief of such an interpretation. At the trial accused No. 6, an ignorant hillman, had to stand in the dock for more than a fortnight and listen to the examination of 96 witnesses before a word of evidence was given against him. Is it unlikely that at the end of that time he was bewildered and befogged about the case? It is clear that the Sessions Judge himself was confused by the complexity of the proceedings, as he fell into the remarkable error of convicting accused No. 4 and accused No. 5 on Charge No. 1, though there is no evidence at all that they had anything to do with any of the incidents included in that charge. I am now concerned, however, not directly with any prejudice which the form of the charge may have caused to the accused, but with its legality. In my opinion, the word "transaction" in ss. 235 and 239 of the Code must not be interpreted in any special or artificial or conventional or technical way but as it is ordinarily used by men of education and common-sense. If you cannot speak of a series of events as a transaction in the ordinary sense in which that word is used, you cannot try a number of persons together in respect of these events by attributing a special and unusual meaning to the word in s. 239 of the Code. Can we in any ordinary sense of word say that accused No. 2, when he attacked the Rampa Chodavaram Police Station in October 1922, was engaged in the same transaction as accused No. 6 when he attacked the Padern Police Station in September of the following year? To my mind it is impossible to do so. If that view is correct, the joint trial of accused No. 2 and accused No. 6 was illegal and void. Similarly the trial of accused No. 1 and accused No. 3 with accused No. 6 was illegal. There are somewhat similar difficulties about the trial of accused Nos. 1, 2 and 3 together; but it is unnecessary to

discuss them. If the trial of accused Nos. 1, 2 and 3 with accused No. 6 was illegal, we cannot exclude accused No. 6 from consideration and leave the trial of accused Nos. 1, 2 and 3 to stand good.

In my opinion the convictions of accused Nos. 1, 2, 3 and 6 on charge No. 1 of waging war must be set aside and an order should be made for them to be re-tried for that offence either separately or, so far as there is evidence that they or any of them were jointly concerned in incidents of waging war which were parts of one transaction, together.

Of the other charges on which the appellants have been convicted charge No. 2 falls with charge No. 1. Charges Nos. 3, 4, 6, and 7 without any specification of times and places are too vague to stand. In my opinion the convictions of all the accused on charges Nos. 2, 3, 4, 6 and 7 should be set aside and they should be acquitted on those charges, as it does not appear to be necessary to try them again for those offences.

These cases coming on for final hearing under s. 429 of the Cr.P.C., upon perusing the Petition of Appeal, the record of the evidence and proceedings of the said Court of Sessions and the judgment of this Court and upon hearing the arguments of Mr. P. Markandeyalu, engaged for the defence under G. O., dated 17th December 1884, No. 3273, Judicial, and of the Public Prosecutor on behalf of the Crown, and Counsel not appearing on behalf of the appellants in Criminal Appeal No. 337 of 1924, the Court (Krishnan, J.) delivered the following

JUDGMENT.—This case has been referred to me under s. 429, Cr. P. C., because of a difference of opinion between the learned Judges who heard the appeals in the first instance. The learned Officiating Chief Justice was of opinion that the convictions and sentences of accused Nos. 1, 2, 3 and 6 should be confirmed and that the case against accused Nos. 4 and 5 should be re-tried; whereas my learned brother Reilly, J., who sat with him, was of opinion that the whole trial was vitiated as illegal and should be set aside; he directed that the 4th and 5th accused should be acquitted, and that accused Nos. 1, 2, 3 and 6 should be re-tried separately.

Both the learned Judges were agreed about certain minor charges framed against the accused. The main point on which they differed is on the question of the legality of

the joint trial of all the accused chiefly on the first count in the charge. Under that count the accused were charged with the offence of waging war against the King-Emperor under s. 121, Indian Penal Code. The charge says, "That you, the above accused (naming all six of them) did with others, at eight places (named) attack and loot or attempt to loot the Police Stations there and did at other places (named) attack the forces of the Crown and did thereby wage war against the King-Emperor." The learned Vakil for the 1st appellant (1st Accused) urges that as it has been shown by the evidence in the case that the 6th accused joined the party waging war only long after the 1st and 2nd accused had ceased to be members of that party as they had already been arrested, the trial of the 6th accused with the 1st and 2nd accused and others jointly was not justifiable by anything in the Cr. P. C. This argument was rejected by the Officiating Chief Justice but has been accepted by my learned brother Reilly, J.

No doubt, as Reilly, J., points out, the fundamental rule under the Cr. P. C. is what is stated in s. 233 that "for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately;" but the section itself mentions the exceptions to it and refers to ss. 234, 235, 236 and 239. The learned Public Prosecutor contends that the joint trial of the six persons under s. 121, Indian Penal Code, is justified by s. 239 (a).

There can be no doubt that there was a war being waged in the Rampa District and this case has arisen with reference to that war; it was started by one Srirama Raju who was the ringleader of the rebels from August 1922 when the first attack on the Chintalapudi Police Station was made and continued for a long time thereafter. The question I have to decide is whether the six persons who have been tried together under the first count are not persons accused of the same offence committed in the course of the same transaction within the meaning of s. 239 (a). There can be no doubt whatsoever that they are persons accused of the same offence because they were all charged under s. 121, Indian Penal Code, with waging the same war. Then the question is whether we can say that the offence was committed in the course of the same transaction so as to fall under s. 239 (a).

The question of the legality of a joint trial, in my opinion, really depends upon the accusation made and not upon the result of the trial; provided, of course, that the accusation is a real one and not a mere excuse for a joinder of charges which cannot be otherwise charged. It was so held in *Abdul Salim v. Emperor* (5) and I am prepared to follow it. It is not pretended here that there was any conscious attempt to join charges which could not otherwise be joined or that the charge as framed under count (1) was so framed for that purpose. The legality of the joint trial in this case has to be judged on the accusation and not on what was subsequently proved. The charge certainly as worded in count (1) puts all the six accused on the same footing as having committed all the various crimes mentioned in it in the course of the rebellion. The fact that it was afterwards shown that some two people among the six had by reason of their arrest ceased to be members of the party before a third man joined it, I do not think, will really affect the question at all.

The only question we have really to decide in the case is whether the various incidents mentioned in the charge were or were not parts of the same transaction. That the offence under s. 121 of waging war is a continuing offence has been laid down in this Court in Referred Trial No. 80 of 1922. It was followed by another Bench of this Court in Criminal Appeal No. 1891 of 1922 and I am prepared to follow that view. The waging of a war is clearly a continuing offence, it begins with the first act of war and goes on till the war is ended in some manner as pointed out by the learned Officiating Chief Justice. It may be, as Reilly, J., remarks, that the various incidents in a war may be so disconnected as to form different transactions. The question whether they form parts of the same transaction or must necessarily be held to be different transactions has to be judged in my view on the facts of each case.

In the present case there is no reason to suppose that the rebellion which was started by Srirama Raju and continuously carried on by him and his followers for a considerable time was anything but a single transaction. It was carried on throughout under his leadership and he and his followers were animated throughout with

(5) 69 Ind. Cas. 145; 49 C. 573; 35 C. L. J. 279; 26 C. W. N. 680; (1922) A. I. R. (O.) 107; 23 Cr. L. J. 657.

the same motive of overthrowing the British Government. There was both continuity of action and unity of purpose regarding the various acts charged against the accused. No doubt several places were attacked and looted and more than one engagement were fought in which some deaths took place; but I consider that we are justified in holding on the facts that the whole thing was one and the same transaction. The point was not taken in the lower Court and has, therefore, not been fully thrashed out. But I agree with the learned Officiating Chief Justice that the joint trial of the accused for the offence under s. 121, Indian Penal Code, is not illegal.

The expression "the same transaction" has been tried to be explained in several cases which have been brought to my notice. After all it cannot be said that any very satisfactory definition of the words has been given. Each case must be judged, in my opinion, on the facts of that particular case. Generally speaking I am prepared to follow the observations of the learned Judges in *Choragudi Venkatadri v. Emperor* (4) in which the effect of the previous decisions has also been considered, as to the meaning of the expression. Abdur Rahim, J., says that the usual tests applied to decide whether different acts are parts of the same transaction are proximity of time, unity of place, unity of purpose or design and continuity of action. It is not necessary that all of them should be present to make the several incidents parts of the same transaction. Unity of place and proximity of time are not important tests at all; but the main test, so far as I can see, is the unity of purpose. Continuity of action goes with unity of purpose. If the various acts are done in pursuance of a particular end in view and as accessory thereto, they may, as Abdur Rahim, J., observes, well be treated as parts of the same transaction. In this case there was clear unity of purpose and continuity of action in starting and carrying on the war. All the accused were throughout acting with the same purpose of subverting the Government in joining the rebellion. In this connection it was urged that as there was a lull in the operations for three months, as stated by the learned Sessions Judge in para. 8 of his judgment, it broke up the war into two campaigns and there were, therefore, at least two transactions. I do not think the

argument is right as in this case it cannot be said that at the time of the lull the rebels had abandoned their idea of fighting against the Government. They were only waiting for a more favourable opportunity of attacking the Government forces. I am, therefore, of opinion that as a question of fact, various incidents mentioned in count (1) of the charge were parts of the same transaction and that the trial of these accused together was justified under s. 239 (a).

It was next contended that a single trial under the sixth count of the charge also rendered it illegal even if the trial under the first count was proper. It was urged by the learned Vakil for the 1st appellant that the charge included more than three offences of the accused committed in the course of a year with eight charges the accused tried; and, therefore, A. Cr. P. C., justifies only a joint trial. There were eight separate and independent charges of dacoity against the six accused, no doubt the objection would be a strong one; but the learned Public Prosecutor points out that these charges are not separate but are made for offences which had been committed in the course of one and the same transaction, namely, the waging of the war. That seems to be so as the various dacoities were only incidents in the course of the war; if the count of waging war failed, count No. 6 also would fail. Count No. 6 begins by saying "That you and others in your attacks on the Police Stations above-mentioned did loot the stations of arms," etc., the words above-mentioned referring to the first count. I think it is not straining its language too much to hold that the charge meant to accuse six persons of dacoity as having been committed in the course of the war and, therefore, the joinder of more than three charges would be justified under s. 239 (d). It may be mentioned that the accused admitted that they did take part in the Futuri rebellion and merely pleaded compulsion as their excuse. They were represented by a Vakil, and no objection was taken to the frame of any of the charges or to the joint trial in the lower Court. There is really no foundation for the suggestion that the accused were embarrassed or in any way prejudiced in their defence. They themselves never said so. However, if the trial was illegal, no doubt, the question of prejudice will not arise. I, however, agree with the learned Officiating Chief Justice for

the reasons above given in holding that the conviction cannot be set aside on the ground that the trial was illegal.

On the merits the case of accused Nos. 1, 2, 3 and 6 has been hardly argued before me, for it is clearly proved against them on the evidence. In fact, as I have stated already, it is not denied that these accused took part in the war. I confirm the conviction of accused Nos. 1, 2, 3 and 6 under s. 121, Indian Penal Code. As regards the sentence on the 1st accused, I shall deal with it presently. In the view I take it is unnecessary to consider their convictions under the other sections charged.

As regards the 4th and 5th accused, they are not shown to have looted any of the Police Stations mentioned, nor committed any of the dacoity or to have fought in any engagement with the forces of the Crown. It is on the evidence that Reilly, J., has directed their acquittal. However, shown by the learned Public Prosecutor that there is a considerable body of evidence against them as set out by the learned Sessions Judge in the Schedule to his judgment to show that they did take part in waging war though not exactly in the manner set out in count No. 1. In these circumstances, the proper order is, in my opinion, to quash the conviction of these two accused, because they would certainly have been prejudiced by the way in which the charge was framed under count No. 1, and to direct them to be re-tried by the Agency Additional Sessions Judge upon properly drawn up charges under s. 121, Indian Penal Code.

As regards the sentence on the 1st accused, I am not satisfied that a differentiation should be made between him and the other accused who took part in the rebellion who are before me. The learned Chief Justice confirms the sentence of death passed on him on the ground that he was probably one of those "who took life at Onjeri," but there does not seem to be clear evidence of it; he was acquitted of the charge of murder of the Police Officers. I would, therefore, alter his sentence and impose upon him the same sentence as the other accused have received, viz., transportation for life. With the alterations above-mentioned, the appeals are dismissed.

V. N. V.

Z. K.

Appeals dismissed.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE CASE No. 36 OF 1925.

May 13, 1925.

Present:—Justice Sir Hugh Walmsley, Kt., and Mr. Justice B. B. Ghose.

W. R. T. FORBES—1ST PARTY

versus

Moulvi MUHAMMAD ALI HAIDAR KHAN AND ANOTHER—2ND PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 539B—Proceedings under s. 145—Local enquiry—Memorandum not recorded—Proceedings, whether vitiated—Prejudice.

There is no universal rule that disobedience of a mandatory provision in a Statute has the consequence of nullification of all proceedings irrespective of the question of prejudice. [p. 309, col. 2.]

Hriday Govinda Sur v. Emperor, 82 Ind. Cas. 767; 40 C. L. J. 149; (1924) A. I. R. (C.) 1035; 25 Cr. L. J. 1375; 52 C. 148, not followed.

Where in a proceeding under s. 145, Cr. P. C., the Magistrate makes a local enquiry in the presence of the Pleaders of the parties, who know where the Magistrate goes and the points to which his attention is drawn, but they do not ask the Magistrate to record a memorandum as required by s. 539B of the Cr. P. C., and are content to go on to judgment without seeing the memorandum, or even ascertaining whether one has been made, it is not open to any of the parties subsequently to say that the proceedings should be set aside for this formal defect unless it is shown that prejudice has been caused. [p. 309, col. 1.]

Reference made by the Sessions Judge, Sylhet, dated the 2nd February 1925.

Sir B. C. Mitter and Babu Preonath Dutt, for the 1st Party.

Mr. B. Chuckerbutty and M. Amiruddin Ahmed, for the 2nd Party.

JUDGMENT.

Walmsley, J.—This case comes before us on a Reference made by the Sessions Judge of Sylhet under the provisions of s. 433, Cr. P. C.

In a proceeding under s. 145, Cr. P. C., the Sub Divisional Magistrate declared the first party to be in possession of the disputed land, by an order dated March 25, 1924. The learned Judge recommends that this order be set aside on the ground that the Magistrate after making a local enquiry did not record a memorandum of the relevant facts which he observed. The rule which requires such a memorandum to be made was enacted by Act XVIII of 1923 and is contained in s. 539-B of the Code as it is after amendment. It does not, however, introduce any new principle, for this Court had often laid down that a memorandum should be prepared so that both sides to an enquiry or trial might

know what the Magistrate during his enquiry had noticed or failed to notice.

It is the form of the rule that creates difficulty. It runs "Any Magistrate mayand shall record a memorandum..... Such memorandum shall form part of the record of the case." The learned Judge refers to a decision by a Divisional Bench of this Court in the case of *Hriday Govinda Sur v. Emperor* (1), where it was held that the rule contained in the second clause of the section, that is the rule which directs that the memorandum shall form part of the record was mandatory, and that failure to comply with it was an illegality and not an irregularity which can be cured. With all deference to the learned Judges I venture to doubt whether that result does follow from applying the epithet mandatory. The decision, however, was in a trial for an offence whereas in the case before us there was no accused person before the Court and the only question was which of two parties was in possession of land, and which should shoulder the burden of instituting a civil suit. In such a proceeding I think that we are entitled to consider what action the petitioners took in regard to the writing of a memorandum. I have already pointed out that the requirement of s. 539-B introduced no new principle. The local enquiry was made in the presence of the petitioners' Pleader; he knew exactly where the Magistrate went and the points to which his attention was drawn. The petitioners through their Pleader must be assumed to be familiar with pronouncements so often made by this Court that a memorandum should be recorded. They did not, however, ask the Magistrate to record a memorandum, or to attach a memorandum to the record or to give them a copy. They were content to go on to judgment without seeing the memorandum, or even ascertaining whether one had been made. I do not think that they can now be allowed to say that for this formal defect the proceedings should be set aside, unless they can show that the Magistrate's omission has caused them prejudice.

As to prejudice, it is quite true that the learned Magistrate referred to what he had seen, and to the conclusions which he drew, but those remarks are redundant for the findings on the evidence adduced by the parties are summed up in these words. "I

(1) 82 Ind. Cas. 767; 40 O. L. J. 119; (1924) A. I. R. (C.) 1035; 25 Or. L. J. 1375; 52 O. 148.

can say with conviction that I consider the first party's evidence to be true, and I can say with even more conviction that I consider the second party's evidence to be a mass of lies and fictions supported by documents which must have been specially made for the occasion."

In these circumstances I hold that sufficient reason has not been made out for interference, and I reject the Reference.

Ghose, J.—I agree that this Reference should be rejected. I only desire to add that there is no universal rule that disobedience of a mandatory provision in a Statute has the consequence of nullification of all proceedings irrespective of any question of prejudice. Whether a mandatory provision is or only directory depends upon consideration of various circumstances to me that the objection in *Hriday Govinda v. Emperor* (1) is not applicable.

Reference rejected.

ODDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION No. 415 OF 1925.

July 15, 1925.

Present:—Mr. Simpson, A. J. C.
MOHAMMAD YAKUB—ACCUSED—
APPLICANT
versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 526—Transfer of case—District Magistrate, expression of opinion by, whether sufficient ground for transfer.

A District Magistrate in making over a case for disposal to another Magistrate made the remark that the case was quite clear and that the defence was ridiculous. He further directed that the Government Pleader should conduct the case and press for a severe sentence:

Held, that this expression of opinion on the part of the District Magistrate was a sufficient ground for directing that the case should be transferred to some other district.

Application for transfer of a criminal case from the District Magistrate, Gonda.

Mr. K. Yusuf Ali, for the Applicant.

ORDER.—This is an application for transfer. The applicant is an excise peon. An Excise Inspector searched his house and suggested that he should be prosecuted under s. 60 (a) of the Excise Act. The learned District Magistrate asked

the Excise Officer to enquire into the matter, and on receiving his report he wrote the following order:—

"Yakub will be prosecuted under s. 60 (a) of the Excise Act. It is quite a clear case and the defence is ridiculous. Case to the Excise Magistrate for disposal. The Government Pleader should conduct this case and press for a severe sentence."

The applicant, therefore, applies for transfer. The District Magistrate was duly notified and does not oppose the transfer. I transfer the case to the Court of the District Magistrate of Bahraich, with power to transfer it to any competent Magistrate subordinate to him.

Z. K.

Case transferred.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION

No. 128 OF 1925.

June 18, 1925.

Present:—Mr. Justice Fawcett and
Mr. Justice Madgavkar.

JAGARDEO RAMSUMER TEWARI—
APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Foreigners Act (III of 1864), s. 2—Cession of territory—Allegiance, whether affected—Election by subject, what amounts to—Common Law of England, applicability of, to India.

Under s. 2 of the Foreigners Act the burden of proving that a person alleged to be a foreigner is not a foreigner and is not subject to the provisions of the Act, lies upon such person. [p. 311, col. 2.]

Where there is a State, the ordinary idea of Constitutional Law is that there are subjects in that State who are ruled by the Sovereign and when territory is ceded the inhabitants of that territory will ordinarily become subjects of the Sovereign to whom the territory is ceded. [*ibid.*]

In the absence of an express provision in a treaty of cession regulating the future nationality of the inhabitants of the ceded territory, a relinquishment of the Government of a territory is not only a relinquishment of the right to the soil of the territory but also of the right over the inhabitants of the country. [*ibid.*]

It is open to a subject of the ceded territory, unless the treaty expressly forbids, to elect to continue his former nationality and to prove such election. The burden of proving such election, however, lies on the person who asserts that he has made such election. It is not enough for him to merely assert, when the question arises, that he has elected to remain within the allegiance of his former Sovereign, there must be conduct on his part such as leaving

the ceded territory and going to reside permanently in his former Sovereign's dominions, to indicate his previous election. [p. 312, cols. 1 & 2.]

The Common Law of England which was formerly administered by the Supreme Court is part of the law to be administered by the High Courts unless it is superseded by Statute or otherwise. This Common Law can only be applicable when it is properly applicable to the society and circumstances of India. There is no department of law in which the Common Law of England is more applicable than that part of Constitutional Law which governs the question of nationality and the question of the status of British subjects. [p. 313, col. 2; p. 314, col. 1.]

Kazi Kabiruddin, (with him Mr. Y. V. Bhandarkar), for the Applicant.

Mr. Kanga, Advocate-General, (with him Mr. S. S. Patkar), for the Crown.

JUDGMENT.

Fawcett, J.—This is a rule which has been issued against the Jailor, Yeravda Jail, calling upon him to show cause why the petitioner Jagardeo Ramsumer Tewari should not be brought before this Court to be dealt with according to law and why he should not be set at liberty, etc., in the exercise of this Court's power under s. 491, Cr. P. C.

The main facts of the case are not in dispute. The father of the petitioner was born at the village of Ramdupati, which at that time was in the Mirzapur District of the United Provinces. But some thirty or forty years back he came from there to Bombay, where he kept buffaloes and carried on a milkman's business. He had several sons, the third of whom is the present petitioner, who is stated to be about thirty years old. According to the affidavit which has been filed on petitioner's behalf and which is supported by other affidavits, the eldest son came to Bombay in about 1908. But after staying there for about twelve months he fell ill and went to his village, where he died. After that in 1909 Sahadev, the second son of the father Ramsumer, came to Bombay but only stayed there for about five months. He also fell ill and went to his village, and the father then brought his third son, the present petitioner, to Bombay in 1909. There is a dispute as to whether the petitioner really came to Bombay in 1909. In the affidavit made by Mr. Cauty, the Deputy Commissioner of Police, Bombay, he states that his information is that the petitioner came in or about 1914. But it is, I think, really immaterial whether he came in 1909 or 1914, so far as the main point in dispute in this case is concerned. The father Ram-

sumer subsequently became ill and returned to his native village where he died. After his death the business appears to have been carried on by the present petitioner with the assistance of some of his brothers. In 1911 there was a cession of territory by the Government of India to the Maharaja of Benares, and the ceded territory contains this particular village of Ramdupati. A copy of the instrument of transfer has been annexed to Mr. Cauty's affidavit, and the preamble of this shows that the cession was made with the approval of His Majesty's Secretary of State for India, with the object that there should be constituted a State under the suzerainty of His Majesty to be granted to the Rajas of Benares, subject to certain restrictions and conditions considered necessary for safeguarding to the residents of the ceded territories the rights and privileges they had enjoyed under the British administration. There are no doubt restrictions on the sovereignty that is conferred upon the Maharaja of Benares and his successors, but it has not been disputed before us that there has been in fact a change in the sovereignty which primarily affects the inhabitants of the ceded territory, i. e.; affects their allegiance in a way that is recognized and I shall deal with later on.

It is contended for the petitioner that he was a British subject at the time of this cession and that he has not ceased to be a British subject. The importance of this is apparent, when reference is made to the definition of "foreigner" which is contained in the Foreigners Act III of 1864, as amended by Act III of 1915. There is no doubt that the petitioner would fall under cl. (a) of this definition as being a 'natural born British subject' at any rate prior to the cession of 1911, and that has not been disputed by the learned Advocate General for the Crown. But the contention that is put forward on behalf of the Crown is that the petitioner has ceased to be a British subject, and, therefore, comes within the proviso to this definition which is as follows:—

"Provided that any British subject who, under any law for the time being in force in British India, ceases to be a British subject shall thereupon be deemed to be a foreigner."

The Government of Bombay, in the exercise of powers conferred upon them by s. 4 of the Foreigners Act, have issued an

order to the petitioner to remove himself from British India. It is not necessary to recite what has happened upon that order, except to say that the petitioner did leave Bombay, but was subsequently found in Andheri, a suburb of Bombay, was arrested and eventually sent to the Yeravda Jail. He questions the validity of this order of the Local Government on the ground that he is not a foreigner. Some other points have been mentioned in the petition, but that is the sole point which has been pressed before us.

I do not think it necessary to go exhaustively into all the legal questions of nationality and change of status that arise in different cases of this kind. We have first of all to consider that s. 2 of the Foreigners Act, which reads:—

"Whoever is or is not subject to the provisions of this Act, is a foreigner and to be subject to the provisions of this Act, the onus of proving that such person is not a foreigner, or is not subject to the provisions of this Act, shall lie upon such person."

If the rule that has been laid down in English cases as to the effect of cession on the question of the nationality of persons ordinarily resident in the ceded territory is followed and held applicable, then there can, I think, be no question that the petitioner must be held to have ceased to be a British subject. The main rule in a case of this kind is summarised in Halsbury's Laws of England, Vol. I, Art. 696, page 317, as follows:—

"Such treaties (that is treaties like the one that was made with the United States of America in 1783) may specifically regulate the future nationality of the inhabitants of the ceded territory, but in the absence of an express provision, a relinquishment of the Government of a territory is not only a relinquishment of the right to the soil or territory, but also of the rights over the inhabitants of the country."

That seems obviously in accordance with common sense, because you cannot well have a Sovereign without subjects; at any rate if there is a State, the ordinary idea of Constitutional Law is that there are subjects in that State who are ruled over by the Sovereign, and naturally when a territory is ceded the inhabitants of that territory will become subjects of the Sovereign to whom the territory has been ceded. Of

course a question can arise as to whether a particular person is an inhabitant of the territory, or even if he is not an inhabitant, whether he has such a connection with the territory as to make him subject to this general rule about change of nationality upon cession. This question has been discussed in certain English cases of which the latest one is *In re Stepney Election Petition, Isaacson v. Durant* (1). In that case at page 60* Lord Coleridge, C. J., very strongly rejected the contention that in all cases where conflicting duties of allegiance arise the subject has by general law, law which has been adopted into English Law, a right of election of which Sovereign he will become the subject. With reference to the case of *Am (2)* he says that the decision is upon any such right of election, "that the King having inhabitants of the States from which they became aliens." He (page 60*):—

"No doubt, if a man had chosen to leave the States newly recognised as independent, and had gone into England or the English dominions he would have remained what he was before, a British subject and within the allegiance of the British Sovereign. But why? Because he never became a citizen of the newly established and recognised States."

Then discussing the case of *Auchmuty v. Mulcaster* (3), he held that it does not help the claim to the alleged right of election. At first sight the distinction between such a right of election and the method by which a man can leave a newly ceded territory and remain within the allegiance of his former Sovereign seems somewhat fine; but, as I understand it, the distinction is one between a mere assertion of elected allegiance and actual conduct clearly showing such an election. It is not enough for an inhabitant to assert, when the question arises, that he has elected to remain within the allegiance of his former Sovereign; there must be conduct on his part, such as leaving the ceded

territory and going to reside permanently in his former Sovereign's dominions, to indicate his previous election. I think the general principle has been well-expressed in Foote's *Private International Jurisprudence*, 4th Edition., at pages 8 and 9, where he says, referring to the case of allegiance dissolved by cession, etc.:—

"On such a dissolution, the resident inhabitants of the territory ceded, separated, or conquered lose their former nationality, and become subjects of the new State to which they are assigned or attached. It has been sometimes said that the inhabitants of the separated territory have it at their own election to determine to which Sovereign they shall bear allegiance in the future. There can be no doubt that such an option may be given by the express provisions of the treaty or Statute by which the separation is governed, in which case a definite period is usually named within which the option must be exercised by quitting or remaining inhabitants of the ceded or separated territory. Where no such option is expressly given, the question has been treated by Lord Coleridge, C. J., as one of fact. When a Sovereign by treaty relinquishes his claim to the allegiance of the inhabitants of specified territories, it becomes a question of fact whether a particular individual remained after the cession (or the limited time) an inhabitant of the specified territory and became thereby a citizen of the State into which it passed as an integral part. In no case has it been held that any inhabitant of the ceded or separated territory has the right to remain an inhabitant of it, and at the same time to retain the allegiance and nationality of the State which ceded or permitted the separation."

There is also a passage in Hall's *International Law*, 7th Edition., which I think may be appropriately cited as helping in the disposal of this particular case. At pages 611 to 613 he says:—

"It has, however, been usual in modern treaties to insert a clause securing liberty to inhabitants of a ceded country to keep their nationality of origin. In the case of persons native of, and established in, the ceded territory, and even in the case of persons who are established in, without being natives of, the ceded territory, this liberty is commonly saddled with the condition that they shall retire within the territory remaining to their state of origin, a certain

(1) (1836) 17 Q. B. D. 54; 55 L. J. Q. B. 331; 51 L. T. 684; 31 W. R. 517.

(2) (1824) 2 B. & C. 779; 4 D. & R. 394; 2 L. J. K. B. (o. s.) 129; 107 E. R. 572; 26 R. R. 551.

(3) (1826) 5 B. & C. 771; 8 D. & R. 593; 4 L. J. K. B. (o. s.) 311; 103 E. R. 288; 29 R. R. 390.

[90 I. C. 1925]

JAGARDEO RAMSUMER TEWARI v. EMPEROR.

time being allowed to them to arrange their affairs and dispose of landed and other property which they may be unable to take with them... Residence in foreign countries being a frequent incident of modern life, withdrawal from a ceded district is not conclusive of the intention of the person withdrawing to reject the nationality of the conquering state. It is, therefore, usual to exact an express declaration of intention, as a condition of preservation of the nationality of birth, from persons against whom there is a presumption of changed nationality—that is to say, from persons born within the territory and living there, and from persons born within the territory but absent at the date of annexation. [This last sentence applies to the petitioner, if, as alleged, he was absent in Bombay at the date of cession in 1911]. There being no such presumption against persons born in another part of the state making the cession, the simple fact of withdrawal is in their case sufficient."

This seems to me to be reasonable and to supply cogent authority for saying that the mere fact of the petitioner and his father having carried on business in Bombay does not suffice to show that he has withdrawn himself from the operation of the general rule under which, as a former and still a periodical occasional inhabitant of this village of Ramdupati, he has since the date of cession become a subject of the Raja of Benares. We have not of course before us such materials as might be available if there had been a civil suit in which this point was in issue. But the admissions before us at any rate supply materials from which, I think, it can be properly concluded that this family has certainly not severed all connection with their village of Ramdupati. Admittedly they have certain ancestral land there, in which the petitioner has a share. I have already mentioned the fact that the father and various sons on falling ill returned to this village. An allegation has been made in Mr. Oauty's affidavit that the family of the petitioner is at present at Ramdupati and I agree with the learned Advocate-General that it is significant that the counter-affidavit contains no direct contradiction of this allegation or any statement that the petitioner's family have in fact been brought to and kept in Bombay. I think that, if that were the case, it would certainly have been put as part of the petitioner's case in the

main petition, just as he has put the fact that for a number of years he and his father have carried on business in Bombay. As I have already said, the onus of showing that he has ceased to be a foreigner rests upon the petitioner, and if the ordinary rules of law upon this subject are applicable in this case, then, in my opinion, he has not satisfied that onus.

It was, however, urged by the petitioner's Counsel that the Common Law of England embodying these particular rules on which I have relied is not a "law for the time being in force," in British India within the meaning of the proviso to s. 1 of the Foreigners Act III of 1864, as amended by s. 2 of Act III of 1915. His contention is that a law must be said—

which alone can be "in force" in British India. However, it is now—such a contention. I have recognised the Common Law of England in British India in various cases. One of these is *Irrawaddy Flotilla Company v. Bugwandas* (4), where their Lordships observe (page 625*):

"For the present purpose it is not material to inquire how it was that the Common Law of England came to govern the duties and liabilities of common carriers throughout India. The fact itself is beyond dispute. It is recognised by the Indian Legislature in the Carriers' Act, 1865, an Act framed on the lines of the English Carriers' Act of 1830 (II Geo. IV, and I Wm. IV, c. 68)."

And dealing as we are with this particular case under s. 491, Cr. P. C., that is to say, as a High Court established by the Letters Patent and the successors of the former Supreme Court of Bombay, it is clear that the Common Law which was formerly administered by the Supreme Court is also part of the law to be administered by the present Court, unless it is superseded by Statute or otherwise. Their Lordships of the Privy Council in *Maharaja of Jeypore v. Rukmini Pattamahadevi* (5), say (page 663†):—

(4) 18 C. 620; 18 I. A. 121; 15 Ind. Jur. 403 & 542; 6 Sar. P. C. J. 40; 9 Ind. Dec. (N. S.) 413 (P. O.).

(5) 50 Ind. Cas. 631; 21 Bom. L. R. 655; 36 M. L. J. 543; 17 A. L. J. 552; 29 C. L. J. 528; (1919) M. W. N. 271; 23 C. W. N. 889; 26 M. L. T. 16; 42 M. 589; 10 L. W. 391; 46 I. A. 109 (P. O.).

*Page of 18 C.—[Ed.]

†Page of 21 Bom. L. R.—[Ed.]

"They (the High Courts) are directed by the several charters to proceed where the law is silent, in accordance with justice, equity, and good conscience, and the rules of English Law as to forfeiture of tenancy may be held and have been held to be consonant with these principles and to be applicable to India."

Of course this Common Law can only be applicable when it is properly applicable to the society and circumstances of India. I cannot, however, conceive of any department of law in which the Common Law is more applicable than that part of Constitutional Law, which governs the question of nationality and the question of the status of British subject. It is a law which was brought in when the British obtained power "in 1661 Charles II. the Governor and places belonging to the East Indies, power belonging to the said Governor and Company or that should live under them in all causes, whether Civil or Criminal, according to the laws of the kingdom, and to execute justice accordingly." (See Tagore Law Lectures, 1872: The History and Constitution of the Courts and Legislative Authorities in India by Cowell, page 16). Therefore I reject the contention that the English Common Law cannot be a part of the law for the time being in force in British India. There is no Statute, so far as I am aware, which in any way affects its applicability, in this case, at any rate none such has been cited. In the circumstances of this case I find that the petitioner has failed to show that he has not ceased to be a British subject, in view of the cession of 1911 already mentioned. In my opinion, therefore, is no proper ground for the exercise of our powers under s. 491, Cr. P. C., which is sought by the petitioner. I would, therefore, discharge the Rule. Any question of costs can be considered later.

Madgavkar, J.—On January 10, 1925, an order was passed by the Local Government against the petitioner under s. 3 of the India Act III of 1864, ordering him as a foreigner to remove himself from British India. With this order he complied. But on March 19, he was found to have returned to British India and was arrested

at Andhari. He is now in confinement in the Yeravda Jail; and the legality of this confinement is questioned in this application, mainly on the ground that he is not a foreigner but that he continues to be a British subject.

The petitioner was born a British subject at Ramdupati, which along with the adjacent villages, was on April 1, 1911, ceded and constituted as a Native State under the jurisdiction of His Highness the Maharaja of Benares. It is argued for the petitioner that he was a resident of Bombay on the date of the treaty and that apart from stray visits to Ramdupati, he has continued to carry on his father's business in Bombay and that he thus continues to be a British subject. The treaty, it is said, does not confer unrestricted powers such as the power of life and death on the Maharaja of Benares so as to create a new political entity. The words "any law for the time being in force" in s. 2 of the Amending Act III of 1915 apply only to Statutes.

For the Crown it is argued by the learned Advocate-General that the cession of territory under the treaty necessarily includes a change of sovereignty and allegiance and, therefore, the petitioner is a foreigner within the meaning of Act III of 1864 as amended by Act III of 1915.

Under s. 2 of the Act of 1864, the onus of proving that he is not a foreigner is expressly laid on the petitioner. And the substantial question, therefore, under the proviso to s. 2 of Act III of 1915 is whether the petitioner by virtue of the treaty of April 1, 1911, has or has not ceased to be a British subject.

Whatever the difficulties of locating sovereignty in the Austinian sense, the treaty clearly creates a political jurisdiction and a Political Agent previously non-existent. For all practical purposes, the latter appears to be a decisive test, unaffected by the various limitations on the Maharaja's powers such as those in cl. 17 in respect of jurisdiction over servants of the British Government and European British subjects or in cl. 25 in respect of death sentences. Kathiawar, to go no further, illustrates the point that such limitations of varying degrees are perfectly consistent with the existence of foreign political status, in the legal sense, both civil and criminal.

A certain amount of stress has been laid for the petitioner on the words "under any law for the time being in force" to be found in s. 2 of Act III of 1915; and the question was argued whether the word 'law' is restricted to Statute Law or whether it includes Common Law. On general principles of interpretation, it is hardly open to the Courts to limit the word by the implicit addition of 'Statute' before it. And on broader grounds, whatever the case in the days of Machiavelli, it is now too late in the day to raise the question of the binding nature of treaties and the duty, in matters civil and criminal, of enforcing and abiding by the their terms, incumbent on all the contracting powers and their Courts, not less than in the case of laws passed by the Legislature. Our reports are full of such cases, as for instance, from Kathiawar, in matters of succession, domicile and extradition. And it is not necessary to fortify them by recent illustrations of the enforcement by Courts in England of various clauses of the Treaty of Versailles. For the purposes of the present application, this treaty, in my opinion, is as much law binding on the Courts as any Statute Law of the Legislature. And the only point for the petitioner is perhaps that the treaty does not in terms declare that the Indian subjects in the ceded territory have ceased to be British subjects.

But that a treaty of cession has by implication such effect has been amply shown in the judgment of my learned brother. In the case of *In re Stepney Election Petition, Isaacson v. Durant* (1), it is to be noted that the decision proceeded on the fact that on the death of William IV, the succession to the Kingdom of Hanover, unlike the succession to the Crown of Great Britain, was governed by Salic Law. But whatever the legal aspect in so peculiar a case, not of treaty but of succession, speaking for myself, I should incline to the opinion that where, as in the present instance, the case is one of a treaty and of rights created thereunder, it would be open to a subject of the ceded territory, unless the treaty expressly forbade, to elect to continue his former nationality and to prove such election. And, in this opinion, I am supported by the cases of *Doe v. Acklam* (2) and of *Jephson v. Riera* (6), as well as by the argument at

page 58* in *In re Stepney Election Petition, Isaacson v. Durant* (1). Further, in the present treaty, cl. 22, which empowers a British subject to call upon the Maharaja within a year to acquire immoveable properties belonging to such subject, is, in my opinion, a clear indication that the subject here could so elect.

In the present case, therefore, the question reduces itself to whether the petitioner can show that on or after April 1, 1911, he elected to continue his nationality as British subject; or whether he accepted the altered nationality under the treaty. Here again the onus is, in my opinion, clearly on the petitioner not less than it would be in the case of domicile: "The abandonment or change of domicile is a proceeding of a voluntary nature, and an intention to abandon must be proved by clear and convincing evidence": *Gaskell* (7). In the

present case, it would appear that the family of the petitioner and his brothers like their father's has continued to be Ramdupati, the lands are retained and the residence of the petitioner and his brothers and their family in Bombay was solely for the purpose of business. The case is one of very common occurrence in the city of Bombay, and I agree with my learned brother that such residence of itself or a continuance of it, is not sufficient evidence of election or of continuance of the petitioner's former status as British subject.

Into the alleged hardship of the present case we are not competent to enter.

I agree, therefore, that the petitioner has not discharged the onus laid on him by law to show that he is not a foreigner; and the Rule must be discharged.

Per Curiam.—The Rule is accordingly discharged.

The learned Advocate-General asks that under cl. (5) of r. 7 of the High Court Rules, Appellate Side of 1920, the Court should allow costs against the petitioner on the Appellate Side scale. We think, however, that the petitioner had legitimate ground for seeking the Court's decision on the question whether he was or was not a foreigner, and in the circumstances we

(7) (1906) A. C. 56; 75 L. J. P. C. 1; 91 L. T. 33; 22 T. L. R. 144.

*Page of (1886) 17 Q. B. D.—[Ed.]

(6) (1835) 3 Knapp 130; 12 E. R. 598.

are not disposed to grant costs against him. The Rule is, therefore, discharged without costs.

Z. K.

Rule discharged.

RANGOON HIGH COURT.

CRIMINAL REVISION No. 836-B OF 1925.

September 17, 1925.

Present:—Mr. Justice Maung Ba.

SULTAN—APPLICANT

versus

MAJOR C. DE M. WELLBOURNE—

RESPONDENT

Criminal Procedure Code (1929), ss. 154, 161—Statement of witness in the course of investigation, whether given voluntarily or otherwise, means "volunteer."

A statement made by a witness in the course of an investigation under the Cr. P. C., and recorded under s. 161 of the Code, is information given to the Police under s. 154 of the Code, and, therefore, if false, is not punishable under s. 182 of the Penal Code. [p. 317, col. 1.]

Obiter.—The word "give" in s. 182, Penal Code, does not bear the restricted meaning of the word "volunteer." [ibid.]

Mangu v. Emperor, 25 Ind. Cas. 978; 35 P. W. R. 1914 Cr.; 227 P. L. R. 1914; 15 Cr. L. J. 650, and *Emperor v. Nga Aung Po*, U. B. R. (1905) Penal Code, 13; 2 Cr. L. J. 474, not followed.

Queen-Empress v. Bhikaji, Rat. Un. Cr. C. 124 and *Queen-Empress v. Ramji Sajaba Rao*, 10 B. 124; 10 Ind. Jur. 300; 5 Ind. Dec. (N. S.) 468, referred to.

Criminal revision against an order of the District Magistrate, Insein.

Mr. S. M. Bose, for the Applicant.

Mr. Gaunt, Assistant Government Advocate, for the Respondent.

JUDGMENT.—Applicant Sultan was being prosecuted before the District Magistrate of Insein under s. 182 of the Indian Penal Code. The particulars of the offence are as follows:—

"That you on or about the 26th day of June 1925 at Insein gave to U Aung Din, a public servant, information to the effect that E A. Bharoocha, Mahomed Yusoof and Gur Khan were driven by you in your *tari* to the Insein Municipal Office on the night of the 5th and 6th June 1925 which information you knew or believed to be false and knew to be likely to cause such public servant to do an act which he should not have done or to cause him to use his lawful power to the injury or annoyance of any person."

It is now contended that he did not give information but only made a statement to a Police Officer who was making an investigation under Chapter XIV of the Cr. P. C. and that for that reason he has committed no offence punishable under s. 182 of the Penal Code.

This case is a sequel to the famous arson case under s. 436 of the Penal Code in connection with the destruction by fire of the Insein Municipal Office. The offence under s. 436 is a cognizable one. A reference to the Criminal Regular Trial No. 47 of 1925 of the Sub-Divisional Magistrate of Insein shows that the First Information Report was lodged by Mr. Yusoof Secretary of the Insein Municipality.

The principal point for decision is whether the statement made by Sultan to U Aung Tun, Inspector, C. I. D. can be considered as information, relating to the commission of a cognizable offence given to the Police within the meaning of s. 154 of the Cr. P. C., or whether it should be considered simply as a statement made to an Investigating Officer under s. 161 of that Code.

An information could be given either orally or in writing. If given orally, the Police Officer is required to record it, and every such information whether given in writing or reduced to writing requires to be signed by the person giving it. Such information forms the basis upon which an investigation under Chapter XIV commences. A Police Officer making an investigation has power under s. 160 to require the attendance of witnesses who appear to be acquainted with the circumstances of the case, and examine them. Such persons are bound to attend, and are also bound to answer all questions relating to the case other than questions the answers to which would incriminate them. Section 162 lays down that no statement made by a person to a Police Officer in the course of such an investigation shall if reduced to writing be signed by that person.

In the present case Sultan's statement (Ex. A) was recorded by the Inspector, but it does not appear to have been signed by Sultan. It was recorded on 26th June 1925, and from the evidence of U Aung Tun it would appear that the fire occurred on 6th June that he took up the investigation from the 15th June, and that a First Information Report had been opened previously

U Aung Tun further stated that one Gur Khan offered to give information and so he recorded Gur Khan's statement on the 20th June, that Gur Khan then made a confession before the Sub Divisional Magistrate, that Gur Khan mentioned a taxi, that later at an identification parade Sultan was identified as the taxi-cab driver, that after that identification Sultan was brought to him, and that on his asking him what he knew about this case Sultan made the statement (Ex. A), U Aung Tun admitted that before he recorded Sultan's statement he had examined two other witnesses whose statements afforded no corroboration of Gur Khan's statement.

In the above circumstances one is driven to the conclusion that the statement of Sultan was recorded under the provisions of s. 161. By no stretch of imagination can that statement be treated as information given to the Police under s. 154. There has been a conflict of judicial opinion as regards the word "give" used in s. 182 of the Penal Code. That word has been interpreted to mean "volunteer" in *Mangu v. Emperor* (1) and a similar view has been taken by Irwin, J. C., in *Emperor v. Nga Aung Po* (2). In that case it was held that giving false answers to questions put by a Police Officer in the course of investigation of a cognizable offence is not punishable under s. 182 of the Penal Code. A contrary view was held in the very old case of *Queen-Empress v. Bhikaji* (3).

I am not inclined to give that restricted meaning of "volunteer" to the word "give." For instance if a Police Officer, has reason to suspect the commission of a cognizable offence, he can investigate the case, under s. 157 for the discovery and arrest of the offender. During such investigation he may find a person who gives him the required information in answer to questions put by him.

There is nothing, in my opinion, to prevent that Officer from recording that information under the provisions of s. 154. In that view I am fortified by the opinion of the learned Judges of the Bombay High Court in the case of *Queen-Empress v. Ramji Sajaba Rao* (4). In that case the information from the

accused was elicited by a Forest Officer in the course of his enquiry. It was there held "that any false information given to that Forest Officer with the intent mentioned in s. 182 of the Penal Code is punishable under that section whether that information is volunteered by the informant or given in answer to questions put to him by that Officer."

Having held that the statement of Sultan did not amount to information given to a Police Officer but amounted to a statement made as a witness to an Investigation Officer under s. 161 of the Cr. P. C., it follows that his prosecution under s. 182 is unjustifiable, because he has not committed that offence.

Accusation is allowed and answers against him are allowed.

Application allowed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 235 OF 1925.

May 20, 1925.

Present :—Sir Lancelot Sanderson, Kt., Chief Justice, and Mr. Justice Panton.

RAM GOPAL GOENKA—PETITIONER

versus

THE CORPORATION OF CALCUTTA—
OPPOSITE PARTY.

Calcutta Municipal Act (111 of 1923), ss. 363, 364—Criminal Procedure Code (Act V of 1898), s. 6—Unauthorized building—Proceedings by Corporation—Owner, if must be heard—Municipal Magistrate, order of—High Court, whether can interfere.

Failure to give the owner of an unauthorised building an opportunity of being heard, which he is entitled to under s. 364 of the Calcutta Municipal Act, before he is proceeded against, is a material irregularity vitiating the trial of the owner before the Municipal Magistrate. [p 318, col. 2.]

A Magistrate appointed for trial of offences against the Calcutta Municipal Act is a Criminal Court within the meaning of s. 6 of the Cr. P. C. [p. 319, col. 1.]

An order passed by the Municipal Magistrate is a judicial order, and the High Court has jurisdiction to interfere by way of revision. [p. 319, col. 2.]

Annie Besant v. Advocate-General of Madras, 52 Ind. Cas. 209; 43 M. 146; 37 M. L. J. 139; 17 A. L. J. 925; 23 C. W. N. 986; 21 Bom. L. R. 867; (1919) M. W. N. 555; 10 L. W. 451; 20 Cr. L. J. 593; 36 M. L. T. 408; 1 U. P. L. R. (P. C.) 74; (1919) 35 T. L. R. 500; 46 I. A. 176 (P. C.), followed.

Rule against an order of the Municipal Magistrate, Calcutta, dated the 28th February 1925.

(1) 25 Ind. Cas. 978; 35 P. W. R. 1914 Cr.; 227 P. L. R. 1914; 15 Cr. L. J. 650.

(2) U. B. R. (1905) Penal Code 13; 2 Cr. L. J. 474.

(3) Rat. Un. Cr. C. 124.

(4) 10 B. 124; 10 Ind. Jur. 300; 5 Ind. Dec. (N. S.) 468.

Mr. Langford James, Babus Probodh Chander Chatterjee, Sures Chunder Taluqdar and Mohendra Kumar Ghose, for the Petitioner.

The Advocate-General and Babu Satindra Nath Mukherjee, for the Opposite Party.

JUDGMENT.

Sanderson, C. J.—This was a Rule issued by my learned brothers Mr. Justice Newbould and Mr. Justice Bepin Behary Ghose calling upon the Municipal Magistrate and on the Chief Executive Officer of the Corporation of Calcutta to show cause why the order complained of should not be set aside or such other order made as to this Court might seem fit and proper.

The order complained of was an order made by the Municipal Magistrate of Calcutta dated the 1st of April 1924, by which the Magistrate directed the demolition of certain alterations by the Corporation at the expense of the owner.

The proceedings in this matter were at some peculiarities. The alleged unauthorised structures were made before the 1st of April 1924. The notice which was served upon petitioner was headed "s. 364, Act III (B. C.) of 1923" (i. e. The Calcutta Municipal Act of 1923 which came into force on the 1st of April 1924). The notice was to the effect that the petitioner was directed to appear to show cause before the Municipal Magistrate of Calcutta why an order should not be made under s. 364 of Act III (B. C.) of 1923, directing that so much of the building as had been unlawfully executed be demolished or altered by the Chairman at the owner's expense.

Although the notice, as I have already said, purported to be under s. 364, the decision of the Magistrate was headed "under s. 363 of the Calcutta Municipal Act of 1923", and when the Magistrate gave his decision, he proceeded under s. 449 of the Calcutta Municipal Act of 1899, which he said corresponded to s. 363 of the Calcutta Municipal Act of 1923. The Act of 1899 was repealed by the Act of 1923.

In my judgment, it must be taken that these proceedings were, in fact, instituted under the Calcutta Municipal Act of 1923. If that be so, then whether the proceedings were taken under s. 363 or s. 364, the proceedings would have to be initiated by the Corporation, which came into being in consequence of the passing of the Calcutta Municipal Act of 1923. The proceedings were in

fact headed "Corporation of Calcutta *versus* Ram Gopal Goenka". Section 363 provides: "If the Corporation are satisfied that the erection of any new building has been commenced without obtaining the written permission of the Corporation they may, after giving the owner of such building an opportunity of being heard, apply to a Magistrate, and such Magistrate may make an order directing that such erection, alteration, addition or other work shall be demolished by the owner thereof; or by the Corporation at the expense of the said owner."

Section 364 provides: "In any of the following cases" (The various matters are set out) "the Corporation may apply to a Magistrate, and such Magistrate may make an order directing that the building, fixture, additions, etc., be demolished, provided that before making such application, the Corporation shall give the owner an opportunity of being heard." It is, therefore, clear that, whether the proceedings were under s. 363 or s. 364, the Corporation instituted the proceedings, and before making an application to the Magistrate the Corporation was bound to give the person, who was to be proceeded against, an opportunity of being heard. It may be said that the petitioner was given an opportunity of being heard by the authorities which existed under the Act of 1890, but there is no doubt that the Corporation, constituted by the Act of 1923, did not give the petitioner an opportunity of being heard before the application by or on behalf of the Corporation was made before the Magistrate:

Consequently, in my judgment, there was a material irregularity in the proceedings in respect of this matter.

But the learned Advocate-General, who appeared for the Corporation, argued that the liability of the petitioner in respect of the unauthorised structures existed after the repeal of the Calcutta Municipal Act of 1899 by reason of s. 8 of the Bengal General Clauses Act. That section provides: "Where this Act, or any Bengal Act made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed."

It might be that the liability of the petitioner in respect of the alleged unauthorized structures still remained after the repeal of the Calcutta Municipal Act of 1899 but a difficulty arises in this way, that even if the present proceedings could be regarded as having been instituted under the repealed Act of 1899, (which I think is not the case) then such proceedings would have to be initiated by the General Committee because s. 449 provides that "if the General Committee are satisfied" as to certain matters therein stated "the General Committee may apply to a Magistrate." The learned Advocate-General informed the Court that the General Committee under the Calcutta Municipal Act of 1899 no longer exists: and, therefore, there is no body competent to take proceedings under s. 449 of the 1899 Act.

Therefore, whichever way this matter is looked at, in my judgment, there was a material irregularity in the proceedings and the order which was made by the Municipal Magistrate, cannot be allowed to stand.

Before leaving this case, it is necessary for me to say one or two words about the preliminary point which was raised by the learned Advocate-General. He argued that this Rule was issued under s. 435, Cr. P. C., and this Court had no jurisdiction to issue a Rule under s. 435 or to make it absolute under s. 439 of the Cr. P. C., on the ground that the Municipal Magistrate, when dealing with this matter, was not acting under the Cr. P. C., and that consequently the provisions of the Cr. P. C. could not be applied by this Court for the purpose of revising the proceedings before the Magistrate.

I am not prepared to accept that argument.

Section 531 of the Calcutta Municipal Act of 1923 provides: "The Local Government may appoint one or more Magistrates for the trial of offences against this Act, and the rules or by-laws made thereunder."

Prima facie, therefore, a Magistrate appointed under that power for the trial of offences against the Calcutta Municipal Act would be a Criminal Court within the meaning of s. 6 of the Cr. P. C.

As a matter of fact, we were informed that the Municipal Magistrate, who acted in this case, was a Presidency Magistrate,

and I have no doubt that he would be a Criminal Court within the meaning of s. 6, which provides as follows: "Besides the High Courts and the Courts constituted under any law other than this Code for the time being in force, there shall be five classes of Criminal Courts in British India. I. Court of Sessions, II. Presidency Magistrate, etc." I think it may be said that the Municipal Magistrate appointed to deal with offences against the Calcutta Municipal Act is a Court constituted under a law other than the Code for the time being in force and comes within s. 6. Consequently, I am not prepared to hold that s. 435 and s. 439, Cr. P. C., do not apply to these proceedings.

This is not of any real importance to the order of the Court. It was a judicial order made by him either in his civil jurisdiction or in his criminal jurisdiction, and this Court has jurisdiction to interfere by way of revision under one Code or the other. See *Annie Besant v. Advocate-General of Madras* (1). In that case Lord Phillimore, after referring to the fact that the High Courts of Calcutta, Madras, and Bombay possessed the power of issuing a writ of *certiorari*, is reported at page 160* to have said "If the order of the Magistrate were a judicial order, it would have been made in the exercise of his civil or of his criminal jurisdiction, and procedure by way of revision would have been open." That is exactly the point, which was put by the Court to the learned Advocate-General in the course of the argument.

In my judgment, this Court has jurisdiction to revise the order of the Municipal Magistrate, and for the reasons already stated I am of opinion that the Rule should be made absolute and the order of the Municipal Magistrate should be set aside.

Panton, J.—I agree.

N. H.

Rule made absolute.

(1) 52 Ind. Cas. 209; 43 M. 146; 37 M. L. J. 139; 17 A. L. J. 925; 23 C. W. N. 986; 21 Bom. L. R. 867; (1919) M. W. N. 555; 10 L. W. 451; 20 Cr. L. J. 593; 26 M. L. T. 408; 1 U. P. L. R. (P. C.) 74; (1919) 35 T. L. R. 500; 46 I. A. 176 (P. C.).

*Page of 43 M.—[Ed.]

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 31 OF 1925.

July 1, 1925.

Present:—Mr. Justice Fawcett and
Mr. Justice Madgavkar.

BASAPPA RACHAPA HUNDEKAR—

ACCUSED

versus

EMPEROR—OPPOSITE PARTY.

*Motor Vehicles Act (VIII of 1914), ss. 5, 18 (2)—
Conviction for dangerous driving—Fine, amount of
—Cancellation or suspension of license.*

A fine inflicted on an accused person should not be excessive, having regard to his pecuniary means.

The best way to stop dangerous driving of motors is for the Court, on a conviction of the offender under s. 5 of the Motor Vehicles Act, instead of imposing a fine discommensurate with the pecuniary means of the latter, to exercise its powers under sub-s. (2) of s. 18 of the Act, by directing the conviction to be endorsed on the license of the offender and to cancel or suspend that license, or even to declare the offender disqualified for obtaining a license either permanently or for such period as it thinks fit.

Reference made by the District Magistrate, Bijapur.

Mr. Ankalikar (with him Mr. H. B. Gumaste), for the Accused.

Mr. S. S. Patkar, Government Pleader, for the Crown.

JUDGMENT.—In this case the District Magistrate has moved this Court to enhance the sentence of fine passed on four accused persons who were motor-drivers and were convicted of the offence of dangerous driving under s. 5 of the Indian Motor Vehicles Act VIII of 1914. Each of them was sentenced to pay a fine of Rs. 25. This Court, however, has only issued notice for enhancement of sentence in the case of accused No. 1 Basappa Rachappa.

The main facts are these:—Basappa was driving a motor-car which takes passengers between Bagalkot and Hongal and the other accused were driving similar motor vehicles. The Magistrate held that they were in fact racing, while they were driving along the road; and the car driven by accused No. 1 Basappa knocked down a man who sustained injuries to his legs and had to be treated in hospital for some time in consequence. There seems no doubt upon the evidence that the convictions of the four accused or at any rate that of accused No. 1, with whom alone we are concerned, is justified. But the maximum penalty provided for the offence is a fine of Rs. 500 and the general rule is that the

fine imposed on an accused person should not be excessive, having regard to his pecuniary means. In the present case there is nothing to suggest that accused No. 1 was a person of such means, as would make it appropriate to impose fine of say) Rs. 100, such as was suggested by the Government Pleader. In my opinion the best way to stop dangerous driving of the kind in question is for the Court, on conviction of the offender, to exercise its powers under sub-s. (2) of s. 18, under which such Court "shall cause particulars of the conviction to be endorsed" on any license held by the accused and may (1) cancel or suspend that license, or even (2) declare the accused disqualified for obtaining a license either permanently or for such period as it thinks fit. That is a very substantial power the exercise of which will have a very deterrent effect, especially in the case of persons like the accused who earn their livelihood by driving motor vehicles. In the present case the learned Magistrate has not complied with the direction contained in this subsection that he should endorse particulars of the conviction upon the accused's license. At any rate there is nothing in the record which shows that that was done or directed to be done. We think that the accused, who is said to be still driving motor-cars, should be ordered to surrender his license to the Magistrate in order that the necessary particulars may be endorsed thereon. It would have been, I think, appropriate if the Magistrate had suspended the accused's license for, say, six months, having regard to the fact that he was driving the car which knocked over the injured man. But as the offence took place in July 1924 and the period for which the accused's license was then in force has probably expired, we do not think that we can appropriately pass an order of suspension or cancellation. The order of endorsement will, we think, be a sufficient enhancement of sentence in the circumstances of the case.

Z. K.

Sentence enhanced.

ODDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 76 OF 1925.

August 10, 1925.

Present:—Mr. Simpson, A. J. C.

BAIJNATH—DEFENDANT—APPLICANT

versus

RAMDAS SAHU—PLAINTIFF—

OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 25—Revision—Discretion of High Court—Limitation, nice question of—Interference.

The High Court has a discretion under s. 25 of the Provincial Small Cause Courts Act and it will not under that section upset a decree passed by a Small Cause Court on the mere possibility that the Court may have gone wrong by a few days on a question of some nicety relating to limitation.

Revision against the judgment and decree of the Judge, Small Cause Court, Akbarpur, dated the 30th March 1925.

Mr. Muhammad Ayub, for the Appellant.

Mr. Naimullah, for the Opposite Party.

ORDER.—This is an application in revision under s. 25 of the Small Cause Courts Act. The suit was one on the basis of a promissory-note. The defence raised two points only.

1. That the money had been re-paid, and

2. That the suit was time barred.

Both issues were decided in favour of the plaintiff and the suit was decreed. The defendant comes here in revision. He cannot, of course, attack the finding of fact that the money has not been re-paid. His point is that the suit was time barred. It is a difficult question to decide whether it was time barred or not, because the promissory-note gives two dates for re-payment. It says three months from execution, and it says the *meti Magh puran mashi* 1978. Now the date of execution was the 23rd November 1921, so three months, calculated according to s. 25 of the Limitation Act, gives the 23rd of February, 1922. But the other date, *meti Magh puran mashi* 1978, corresponds to the 12th of February, 1922. The suit was brought on the 16th February, 1925, so it is within time from the 23rd of February 1922, but beyond time, reckoning from the 12th of February 1922. Several rulings have been cited at Bar, and I have considered them. But I do not propose to decide the point. I dismiss the application in revision on the ground that I have a discretion under s. 25, and, I am not prepared to upset the decision of the Court below, because it

might plausibly be argued that the claim was beyond time. In certain cases no doubt it might be proper to proceed on a ground of limitation, but the possibility that a Small Cause Court may have gone wrong by a few days on a question of some nicety relating to limitation, is not a ground for setting aside the decree. The application is dismissed with costs.

Z. K.

Application dismissed.

PATNA HIGH COURT.

CIVIL REVISION

15 AND 516 OF 1924.

25.

P.

K. Mullick, Kt.,

de Ross.

MUM—PETITIONER

alias

alias PAHLAD DAS

OPPOSITE PARTY.

Jurisdiction—Appeal—Appellate Court's power to determine value of appeal—Revision.

It is the duty of a Court of Appeal, when an appeal is presented to it, to determine the jurisdictional value of the appeal and if it comes to the conclusion that the value exceeds its jurisdiction to return the appeal for presentation to the proper Court; and as in doing so the Court does not act without jurisdiction, its order is not open to revision. [p. 332, col. 1.]

Raghunath Charan Singh v. Shamo Koeri, 31 C. 344 and *Peari Shah v. Suraja Mal Marwari*, 16 Ind. Cas. 575; 16 C. L. J. 371; 17 C. W. N. 503, referred to.

Revision from an order of the District Judge of Muzafferpur, dated the 27th August 1924.

Mr. Muhammad Hasan Jan, for the Petitioner.

Mr. Siveshwar Dayal, Syed Noorul Hasan and Mr. A. H. Fakhruddin, for the Opposite Party.

JUDGMENT.

Mullick, J.—These two applications in revision arise out of Suits Nos. 20 and 21 of 1922 before the Subordinate Judge of Muzafferpur. The plaintiff, a *mutwali*, asks for a declaration that the properties in suit are increments of a *wakf* created by *Musammamat Nurjahan Begum* and for recovery of possession from the defendants who in one case claim title under a Court sale of the 16th February 1914 and in the other under a *kobala* executed by *Musammamat Nurjahan* on the 9th August 1914. One of the issues raised at the trial was whether the Court-fee paid was sufficient. The issue

was decided in favour of the plaintiffs, but the suits were dismissed on the merits.

An appeal was taken by the plaintiffs to the District Judge who found that the value of the properties was not Rs. 2,100 as held by the Trial Court but not less than Rs. 15,000 or 20,000 and he accordingly returned the memoranda of appeal to be presented to the proper Court.

Against this order an appeal was preferred to this Court under O. XLIII r. 1 (a) of the C. P. C., but we held following *Raghunath Charan Singh v. Shamo Koeri* (1) that no appeal lay and we directed the applications to be registered as revision cases.

It is now urged before us by the learned Vakil for the plaintiffs that the learned Judge's order returning the memoranda of appeal was with a view to link this contention with the provisions of the Suits Valuation Act.

But this contention does not apply. The Suits Valuation Act applies to suits of unlimited pecuniary jurisdiction. An objection as to jurisdiction could be made before him on the ground of his jurisdiction to try the suit. If the suit had been tried by a Munsif it may be that an objection as to valuation for the purpose of determining the Court-fee might, in certain circumstances, have also been regarded as an objection as to jurisdiction; and in that case the Appeal Court, if satisfied, that, in spite of the under-valuation, the disposal of the suit on the merits had not been prejudiced, would have been entitled to hear the appeal as if there has been no defect of jurisdiction.

But here the question is not whether the Subordinate Judge had jurisdiction to try the suit but whether the Appeal Court had jurisdiction to hear the appeal. Ordinarily the Appeal Court does not interfere with a valuation made by a Trial Court for the purpose of determination of jurisdiction, but it is always open to a party to take this as a ground of appeal. The Court may also investigate the matter in exercise of its inherent powers. Part I of the Suits Valuation Act empowers the Local Government to make rules for determination of the value of land for purposes of jurisdiction in certain classes of suits, and Part II declares that in suits not coming within paras. v, vi and ix and para. x cl. (d) of s. 7 of the Court Fees Act, the value as determinable for the computation of Court-fees and

the value for the purposes of jurisdiction shall be the same. Under the first part of s. 12 of the Court Fees Act the valuation made by the Trial Court for the purpose of computing the Court-fee is final as between the parties, but the finality so conferred is confined within very narrow limits and it is even open to a party to appeal on a question of category, that is to say, the class within which the suit falls. On a question of valuation pure and simple a party cannot appeal but the Court may act under the 2nd para. of s. 12 of the Court Fees Act for the purpose of protecting the revenue.

Here the suits before us fall within s. 7 para. iv (c) of the Court Fees Act and the valuation for the purpose of computing the Court-fee must determine the jurisdiction. But there was nothing to prevent the defendants from objecting before the District Judge that he had no jurisdiction to hear the appeal. The District Judge had jurisdiction, and indeed it was his duty, to determine the point, and as there was no material before him for coming to the finding that the value of the subject-matter was at least Rs. 15,000 and that, therefore, he was not competent to hear the appeal, no revision lies against his order.

It follows from this view that an appeal on the ground of defect of jurisdiction may if successful disturb the finality of the valuation for the purpose of computation of Court-fees in suits coming under s. 8 of the Suits Valuation Act, but there can be no doubt that the first clause of s. 12 of the Court Fees Act is subject to the provisions of the Suits Valuation Act; and so it has been held in *Peari Shah v. Suraja Mal Marwari* (2). In the present case the Court vested with jurisdiction to hear the appeals will in deciding the question of jurisdiction be competent to levy deficit Court-fees on the plaintiff if satisfied that the District Judge's valuation was correct.

The immediate question, however, before us is whether the District Judge acted without jurisdiction in returning the memoranda of appeal. The answer is in the negative and these applications in revision are dismissed with costs: hearing fee two gold mohurs in each case.

Ross, J.—I agree.

S. D.

Revision dismissed.

(2) 16 Ind. Cas. 575; 16 C. L. J. 371; 17 C. W. N. 503.

1) 31 C. 344.

[90 I. C. 1925]

BALLABH DAS v. NARAIN PRASAD.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 55 OF 1923.

July 18, 1924.

Present :—Mr. Kotval, A. J. C.

Diwan Bahadur BALLABH DAS—

DEFENDANT—APPELLANT

versus

Seth NARAIN PRASAD—PLAINTIFF

—RESPONDENT.

Construction of document—Agreement to execute kararnama authorizing creditor's agent to receive cheques due to debtor, whether assignment—Decree in favour of third person—Attachment of cheques—Creditor, whether can object—Lien.

L, a P. W. D. contractor, borrowed money from B and executed two agreements in his favour on 4th September 1917 and 19th September 1919, agreeing to credit or deposit at B's shop all cheques that he may get from P. W. D. on account of the works and not to cash them, and to execute a *ikararnama* in the name of a servant of B whom B may appoint to authorize him to take on his (A's) behalf cheques in his name from the P. W. D. and get them credited in B's shop, and that he will have no authority to take the cheques until the satisfaction of the debt. One N, another creditor of L, obtained a decree against L and attached certain cheques of L obtained from P. W. D. B objected in execution proceeding that cheques were assigned to him. The objection was overruled. B then filed a suit for a declaration that the attachment was not valid:

Held, that the terms of the *ikararnama* did not constitute a present assignment of the debt due to A but an agreement to assign at future dates, and unless L authorized the P. W. D. to make over each cheque to the agent of B there was no lien acquired over it. [p. 324, col. 1.]

Row & Co. v. Dawson, (1749) 1 Wh. & T. L. C. (8th Ed.) p. 95; 1 Ves. Sen. 331; 27 E. R. 1064, referred to.

Appeal against a decree of the District Judge, Jubbulpore, in Civil Appeal No. 21 of 1922, dated the 27th November 1922.

Sir B. K. Bose, for the Appellant.

Mr. M. Gupta, for the Respondent.

JUDGMENT.—Laxman Hira, defendant No. 2, borrowed money from the plaintiff, Narayan Prasad, from time to time to carry on certain road construction work which he had undertaken to do for the Public Works Department. On the 3rd December 1918 accounts were made up and Rs. 4,000 were found due to the plaintiff and for this sum Laxman passed an acknowledgment. He had undertaken other works of a similar nature for which he borrowed money from Ballabhdas defendant No. 1 under two *ikrarnamas* dated 4th September 1917 and 19th August 1919 Exs. D-2 and D-1. About the end of 1920 the plaintiff filed a suit in the Mandla Court against defendant, Laxman Hira, and obtained a decree for

Rs. 3,779-10-0 and caused certain cheques payable to him by the Public Works Department to be attached in execution. Defendant No. 1 filed an objection to the attachment on the strength of Exs. D-2 and D-1 and succeeded in getting the property released. The plaintiff, therefore, files this suit against the two defendants for a declaration that defendant No. 1 had no right to the cheques and that they were liable to attachment in execution of his decree as the property of defendant No. 2. As the amount due on the cheques was withdrawn by defendant No. 1 after the institution of the suit the plaintiff was allowed to amend his prayer for relief to one for a decree against defendant No. 1 for the amount.

Defendant No. 1 pleads that Exs. D-2 and D-1 were assigned in his favour on the ground that they were assignments and created a lien in his favour at the time of the plaintiff's suit. The cheques were the property of defendant No. 2 and were liable to attachment at the plaintiff's instance. It decreed the plaintiff's claim. The lower Appellate Court has upheld the Trial Court's decree.

The contention raised in the Trial Court by defendant No. 1 is repeated in this Court. Reliance is placed upon *Row v. Dawson* (1). In this case A borrowed money of B and gave him a draft upon a fund due to him (A) out of the Exchequer. The draft deposited with the officer from whom the fund was payable. A afterwards became bankrupt. The question was whether B became entitled to specific lien upon the fund or whether the assignees under the commission of bankruptcy were entitled to have the amount paid to them. It was held that the draft was an assignment of the fund or debt due to A and on being deposited with the officer attached immediately to the debt so that the officer could not have paid it to A supposing he had not been bankrupt without making himself liable to B.

The question then is whether by the *ikrarnama* Laxman assigned to defendant No. 1 Ballabhdas debts due from the Public Works Department. The term of the *ikrarnama* dated the 4th September 1917 now relevant is as follows. "I will credit (or deposit) at your shop all cheques that I may get from the Public Works Department on account of these works. I will not

(1) (1749) 1 Wh. & T. L. C. (8th Ed.) p. 95; 1 Ves. Sen. 331; 27 E. R. 1064.

cash them." This term is maintained by the *ikrarnama* dated the 19th August 1919 which further stipulates as follows: "I will be giving you cheques in satisfaction of the money due to you just as I have been doing. I will execute a *mukhtiarnama* in the name of the servant whom you may appoint for making disbursements or of the person whom you may propose and will authorise him to take on my behalf cheques in my name from the Public Works Department and get the same credited to my *khata* at your shop. The *mukhtiar-am* shall, however have no authority to sign on my behalf any, bill in my name All cheques that may be issued in respect of these works shall be credited (or your shop) until full satisfaction with interest and commission. I have no authority to take any, bill in my name I have been authorized to take any, bill in my name alone have laid out money from the beginning. I, therefore, have no one besides yourself either you or any of my heirs or other *mahajan* or creditors shall be entitled to take the cheques."

These terms do not constitute a present assignment of the debts. The cheques could not be taken from the Public Works Department until Laxman executed an authority in favour of the agent appointed as agreed to take the cheques. Assuming that the mere delivery of the cheques into the hands of the defendant, amounted to assignment of the debts, the assignments would not be complete until the agent was placed in a position to demand the cheques from the Public Works Department. The agreement is an agreement to assign at future dates. Until each cheque is authorized by Laxman to be made over to the *mukhtiar* there is no lien acquired over it. Therefore, at the time of the attachment of the cheques by the plaintiff there was no lien on them or the debts payable by the Public Works Department.

As regards the third ground of appeal it is sufficient to state that no plea was raised and no issue framed on the point in the Trial Court. There is nothing on the record to show what cheques were attached by defendant No. 1 in his suit and what by the plaintiff in his, and whether any assets were really held by the Court. The ground cannot be considered now. The appeal fails and is dismissed with costs.

G. R. D.

*Appeal dismissed.***ALLAHABAD HIGH COURT.**

FIRST CIVIL APPEAL No. 137 OF 1922.

June 25, 1925.

Present:—Mr. Justice Lindsay and
Mr. Justice Kanhaiya Lal.Syed SHABBAR HUSSAIN—
PLAINTIFF—APPELLANT

versus

Haji ABBAS ALI AND OTHERS—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4
—Pre-emption suit—Appeal by pre-emptor—Leith of
one of several vendee respondents—Substitution not
effected within time—Abatement of appeal.

The cause of action for a pre-emption suit is one and indivisible. Therefore, where an appeal by the pre-emptor in a pre-emption suit abates as against one of several vendee respondents, on account of failure to effect substitution within time after his death, the appeal abates in its entirety. In such a case the right to sue does not survive against the remaining vendees who constitute only a part of what was for the purposes of the suit one legal unit. [p. 325, col. 2.]

Mamuddin v. Sadarat Rai, 5 Ind. Cas. 897; 32 A. 301; 7 A. L. J. 228, followed.

First appeal from a decree of the Subordinate Judge, Basti, dated the 4th February 1922.

Mr. Iqbal Ahmed, for the Appellant.

Mr. S. N. Sen, for the Respondents.

JUDGMENT.—The appellant in this case Syed Shabbar Hussain was the plaintiff in the Court below in a suit brought to pre-empt a sale which was carried out by means of a document executed on the 20th August 1920. The first party of defendants to the suit consisted of eight persons who are the purchasers under the deed just mentioned. The defendants second party, consisting of two persons, were the vendors. The sale was a sale to eight persons in consideration of a sum of Rs. 14,999.

The plaintiff's suit failed in the Court below on the ground that the existence of a custom of pre-emption had not been proved. The plaintiff then appealed to this Court and impleaded the eight vendees and the two vendors as respondents. Since the filing of the appeal one of the vendees has died and admittedly no application has been made within time to make his legal representatives parties to the appeal. The necessary result of this default on the part of the plaintiff-appellant is that the appeal has abated as against the deceased respondent in accordance with the provisions of O. XXII, r. 4 (3). Under that sub-rule it is declared that where within the time limited by law no application is made under sub-r. (1) the suit shall abate

[90 I. C. 1925]

RAMESWAR NARAYAN SINGH v. MAHABIR PRASAD.

as against the deceased defendant. The same rule is applicable in the case of appeals.

A preliminary objection is now raised on behalf of the remaining respondents vendees to the effect that the appeal has abated not only as against the deceased respondent but in its entirety, and we are of opinion that this plea must prevail.

It cannot be contended on the language of O. XXII, r. 4 (3) that the only result of the default to make the legal representatives of the deceased respondent parties to the record is that the appeal abates only against the deceased respondent and can proceed as against the others. In our opinion that is not the meaning of the sub-rule. The question whether the appeal abates entirely or only against the deceased respondent must be determined with reference to the nature of the suit or rather the nature of the right to sue. We may here refer to the observations at page 112* *Wajid Ali Khan v. Puran Singh* (1) in which the argument that the appeal necessarily abates only against the deceased respondent but not against the others was repelled.

We have, therefore, in this case to consider what was the plaintiff's right to sue. He claimed as a co-sharer of the vendors to pre-empt the sale made in favour of the eight defendants vendees and his right as a pre-emptor was a right to sue all these vendees as one party and to claim that he should be substituted as vendee in their place. He was bound to pre-empt the whole sale and could not pre-empt a part and so he was under an obligation to make all the vendees defendants in the suit. Every one of the vendees was a necessary party.

Now it is the same right of suit which the plaintiff-appellant is asserting here in this appeal. His suit has failed in the Court below and he asks this Court to enforce the right that he asserted in the Trial Court. If that right is one which in the Court below he could assert only against the eight vendees together it follows that he cannot assert it here against only seven of them. His claim as pre-emptor was to be substituted as vendee of the entire property sold and by his own default that relief can no longer be granted. No decree

which we could give could displace the representatives of the deceased vendee from possession.

The fact is that the cause of action for the suit for pre-emption was one and indivisible. There was only one sale in favour of the body of eight persons who are for the purposes of the suit to be treated as one legal entity. The plaintiff asks to be put in the place of this body of purchasers. That was his right to sue a right which he could assert by a suit and as this cannot now be done it appears to us that the claim must fail in its entirety. The right to sue does not survive against the remaining vendees who constitute only a part of the purposes of this case.

Authority [see the *Sadarat Rai* (2).] We effect to the pre-emptor that the appeal The result is that

and is dismissed with costs including in this Court fees on the higher scale.

N. H.

(2) 5 In

Appeal dismissed.

Cas. 897; 32 A. 301; 7 A. L. J. 228.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 643 OF 1922.

April 29, 1925.

Present :—Mr. Justice Kulwant Sahay.
KUMAR RAMESWAR NARAYAN
SINGH—DEFENDANT—APPELLANT
versus

MAHABIR PRASAD AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Chota Nagpur Tenancy Act (VI of 1908), ss. 214, 231, 252—*Limitation Act* (IX of 1908), Sch. I, Art. 95—Sale of holding—Suit to set aside sale on ground of fraud, nature of—Limitation applicable.

Sections 214 and 258 of the *Chota Nagpur Tenancy Act* do not create a right to institute a suit to set aside a sale of a holding held under the provisions of the Act. They bar the institution of such a suit except on the ground of fraud or want of jurisdiction. The right to institute a suit to set aside a sale is conferred by the general law and has been restricted by these sections to the case of fraud or want of jurisdiction. A suit, therefore, to set aside a sale of a holding held under the provisions of the *Chota Nagpur Tenancy Act* on the ground of fraud, is not a suit instituted under the provisions of the Act as contemplated by s. 231 of the Act, and consequently the period of

(1) 85 Ind. Cas. 66; 47 A. 100; 22 A. L. J. 994; L. R. 6 A. 39 Civ.; (1925) A. I. R. (A.) 108.

*Page of 47 A.—[Ed.]

limitation applicable to such a suit is not the one provided by that section but the one laid down in Art. 95 of Sch. I to the Limitation Act and begins to run from the date on which the fraud becomes known to the plaintiff. [p. 326, col. 2; p. 327, col. 1.]

Appeal from a decision of the Subordinate Judge, Ranchi, dated the 12th April 1922, reversing that of the Munsif, Hazaribagh, dated the 31st January 1921.

Mr. B. C. De, for the Appellant.

Messrs. N. Roy and Satdeo Sahai, for the Respondents.

JUDGMENT.—This is an appeal by the defendant against the decision of the Subordinate Judge of Ranchi reversing the decision of the Munsif of Hazaribagh and decreeing the plaintiff's suit. The suit was for setting aside a sale of a raiyati holding held under the Chota Nagpur Tenancy Act on the ground of fraud. The learned Subordinate Judge held that the sale was vitiated on the ground of fraud and accordingly decreed the suit and set aside the sale. Against this decision the defendant has come up in second appeal.

The principal question for decision in this appeal is as to whether the suit was barred by limitation. The sale in execution of the decree obtained by the appellant took place on the 3rd of December 1917. The plaintiff's case is that the entire amount due under the decree had been paid off and the appellant acted fraudulently in getting the sale confirmed and that he came to know of the fraud for the first time on the 11th November 1919 when possession was delivered to the appellant. The suit was instituted on the 10th July 1920. The Munsif held that the period of limitation was one year and that the plaintiffs had knowledge of the sale beyond one year from the date of the suit and that the suit was accordingly barred by limitation. He did not in his judgment state under what provision of the law he held the period of limitation to be one year. The learned Subordinate Judge on appeal

was of opinion that the period of limitation applicable to the suit was the one provided for in Art. 95 of the First Schedule to the Indian Limitation Act. It has been contended, however, on behalf of the appellant that the present suit was governed by s. 231 of the Chota Nagpur Tenancy Act and that the period of limitation was one year from the date of the accrual of the cause of action and that upon the finding of the Munsif the cause of action accrued to the plaintiffs at least on 8th April 1918, if not earlier, and that the suit being instituted beyond one year from that date was barred by limitation. Now, in order to make the provisions of s. 231 applicable to the present suit it must first be established that the suit was one instituted under the Chota Nagpur Tenancy Act. The learned Subordinate Judge is of opinion that s. 231 has no application to the present case inasmuch as the suit was not one under the Act. I am of opinion that the learned Subordinate Judge was right and that the present suit is not one under the Chota Nagpur Tenancy Act. Reliance has been placed by the learned Vakil for the appellant upon the provision of ss. 214 and 258 of the Chota Nagpur Tenancy Act and it has been contended that the present suit is one under the provisions of those sections. I am of opinion that this contention is unsound. Section 214 bars a suit to set aside a sale made under Ch. XVI of the Act except on the ground of fraud or want of jurisdiction. Section 258 contains a provision similar to that in s. 214. These sections do not create a right to institute a suit to set aside a sale of a holding made under the Act. They bar the institution of such a suit except on the ground of fraud or want of jurisdiction. The right to institute a suit to set aside a sale has not been created but has been taken away under the provisions of those sections. The right exists in a person to bring a suit to set aside a sale under the general law and was not conferred under the provisions of the Chota Nagpur Tenancy Act and such right was taken away by these sections except the right to bring a suit on the ground of fraud or want of jurisdiction. The present suit was, therefore, not a suit instituted under the provisions of the Chota Nagpur Tenancy Act as contemplated by s. 231 of the Act; and consequently the period of limitation is not the one provided by that section but

[90 I. C. 1925]

JAMNA PERSHAD v. RAMLAL.

the one provided by the Indian Limitation Act. I am, therefore, of opinion that the suit must be governed either by the provisions of Art. 12 or by those of Art. 95 of the First Schedule to the Indian Limitation Act. In my opinion the suit being for a relief on the ground of fraud the Article applicable is 95 and not Art. 12 of the Limitation Act, and the period of limitation is, therefore, three years from the time when the fraud became known to the plaintiffs. In the present case the suit was brought within three years even from the date of the sale and was evidently within time.

It has next been argued that there was no fraud as alleged in the plaint. I am of opinion that the appellant cannot be allowed to raise this question in second appeal. It was found by the Munsif that there was fraud on the part of the defendant and that finding was not challenged by the defendant before the Subordinate Judge as is expressly stated in the decision of the Subordinate Judge. It has been contended that the fraud alleged was not in bringing about the sale but in getting the sale confirmed after receipt of the entire amount of the decree; and it is pointed out that under the provisions of the Chota Nagpur Tenancy Act a sale is not required to be confirmed. No doubt, there is no provision in the Act for confirmation of a sale and in *Lal Nilmani Nath Sahi Deo v. Baldeo Das Birla* (1) it was held by this Court that there was no provision in the Act for confirmation of a sale. Reference was made in that case to the expression "confirmation of sale" occurring in cl. (d) of s. 209 of the Act; but it is noticeable that the word "date" was substituted in this clause for the word "confirmation" by the Bihar and Orissa Act (VI of 1920) and the word "confirmation" now no longer occurs in this section. The question of fraud, however, was not raised by the appellant in the lower Appellate Court, and I am of opinion that the appellant cannot be allowed to raise the question here in this second appeal. The only point argued before the Subordinate Judge was the question of limitation and this question appears to have been correctly decided.

This appeal is dismissed with costs.

Z. K.

Appeal dismissed.

(1) 55 Ind. Cas. 27; 1 P. L. T. 146; 5 P. L. J. 101; (1920) Pat. 73; 2 U. P. L. R. (Pat.) 69.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 39 OF 1924.

July 16, 1925.

Present :—Mr. Wazir Hasan, A. J. C.

JAMNA PERSHAD AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

RAMLAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Wajib-ul-arz, entry in, value of.

Where it is not shown by reliable evidence that the officer engaged in compiling a *wajib-ul-arz* neglected to perform his duty or was misled in recording a custom, and it does not appear that a statement of custom in the *wajib-ul-arz* is ambiguous, the record of the custom in the *wajib-ul-arz* is most valuable evidence of the custom. [228, col. 2.]

Civil Decree the judgment and Judge, Lucknow, da

for the Appellants.
Gaya Prasad and
its.

This is the plaintiffs' appeal from the decree of the District Judge of Lucknow, dated the 22nd October 1923, reversing the decree of the Court of the Munsif (North) Lucknow dated the 6th September, 1922. The result of the decree of the lower Appellate Court was that the plaintiffs' suit for possession of certain *zemindari* property situate in three villages was dismissed.

The property in suit belonged to one Nand Kishore, who was a separated Hindu of a family governed in the matter of succession by the rules of the Mitakshara. On the death of Nand Kishore his estate was inherited by his widow, *Musammatt Muna*. She died in 1911. The assignors of the plaintiffs are the remote nephews of Nand Kishore and they claim possession of Nand Kishore's estate on the title that the assignors are the reversioners to the estate of Nand Kishore. The defendants are in possession of that estate and they are the sons of deceased daughters of Nand Kishore. On this statement of facts it is perfectly clear and it is not disputed that the title in law to the property in suit rests with the defendants. The ground, however, upon which the plaintiffs' claim to eject the defendants is based is that under a family custom the daughters and daughters' sons are excluded from inheriting the estate of Nand Kishore. The issue raised on these pleadings was decided by the Court of first instance in favour of the plaintiffs. On

appeal by the defendants it was decided against them.

In second appeal the decision of the lower Appellate Court is challenged on three main grounds:—

(1) that the lower Appellate Court has failed to place a proper construction on the paragraph of the *wajib-ul-arz* of the village Kesarmau relating to the rules of succession in the family;

(2) that the lower Appellate Court has improperly rejected statements of certain deceased persons as inadmissible in evidence, and.

(3) that it has again improperly rejected certain oral evidence produced by the plaintiffs in proof of the exclusion of daughters and Kishore.

As to the ground once that I do not Advocate for the judgment of the lower court. The question of mis-construction of the *wajib-ul-arz* of Kesarmau arises. Indeed there is no dispute either at the Bar or between the parties as to the plain meaning of the words used in the that *wajib-ul-arz* on the question of custom. Paragraph 4 of that *wajib-ul-arz* which is the paragraph relevant to the purposes of the appeal states in absolutely clear and definite language in the first instance that daughters are generally excluded from inheritance. In the second instance, however, there is a qualifying statement that the record of custom therein made will not apply to the dispute then pending with reference to the daughters' title in a case in the Settlement Court. I gather from the judgment of the learned Judge in the lower Appellate Court that he would have been prepared to accept the entry in the *wajib-ul-arz* as a sufficient proof of the custom relied upon by the plaintiffs had the clause to which reference has just now been made, not been recorded as a part of the entry relating to the custom. He thinks that the qualifying clause detracts from the value of the entry as evidence of a pre-existing custom. It is clear, therefore, that the question with reference to this *wajib-ul-arz* is one of its evidential value and neither of its construction nor of its admissibility in evidence. The latest decision of their Lordships of the Privy Council with respect to an entry of custom in the *wajib-ul-arz* of a village is to be found in the case of *Balgobind v. Badri*

Prasad (1). The appeal was preferred from a decree of this Court and the appeal in this Court was a first appeal. That decision of their Lordships of the Privy Council is a clear authority for the view that the entry of a custom in a *wajib-ul-arz* is evidence and in the absence of circumstances mentioned in that judgment is a most valuable evidence of the custom. This is amply borne out by the following quotation:—

"One of these duties was, to record customs as the Settlement Officer found them, and not as he might think they ought to be. When it is not shown by reliable evidence that the Settlement Officer neglected to perform his duty or was misled in recording a custom, and it does not appear that the statement of the custom is ambiguous, the record in a *wajib-ul-arz* of a custom is most valuable evidence of the custom, much more reliable evidence than subsequent oral evidence given after a dispute as to the custom has arisen."

The view taken by their Lordships of the Privy Council confirms the opinion frequently expressed by the Judges of this Court on the same point. In this connection reference may be made to the decision of Mr. (now Mr. Justice) Lindsay in the case of *Lalman v. Nand Lal* (2). In the case before me the learned Judge in the Court below was, therefore, perfectly competent to attach no or little value to the entry of custom in the *wajib-ul-arz* under consideration and sitting as a Court of second appeal. I am equally incompetent to review his finding and to hold that more weight ought to be attached to this piece of evidence.

Before parting with this ground of appeal it may be mentioned that there was another circumstance appearing in evidence which induced the learned Judge to regard the entry in the *wajib-ul-arz* as to the custom of little value. The suit which was mentioned as pending in the Settlement Court in the *wajib-ul-arz* of Kesarmau ended in favour of the daughters. A copy of the judgment of the Trial Court and also a copy of the judgment in appeal have been filed in the present case. The Court had before it another *wajib-ul-arz* the entry in which was absolutely general without any qualification as regards the custom excluding daughters.

(1) 74 Ind. Cas. 449; 26 O. C. 217; (1923) A. I. R. (P. C.) 70; 21 A. L. J. 578; 9 O. & A. L. R. 581; 45 M. L. J. 289; 45 A. 413; 38 C. L. J. 302; (1923) M. W. N. 799; 33 M. L. T. 317; 10 O. L. J. 368; 50 I. A. 196; 29 C. W. N. 165 (P. C.).

(2) 20 Ind. Cas. 894; 17 O. C. 1.

ters from inheritance. That *wajib-ul-arz* is of the village Asanha. A copy of the same is also filed in the present case and part of the property in suit is situate in that village. In spite of the entry in the village Asanha the Settlement Court came to the conclusion that there was no such general custom of the exclusion of daughters.

As to the second ground of appeal, I may dispose it off quite briefly. It appears that certain persons were examined as witnesses in a case pending in one of the Courts in Oudh about 15 years ago and the dispute involved in that case was the right of succession to an estate. One of the issues raised was whether the daughters were excluded by a family custom from inheriting the estate of their deceased father. Some of the witnesses, who gave evidence in support of the custom, are now dead. They all belonged to the family of Nand Kishore. The learned Judge has rejected the statements as being inadmissible under s. 32, cl. (4), of the Indian Evidence Act. He is of opinion that they were made after the dispute had arisen. For me it is not necessary to decide whether these statements were technically admissible in evidence or not. To my mind they are certainly of very little value as proof of the custom now in question. That there was a clashing of interests between the two parties to the litigation is perfectly clear. One party supported the custom, the other repudiated it. In this division into two camps some people appeared as supporters of one party and others of the other. In conditions like these it is difficult to say that the evidence produced was not tainted with partiality.

As to the third ground of appeal, I find that the learned Judge in the Court below has considered the evidence relating to the five instances in which the appellants relied in proof of the custom of the exclusion of daughters. This evidence purports to show that a brother succeeded to the exclusion of a daughter. Now in a case of a brother succeeding another brother the evidence that the two brothers were separate must be definite, clear and reliable. The learned Judge thinks that the evidence produced in this case is not of such a nature. On that ground he rejects the instances as of no consequence.

I am, therefore, of opinion that the appeal fails and it is hereby dismissed with costs.

Z. K.

*Appeal dismissed.***PATNA HIGH COURT.**

CIVIL REVISIONS NOS 441 AND 442 OF 1924.

April 27, 1925.

Present:—Mr. Justice Kulwant Sahay.

SHAMSHER NARAIN SINGH AND

OTHERS—PETITIONERS

versus

Malik MOHAMMAD SALE alias

WASIUDDIN—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. IX, r. 13, O. XXII, rr. 3, 4—Evidence Act (I of 1872), s. 78 (6)—Ex-parte decree, application to set aside—Finding as to non-service of summonses and date of knowledge of decree based on evidence—Revision—Interference with finding—Copies of registers kept by officers of Native State, admissibility of.

Where on an application to set aside an *ex parte* decree the evidence on the record and that the applicant had no knowledge of the suit and that he came days of the application to set aside the *ex parte* decree, with in revision inasmuch as the Court has committed a mistake as to affect its finding.

Where in a proceeding to set aside an *ex parte* decree it appears that the heirs of a deceased plaintiff have not been made parties to the application, but the Court comes to the finding that the remaining plaintiffs represent the deceased plaintiff and that it was not necessary to bring his heirs on the record, the finding cannot be interfered with under s. 115 of the C. P. C. [ibid.]

Copies of entries in registers kept by the officers of a Native State are not admissible in evidence having regard to the provisions of s. 78 (6) of the Evidence Act. [ibid.]

Where a Court erroneously holds that certain documents are admissible in evidence but in arriving at its finding it does not base its decision upon those documents alone and arrives at its finding independently of such documents, its finding cannot be said to be vitiated by reason of the fact that it has relied upon inadmissible evidence in arriving at that finding. [ibid.]

Revision from an order of the Munsif, Bihar, dated the 16th September 1924.

Messrs. S. N. Roy and A. H. Fakhruddin, for the Petitioners.

Mr. Hasan Jan, for the Opposite Party.

JUDGMENT.—These two applications arise out of an order passed by the Munsif of Bihar setting aside two *ex parte* decrees on an application of the defendant under O. IX, r. 13 of the C. P. C. The decrees were obtained by the plaintiffs-petitioners on the 6th of January 1920. These decrees were *ex parte* as the defendant did not appear and contest the suits. In execution of these decrees the holding was sold on the 18th of May 1920 and purchased by the plaintiffs. The sale was confirmed on the 18th of June 1920 and possession was de-

livered to the auction-purchasers on the 6th of July 1920. The present applications in the two suits under O. IX, r. 13 of the C. P. C. were filed on the 9th of January 1924, the allegation being that the defendant came to know of the decrees and of the sale for the first time on the 11th of December 1923.

The opposite party's case was that he was in the territories of the Nizam of Hyderabad as he was in service there and returned home in April 1923, and he had no information of the institution of the suits or of the decrees, or of the execution proceedings or sale of the holding. The learned Munsif has considered the case in very great detail and he has come to the conclusion that the opposite party was not a party to the suits and was not served upon him. As the learned Munsif has found that the opposite party did not know of the decrees until thirty days after the sale, another objection on the ground of limitation by reason of the fact that one of the plaintiffs Taluka Prasad was dead and his heirs were brought on the record for the first time on the 10th of March 1924, and it was contended that so far as the heirs of Taluka Prasad were concerned, the applications were evidently barred by limitation. The learned Munsif has found that it was not necessary for the opposite party to bring the heirs of the deceased Taluka Prasad on the record inasmuch as all the plaintiffs were members of a joint Hindu family and the surviving plaintiffs represented the family. Upon these findings the learned Munsif has granted the applications.

It has been contended in revision that the learned Munsif was wrong in holding that the applications were within time, and secondly, that he was wrong in using in evidence, certain documents produced by the opposite party which were copies of attendance register and leave register kept by the officers of the Nizam of Hyderabad, which showed the presence of the opposite party at Hyderabad. As regards the question of limitation it has been argued that the heirs of Taluka Prasad were necessary parties, and as they were not brought on the record within thirty days of the date of knowledge of the decrees as alleged by the opposite party, the applications were barred by limitation. Now the learned Munsif has come to a finding that the other plaintiffs represented Taluka Prasad and it was not necess-

ary to bring his heirs on the record. The learned Munsif may be right or he may be wrong, but there is no question of jurisdiction involved on this point. He was entitled to come to a finding on the question as to whether the surviving plaintiffs represented Taluka Prasad and as to whether the applications were barred by limitation and he did come to the finding that the applications were not barred because the heirs of Taluka Prasad were not brought on the record within thirty days. I am of opinion that it is not a question which can be considered in revision under s. 115 of the Code.

As regards the question relating to the admissibility of documents of the Hyderabad State, it is clear that those documents were not properly admissible in evidence having regard to the provisions of s. 78 clause (6) of the Indian Evidence Act. But the learned Munsif does not base his decision upon those documents only. Before referring to those documents, the learned Munsif had, upon other evidence in the case, come to the conclusion that the opposite party was absent from his home and summonses were not served upon him. The learned Munsif has, no doubt, not applied his mind to the consideration of the question as to whether these documents were admissible in evidence or not, but, even excluding these documents from the record, it appears from the judgment that there was sufficient evidence to enable the Munsif to come to a finding on the question as regards the service of summonses.

It was next contended that the document marked Ex. F in the case (which was a compromise petition filed in a proceeding relating to the execution of a decree obtained by the opposite party against the petitioners) showed conclusively that the opposite party had knowledge of the decrees and of the execution proceedings long before 30 days of the filing of the present applications. The learned Munsif has considered this compromise petition and has come to the conclusion that this petition was not filed with the knowledge of the opposite party. He has compared the handwriting and he has considered the other circumstances connected therewith, and his finding on this document is a finding of fact upon a consideration of the document. I cannot in revision say that the Munsif has committed any such error or any illegality

or irregularity so as to affect his jurisdiction.

There is no question of jurisdiction involved in these applications and they are dismissed with costs. There will be only one hearing fee, two gold mohurs.

Z. K.

Application dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 241 OF 1922.

February 3, 1925.

Present:—Mr. Justice Odgers.

MADE GOUDA AND OTHERS—DEFENDANTS

—APPELLANTS

versus

CHENNE GOUDA AND OTHERS—

PLAINTIFFS AND DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 54, 118, 123—Hindu Law—Partition—Allotment of share to stranger—Registered-deed, whether necessary—Title, acquisition of.

Where at a partition between members of a joint Hindu family, a share in the family properties of the value of more than Rs. 100 was allotted to a stranger, but the deed was not registered:

Held, that there being no registered instrument, whether the transaction was a gift or an exchange, it offended against the provisions of the Transfer of Property Act and that the stranger acquired no title in the properties allotted to him. [p. 331, col. 2.]

A person cannot by the mere recognition of another as a co-sharer of his convey to the latter a title in immoveable property without observing any of the formalities required by law for the purpose. [p. 332, col. 1.]

Ramkishore Kedarnath v. Jainarayan Ramrachpal, 20 Ind. Cas. 958; 40 C. 966; (1913) M. W. N. 661; 14 M. L. T. 163; 17 C. W. N. 1189; 18 C. L. J. 237; 15 Bom. L. R. 867; 11 A. L. J. 865; 25 M. L. J. 512; 10 N. L. R. 1; 40 I. A. 213 (P. C.) and Second Appeal No. 225 of 1920, followed.

Girhi Rani Misrani v. Chandra Lal Kanth, 17 Ind. Cas. 885; 17 C. W. N. 62, followed.

Second appeal against a decree of the Court of the Additional Subordinate Judge, Coimbatore, in A. S. No. 10 of 1921, preferred against the decree of the Court of the District Munsif, Kollegal, in O. S. No. 88 of 1919.

Mr. C. V. Ananta Krishna Iyer, for the Appellant.

Mr. K. Bhashyam Iyengar, for the Respondents.

JUDGMENT.—In this case the plaintiff is the grandson of the 1st defendant. The latter is the appellant and is the uncle of the 2nd defendant who is his sister's son. The 1st defendant and his sons entered into a partition in the year 1908 of

their joint properties. In this partition they purported to include the 2nd defendant and to allot to him a proportionate share of the joint properties. The 2nd defendant has subsequently assigned a portion of the property to which he alleges he has thus acquired title to the assignee, the respondent. The learned District Munsif found that the 2nd defendant got his share as a gift or that he got it in consideration of the fact that he surrendered part of his property to the 1st defendant by exchange. In either case he held that as the property was Rs. 100 in value and there was no registered instrument, whether the transaction was a gift or exchange, it offended against the provisions of the Transfer of Property Act. The learned Judge, on appeal, was made a finding it difficult to say whether the 2nd defendant could be considered as a member of the joint family and, therefore, not a co-partner. The learned Judge further says that the transaction was not a gift, but a partition of family property of which family 2nd defendant was not a member. In Ex. C the 2nd defendant apparently described the property as having been given to him by way of gift. The comment of the learned Additional Subordinate Judge that this recital is interlineated is a mistake, the word or words simply having been underlined in the course of the argument. The learned Subordinate Judge bases his finding on the authority of *Girhi Rani Misrani v. Chandra Lal Kanth* (1). It is sufficient to say that this decision has been considered in S. A. No. 225 of 1920 by a Bench of this Court by which decision I am, sitting as a Single Judge, bound. The Calcutta case was very carefully examined in that second appeal and Napier, J., says: "I know of no authority for the proposition that the formal requirements of the Transfer of Property Act can be avoided by calling a transaction by a particular name under the Hindu Law". Krishnan, J., considering the same case says that the Judges in the Calcutta case did not treat the case before them as one of gift, but they do not say under what category it falls. "It does not appear that they meant to treat it as a family arrangement, but if it was meant to

hold that a person could by the mere recognition of another as co-sharers of his convey title to him of immovable property without observing any of the formalities required by law for it, I am, with all respect, unable to follow their view." Reference may also be made to the Privy Council case reported as *Ramkishore Kedarnath v. Jainarayan Ram-rachpal* (3). Therefore, as regards Issue No. 4, I think the Subordinate Judge is clearly wrong and with regard to this, the appeal must be allowed with costs. Mr. Bhashyam Iyengar has, however, represented that the appeal should not be wholly disposed of in this manner but that the case should be sent back to the Appellate Court to be dealt with. I am of opinion that no objection has been made by Mr. Krishna Iyer to this. What I propose to do is to allow the appeal with costs and the appeal will be remitted to the Appellate Court for decision. Whether any and what valid title has been claimed by the 2nd defendant independently of the points decided in this judgment. Appellant will have the Court-fee of the second appeal refunded.

V. N. V.

Appeal allowed.

(2) 20 Ind. Cas. 958; 40 C. 966; (1913) M. W. N. 661; 14 M. L. T. 163; 17 C. W. N. 1189; 18 C. L. J. 237; 15 Bom. L. R. 867; 11 A. L. J. 865; 25 M. L. J. 512; 10 N. L. R. 1; 40 I. A. 213 (P. C.).

POUDH JUDICIAL COMMISSIONER'S COURT.

PRIVY COUNCIL APPEAL No. 8 OF 1925.

July 9, 1925.

Present:—Mr. Wazir Hasan, A. J. C.,
and Mr. Simpson, A. J. C.

JAGMOHAN SINGH AND OTHERS—
PLAINTIFFS—APPLICANTS

versus

SHEO MANGAL SINGH AND OTHERS—
—DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 109 (c), O. XLVII, r. 7—Review, decree passed on—Appeal to His Majesty in Council, leave for, when to be granted.

Where a decree passed by the High Court is of such a character that if it had been passed by a Court subordinate to the High Court no appeal against it would have been permissible to the High

Court, leave will not be granted under s. 109 (c) of the C. P. C. for an appeal to His Majesty in Council against the decree.

Where a decree is passed by the High Court on review, leave to appeal against the decree to the Privy Council under s. 109 (c) of the C. P. C. will not be granted unless the decree is open to objection on some ground recognized by r. 7 of O. XLVII of the C. P. C.

Application for leave to appeal to His Majesty in Council against an order of Mr. Ashworth, A. J. C., in Miscellaneous Application No. 647 of 1924, dated 10th January 1925, and reported as 86 Ind. Cas. 29, reversing the decree of Mr. Pullan, A. J. C., in Second Civil Appeal No. 163 of 1923, dated 21st July 1924 and reported as 82 Ind. Cas. 583.

Mr. Moti Lal Seksena, for the Applicant.

Mr. St. G. Jackson, for the Opposite Party.

ORDER.—This is an application for leave to appeal to the Privy Council. Such appeals are governed by ss. 109 to 112 of the C. P. C. The value of the subject matter of the suit is only Rs. 2,700 and, therefore, no appeal lies under s. 109 (a) or (b) read with s. 110 of the Code. If we are to grant leave to appeal, it must be because we regard the decree as a fit one for appeal to His Majesty in Council. We do not think so. It is not necessary to go into the facts of the case. It is enough to say that the suit is one for possession of land and that the Trial Court dismissed it. On appeal the first Appellate Court dismissed the appeal. On second appeal a learned Judge of this Court, Mr. Pullan, allowed the appeal and granted a decree for possession. The defendant-respondent applied in review to this Court. Mr. Pullan was no longer a member of the Court and the application was heard by another Judge, Mr. Ashworth, who granted the application and dismissed the appeal. The plaintiffs are now the applicants for leave to appeal. The ground on which they proceed is that Mr. Ashworth proceeded on a finding that Mr. Pullan was wrong in law in his decision. It is urged that an error of law is not a good ground for granting a review.

In the view we take of the case, it is unnecessary to go into this question. Mr. Ashworth did not profess to proceed on this ground. He considered that Mr. Pullan's judgment contained an error on the face of the record. Whether this is

so or not we do not feel called upon to decide. The question before us is not whether Mr. Pullani was right or whether Mr. Ashworth was right, but whether Mr. Ashworth's decree is one fit for appeal to His Majesty in Council. On the face of it it is not.

The plaintiffs, who are the applicants before us, brought a suit for possession of land valued at Rs 2,700 only. Their suit after various vicissitudes has been finally dismissed. If that were all they would have no right of further appeal, but they say that because a review was granted they ought to be allowed to appeal to the Privy Council. The rules governing appeals from the decree passed on review are contained in O. XLVII of the C. P. C. Rule 7 of that Order lays down that an order of the Court rejecting the application shall not be appealable but an order granting an application is appealable on three grounds only. One of these is that the review was granted beyond the time of limitation. That was not the case here. The others are that the application was in contravention of the provisions of r. 2 or r. 4. Neither of these rules was contravened. Therefore, if the review decree had been passed by a Court subordinate to this Court no appeal would lie to this Court. We think that we ought to be guided by the same principles in deciding whether an appeal ought to be permitted to the Privy Council. For these reasons, the application is dismissed with costs.

Z. K.

*Application dismissed.***CALCUTTA HIGH COURT.**

LEFTENS PATENT APPEAL No. 32 OF 1924.

March 19, 1925.

Present:—Justice Sir Ewart Greaves, Kt.,
and Mr. Justice Cuming.JABED ALI TALUKDAR AND OTHERS—
DEFENDANTS—APPELLANTS

versus

SURENDRA NATH BANDOPADHYA
AND OTHERS—PLAINTIFFS AND OTHERS—
DEFENDANTS—RESPONDENTS.*Evidence Act (I of 1872), s. 115—Estoppel—Execution of decree—Decree for rent—Sale—Purchaser believing that he is purchasing free from encumbrances**—Co-sharer party to decree, whether estopped from challenging character of decree—Execution of rent-decree by co-sharer—Notice to other co-sharers, necessity of*

The obligation of serving co-sharers with notice of the execution of a rent-decree and the sale thereunder is not sufficiently carried out by serving notices on some of them. [p. 336, col. 1.]

Rajani Kanta Ghose v. Rahaman Gazi, 82 Ind. Cas. 507; 27 C. W. N. 765; 37 C. L. J. 447; (1924) A. I. R. (C.) 408, distinguished.

Where a co-sharer landlord, who is a party to a decree for rent obtained by another co-sharer, stands by and allows the purchaser at the auction-sale in execution of the decree to purchase the holding under the impression that the decree is a rent decree and that he is purchasing the holding free from encumbrances, the co-sharer who stands by is estopped from subsequently challenging the character of the decree as a rent-decree and stating that the sale was not free from encumbrances. [p. 336, col. 2.]

Let the appeal be allowed against the judgment of the learned Judge Ghose, dated the 14th April 1925, and reported as follows:—

Briefly these:—
The plaintiffs are co-sharer proprietors of *zeminari* No. 3558 of the Bakerganj Collectorate to the extent of 1a. 18y. 3 $\frac{3}{4}$ karas 1 $\frac{1}{2}$ grant 3 $\frac{3}{4}$ tils. Within the said *zemindari* there is a *taluk* named Taluk Abdul Kasim. The plaintiffs obtained a decree for their share of the rent in 1906 and purchased on 21st September 1909 this share of Taluk Abdul Kasim which belonged to one Akimanessa Bibi. Within the said *taluk* the principal defendants held a *howla* and the plaintiffs brought the present suit for the entire rent of the *howla* making other co-sharers of Taluk Abdul Kasim parties defendants thereto on the strength of his title by purchase in 1909.

On 27th November 1909 one Golam Azam Chowdhury purchased 1 *kara* share of the *zemindari* from one Ahmad Hossein. In 15th April 1910 Nawab of Dacca one of the co-sharer *zemindars* brought a suit for rent making other co-sharers party defendants under s. 148A, Bengal Tenancy Act, but Golam Azam was not impleaded as a party to the said suit. A decree was passed on 14th August 1910 and Golam Azam got his name registered on 19th August 1910. The notices under s. 158B on co-sharer landlords were served on 20th September 1910 and notices were served on the plaintiffs both as co-sharers and *izaradar* of Golam Azam. The sale was confirmed on 29th May 1911 and sale certificate granted on 5th March 1912. On 14th April 1911 the present plaintiffs brought a suit for rent of the *taluk* against

Bibi Akimennessa and attached the surplus sale-proceeds on 14th June 1911.

The present suit for rent was instituted on 10th May 1917 making the co-sharers of the *taluk* party defendants. The suit was contested by the tenants and the co-sharers who purchased in execution of Nawab's decree.

Letters Patent Appeal was filed by the purchaser.

Mr. *Jatindra Nath Sanyal*, for the Appellants.—Golam was not a proprietor at all at the date of the decree. Even assuming that he purchased 1 *kara* share in 1909 his name was not registered till after the decree in Nawab's rent suit. Section 78 of the Land Registration Act prevents a suit by an unregistered proprietor. A Court cannot pass a decree against an unregistered proprietor. Therefore, the Nawab's decree was sufficient compliance with the law and the registered proprietors were not parties to the suit. Section 60, Bengal Tenancy Act, provides that payment to the registered proprietor is sufficient discharge and the tenant is not entitled to plead in defence to a suit by registered proprietor that the rent is due to any third person. Thus Golam was not a necessary party to the suit.

As for the execution case and notice under s. 158B of the Bengal Tenancy Act non-service of notice upon one of the co-sharers did not nullify the sale or alter its character to that of sale held in execution of a money-decree the co-sharer not served with notice could alone object, see *Rajani Kanta Ghose v. Rahaman Gazi* (1). Golam Azam does not object, the only person objecting in this case is a co-sharer who was party to the sale and who was served with notice and he is not entitled to object.

Even assuming that Golam was a necessary party he was sufficiently represented by his *izaradar* Hariprosad. *Izaradar* being a party to the suit and the execution case the proprietor was sufficiently represented.

The plaintiff is clearly estopped by his conduct from raising the question that the sale in execution of Nawab's decree was not a sale free from all encumbrances. Apart from s. 115 of the Evidence Act

there can be estoppel. It is well established that if a man having title to an estate, which is offered for sale, and knowing his title, stands by or does not forbid the sale, and thereby another person is induced to purchase the estate, under the supposition that the title of the actual vendor is good, the true owner, so standing by and being silent, will be bound by the sale and neither he nor his privies will be at liberty to dispute the validity of the sale; see *Story's Equity*, 3rd Edition, page 156, *Bigelow on Estoppel*, 6th Edition, pages 648, 649, 650 and 651 (top); *Thomas Barclay v. Syed Hussein Ali Khan* (2) and also *Joy Chandra Banerjee v. Sreenath Chatterjee* (3).

Here Hariprosad was the *izaradar* of Golam. Notice under s. 158B was served on him, he knew that the *taluk* was being sold free from all encumbrances, he stood silent fully knowing his title but did not make his rights known, thus the appellants who were strangers were induced to purchase the property for Rs. 4,501 whereas on the first day of the property was put up to sale subject to encumbrance and the bid was only Rs. 500. On the facts found by the learned Subordinate Judge and accepted by Mr. Justice Ghose that plaintiff is equitably estopped from questioning that the decree obtained by Nawab was not a rent-decree and the sale was not free from encumbrances.

The plaintiffs brought a suit for rent of their share of the *taluk* on 14th April 1911 against *Bibi Akimannessa* for a period of April 1907 to April 1911, i. e., for a period subsequent to sale and attached the sale-proceeds; thus the plaintiffs must be deemed to have waived their rights under their purchase on 21st September 1909.

Jogeshri Chowdhrair v. Mahomed Ebrahim (4), *Kalanand Singh v. Gunpat Singh* (5), *Sitanath Midda v. Basudeb Midda* (6).

Mr. *Gunada Charan Sen* (with him *Babu Prosanna Bhusan Gupta*), for the Respondents.—That Golam was a proprietor from the date of his purchase in 1909. *Izaradar* did not represent the proprietor for the purpose of s. 148A and making him a party to Nawab's rent suit of 1910 was not a sufficient compliance with the law and

(2) 6 C. L. J. 601.

(3) 32 C. 357 at p. 363; 1 C. L. J. 23.

(4) 14 C. 33; 7 Ind. Dec. (N. S.) 23.

(5) 11 Ind. Cas. 974; 16 C. W. N. 104.

(6) 2 C. L. J. 540.

(1) 82 Ind. Cas. 507; 27 C. W. N. 765; 37 C. L. J. 447; (1924) A. I. R. (C.) 408.

the decree passed had the effect of a money-decree only. It would not be correct to say that merely because a proprietor had not registered his name he was not a necessary party to a suit for rent under s. 148A, Bengal Tenancy Act.

All the co-sharers must be served with notice of sale. The provisions of s. 158B must be strictly complied with and non-service of the notice of sale on any of the co-sharer will render the sale a money sale, see *Ahamad Biswas v. Benoy Bhusan Gupta* (7). The case reported in *Rajani Kanta Ghose v. Rahaman Gazi* (1) depends upon the particular facts of the case.

The plaintiff had no duty to speak, there was no fiduciary relationship between plaintiffs and the defendants and mere silence on the part of the plaintiff cannot create estoppel. Besides there can be no estoppel against Statute. The law provides that unless certain formalities be complied with the decree for rent and the rent sale at the instances of a co-sharer landlord shall have the effect of a money-decree and money sale and these statutory provisions cannot be ~~be~~ ^{not} over by estoppel and the decree and sale cannot be treated as having a higher sanctity owing for the silence of the plaintiff.

Again the *izara* was taken by Surendra and other sons of Hariprosad in 1914, an affidavit was sworn and copy served on the Vakil for other party before the case was heard before Mr. Justice Ghose so the plaintiffs did not know of his rights at the time of the purchase by the defendants.

Babu *Jatindra Nath Sanyal* in reply.—The Subordinate Judge came to a clear findings that *Hariprosad* was the *izaradar* at the time of the sale in execution of Nawab's decree. The case has been fought out on that basis before Mr. Justice Ghose. This Court cannot go behind the findings of the Subordinate Judge.

The principle that there is no estoppel against Statute does not apply whether so far as the plaintiff is concerned he is estopped from saying that the decree is not a rent-decree and the sale is not free from encumbrances. This is a personal disability of the plaintiff owing to his conduct in keeping silent and has nothing to do with the character of the decree or sale.

JUDGMENT.

Greaves, J.—This is an appeal under cl. 15 of the Letters Patent from a deci-

(7) 53 Ind. Cas. 515; 23 C. W. N. 931.

sion of Mr. Justice Bipin Behary Ghose dated the 31st July 1924. The appeal is by the defendants, Mr. Justice Ghose having reversed the decision of the lower Appellate Court which was in favour of the defendants. The suit was brought for rent of a *howla*, and the facts are as follows. The respondents who are the plaintiffs in the suit claimed one anna and odd share in a *zemindari*. In the *zemindari* there was a *Taluq* Abdul Kasim and in the *talug* there was a *howla* which was held by the tenant-defendants. As I have already stated the suit was a suit for rent of the plaintiffs' share in *howla*. The plaintiffs' story was that in the year 1906 they commenced a suit for rent—share of the *talug*

share of the taluq,
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September 1909 one
purchased a share
however,

was not registered until 19th August 1910 and before that date, namely, on the 1st April 1911 the Nawab of Dacca who was a co-sharer in the *zemindari* commenced a suit for his share of the rent of the *taluk*. He made the other co-sharers parties and consequently if all the co-sharers were on the record the decree which he had obtained on the 14th August 1910 was rent decree which could be executed as such. The Nawab of Dacca proceeded to execute his decree and in March 1911 the property was sold in execution of the rent-decree, if it was a rent-decree in the presence of the present plaintiffs as the Courts have found. This sale was confirmed on the 24th May 1911. Now the position is that if all the co-sharers were parties to the Nawab's suit and had also notice of the execution proceedings the sale of the appealing defendants would be free from any incumbrance in favour of the plaintiffs by virtue of their purchase in 1909.

Five points have been raised before us in this appeal. It is stated that Mr. Justice Ghose was wrong in holding that Golam was a proprietor. Mr. Justice Ghose so held, and the result is that if this finding is correct the sale in execution of the Nawab's decree was not a sale free from encumbrance. We think that the decision of Mr. Justice Ghose on this point is correct and that Golam was a proprietor by virtue of his purchase and that the sale in execution

was not a sale free from all encumbrances. This also disposes of the second point that if Golam was the proprietor then as he was not registered until 10th August 1910 he was not a necessary party. I agree with Mr. Justice Ghose's conclusion that he was a necessary party as he was the owner from the date of his purchase.

Thirdly, it was urged that if Golam was a necessary party he was sufficiently represented by his *izaradar* who according to the finding of the Subordinate Judge was the father of Surendra Nath Banerjee and who according to the same finding was on the record in the Nawab's suit both as a co-sharer in the *zamin* and as an *izaradar*. We agree with Mr. Justice Ghose that Golam was not represented by his *ejaradar* and was not cured by this.

Fourthly, it was urged that it was sufficient on some of the facts and reliance was placed on the case reported as *Rajani Kanta Ghose v. Rahaman Gazi* (1). This seems to us to be a decision which depended upon the facts of the case and cannot be taken as having laid down any principle of law. We do not think that obligation of serving co-sharers is sufficiently carried out by serving notices on some of them.

Then comes the fifth point which is really the main question before us and which is a question of estoppel. What is urged before us on behalf of the appellants is that assuming that Mr. Justice Ghose was right in finding that the decree obtained by the Nawab was not a rent-decree and that the sale in execution to the present appellants was not a sale free from all encumbrances under the circumstances of the present case by the doctrine of estoppel the plaintiffs are precluded from setting up this contention. Mr. Justice Ghose has negatived this contention and he has held that the mere fact that the plaintiffs were on the record in the Nawab's suit as co-sharers did not involve on them any obligation of stating the facts to the purchaser. I agree with him in this conclusion and I do not think that the mere fact that the plaintiffs as co-sharers were on the record in the Nawab's suit involved any obligation on them of stating the encumbrance at the time of the sale. But that does not, in my opinion, dispose of the case. If the defendants knew the facts and stood by

and allowed the present appellants to purchase on the basis that the Nawab's decree was a rent decree and that the sale in execution was not, therefore, a sale free from encumbrance then we think that they would be debarred from setting up in these proceedings that it was not a rent decree. Consequently, what really we have to ascertain is what was the state of the knowledge of Surendra Nath Banerji's father at the time of the execution proceedings in the Nawab's suit. Mr. Justice Ghose has not considered that position. But according to the findings of the learned Subordinate Judge which findings whether correct or not, are binding on us, the father of Surendra Nath Banerji, Hariprasad Banerji, was on the record in the Nawab's suit not merely as a co-sharer *zemindar* but also as an *izaradar* of Golam. It follows from this finding that Hariprasad must have known that Golam was a co-sharer at the time of the execution proceedings and, therefore, a necessary party to the Nawab's suit and assuming this position which we are bound to assume from the findings of the Subordinate Judge we think that he would be estopped by this fact from now asserting in these proceedings that the sale in execution of the Nawab's decree was not a sale free from encumbrance. It has been urged before us that the *ejara* was not created until 9th April 1914 and that consequently at the time of the proceedings in the Nawab's suit Hariprasad could not have been on the record as an *izaradar*, and we were asked to rely on an affidavit which is before us and notice of which was given to the present appellants in the proceeding before Mr. Justice Ghose. But we cannot in second appeal go into the question of facts of this nature and we must accept the finding of fact of the lower Appellate Court and on this finding for the reasons which I have indicated Hariprasad knew at the time of the execution proceedings in the Nawab's suit that what the appellants were purchasing was not free from encumbrance. By the doctrine of equitable estoppel his standing by and allowing the purchaser to buy thinking he was purchasing free from encumbrance precludes him from now asserting in this proceeding that the decree in the Nawab's suit was not a rent-decree and that, therefore, the sale in execution was not a sale free from encumbrance.

This, therefore, disposes of the appeal.

which must succeed on the 5th ground which was urged before us, namely, the ground of estoppel.

There is one thing that we ought to mention, namely, that it was urged before us that there could be no estoppel against the Statute. That proposition is perfectly true but has no application to the present case.

The appeal accordingly succeeds. The decision of Mr Justice Ghose is set aside and that of the lower Appellate Court is restored.

The appellants will be entitled to their costs in this Court and before Mr. Justice Ghose and in the lower Courts.

Cuming, J.—I agree.

Z. K.

Appeal allowed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 49 of 1924.

August 29, 1924.

Present:—Mr. Charles Gordon Spencer,
Officiating Chief Justice, and
Mr. Justice Srinivasa Iyengar.
K. RAJAGOPALA CHARARIAR
—DEFENDANT—APPELLANT

versus

**Musammat JAMAL AYISHA BIBI AND
OTHERS—PLAINTIFFS—RESPONDENTS.**

*Receiver—Suit for rent—Appointment of Receiver—
Direction to sell press installed in leased premises—
Sale—Prior mortgagee of press, acquiescence of, in
Receiver's management, effect of—Expenditure
incurred by Receiver—Priority over mortgagee's claim.*

In execution of a decree for arrears of rent and for ejectment of a tenant, a Receiver was appointed who was directed by the Court to sell a press and machinery installed in the leased premises for the best price obtainable and meanwhile to keep it running as a going concern and to pay the rent due to the landlord. A mortgagee of the press and machinery, though not a party to the suit, acquiesced by his acts and conduct in the employment of and management by the Receiver for the benefit of all parties. The press and machinery when sold fetched a price less than the amount due under the mortgage.

Held, that the mortgagee was not entitled to the sale-proceeds without paying thereout the rent due to the landlord, wages of the workmen employed in running the press and the Receiver's remunerations which items were entitled to priority over the mortgagee's claim. [p. 339, col. 1.]

Per Srinivasa Iyengar, J.—When property is placed in *custodia legis* by the appointment of a Receiver all the orders passed by the Court for the management of such property will be binding on

all persons who, if not actual parties to the suit, have so conducted themselves either with regard to the litigation or with regard to the management of the property under the directions of the Court, as to make themselves virtually or constructively parties to the suit or have otherwise submitted themselves to such management by the Court. [p. 339, col. 1.]

Appeal from the judgment of Mr. Justice Kumaraswami Sastri, in Ordinary Original Civil Jurisdiction Civil Suit No. No. 133 of 1922, dated the 21st July 1924.

Messrs. C. S. Venkatachariar and T. S. Venkatesa Iyer, for the Appellant.

Mr. A. E. Rencoytre, for the Respondents.

JUDGMENT.

Spencer, Offg. C. J.—The appellant holds a first mortgage over the machinery, types and other *in-trade* of the Modern Printing which is installed in premises below the 1st respondent. The 1st respondent has a decree for arrears of rent and ejectment of the appellant against the 2nd respondent. Third Receiver appointed in the *case* of the 1st respondent's decree and was directed by the Court in presence of all the parties to sell the press for the best price obtainable and meanwhile to keep it running as a going concern and to pay the rent due to the landlord. Owing to various reasons the attempt to dispose of the press as a going concern was unsuccessful, and the materials were eventually sold for Rs. 10,000 which is less than the sum due to the appellant on his mortgage decree of July 10, 1924. In this appeal we are asked to declare that the appellant's claim to the proceeds of the mortgaged property should be given precedence over the 1st respondent's claim for rent and over the disbursements made by the Official Receiver to workmen for keeping the press running as a going concern. It is argued for the appellant that his position as a secured creditor cannot be rendered worse by an order passed on a petition to which he was not a party, that the landlady can only pursue her remedy for rent against the printer and the Receiver, that his consent to the sale of the press free of encumbrances was given on condition that he should have the same right over the proceeds as he had over the property mortgaged to him, that the Receiver is not entitled to pay the rent out of the proceeds of the *corpus* and that the order of Devadoss, J., was only to pay the rent out of the nett collections.

The last plea is not well founded. In the affidavit of the 1st respondent's agent, it was suggested that the Court should direct the Receiver to pay the rent out of the gross collections. But the order of the Court, dated the 26th February 1923 does not state from what source the Receiver should pay the rent. In this affidavit of July 1924, the appellant states, that he understood Mr. Justice Devadoss' order that the rent should be a first charge as meaning that it should only be paid after the secured creditors had been satisfied. But the reply affidavit of the 1st respondent's assistant contains a sworn statement that Mr. Justice Devadoss refused to make any order for sale of the property unless the parties agreed that rent should be paid to the plaintiff as a first charge. Apart from any consideration as to whether the parties understood the learned Judge's order to mean, it is very clear from the affidavits and orders to which our attention has been drawn that the appellant, though a party to the 1st respondent's suit, became aware of the appointment of a Receiver and that he applied to the Court that the Receiver appointed in the 1st respondent's suit should be appointed Receiver in his own mortgage suit (Original Side No. 582 of 1923) and that he opposed the removal of the press from its present premises and asked that the defendant should be restrained by an injunction from removing it. He, therefore, acquiesced in the housing of the property in the 1st respondent's premises and in the employment of a Receiver to preserve the property for the benefit of such parties as might be eventually held to have a prior right to it. It is clear that notice was given to his Vakil before passing the order of 24th July 1923 to sell the plant and machinery to public auction with the reserve price of Rs. 31,500 after rejecting an offer for Rs. 30,500. Kumaraswami Sas'ri, J., decided that the appellant was estopped by his conduct from claiming that the landlady and the Receiver should go without satisfaction of their claims and I am clearly of opinion that the learned Judge was right. Appellant evidently acquiesced in the property being kept where it was and he took the benefit of its being preserved. He cannot now claim to have the properties without paying any rent for the period prior to the sale at which he purchased. If he had not moved for keeping the properties in the 1st respondent's pre-

mises, she might have got vacant possession and have let the premises to others. He not only enjoyed the benefit of the Receiver's management, but also he has had the benefit of the shelter of the 1st respondent's roof which together resulted in the property being preserved for him and he adopted those benefits when he asked for the press to be left where it was and for an order that the 3rd respondent should continue to manage it instead of getting it sold as soon as possible under his mortgage. The case, therefore, in my opinion, clearly falls within s. 70 of the Contract Act which, as I explained in *Rajah of Pittapur v. Secretary of State* (1) covers cases of the nature of salvage. The English case of *Bertrand v. Davies* (2) was quoted on behalf of the Receiver. In that case it was held that a Manager appointed by a Court to manage a West India estate was entitled to a lien on the estate for expenditure incurred in the course of management when the persons interested by tacit acquiescence had encouraged him to incur such expenditure. In *Fisher on Mortgages*, page 281 this case is quoted as an instance of an equitable salvage lien arising in connection with certain undertakings which would fail for want of immediate pecuniary and other supplies. In this respect the cultivation of West India estates has been put on the same footing as the working of mines, alum works and other works of a perishable nature. The facts of *Bertrand v. Davies* (2) are not exactly similar to the present case but the principle of salvage is the same. In *Giridhari Lal Ray v. Dharendra Kristo Mukerjee* (3) there was an order of Court directing the Receiver to raise a loan to preserve the property for the benefit of all parties and the learned Judges held that, if the Court was satisfied that a certain order was made for the benefit of all the parties to the litigation, it was not necessary to inquire further into the circumstances which justified such an order and that a Court appointing a Receiver to be in possession of an estate can deal with the property which is under its control and can authorise the Receiver to create a lien on the property which will take priority over any other

(1) 25 Ind. Cas. 783; 16 M. L. T. 375 at p. 380.

(2) (1862) 54 E. R. 1204; 3 Beav. 429; 32 L. J. Ch. 41; 9 Jur. (N. S.) 34; 7 L. T. (N. S.) 372; 11 W. R. 48; 135 R. R. 504.

(3) 34 C. 427; 11 C. W. N. 1; 4 C. L. J. 495.

mortgage of an earlier date. In the present case the Court did not order the Receiver to raise a loan for the purpose of paying the rent of the premises where the press was and for paying the wages of the workmen who were employed to work it as a going concern. The Judge might have done so and, if in pursuance of the Court's order the Receiver had mortgaged the press for raising a fund to defray the cost of his management, that mortgage would have taken precedence over the appellant's security. Under these circumstances, I have no doubt that the learned Judge's order to pay the rent due to the plaintiff from 1st December 1922 upto the delivery of possession and the wages of the workmen and the Receiver's remuneration in priority to the appellant's mortgage out of the proceeds of the sale of the press was justified both in fact and in law, and the appeal is dismissed with costs of 1st and 3rd respondents (two sets).

Srinivasa Iyengar, J.—The question raised in this appeal is a difficult and important one and I have given it my earnest consideration. At the hearing of the appeal I was much impressed with the argument on behalf of the appellant that if one person should file a suit against another and get an order for the appointment of a Receiver in that suit in respect of property which is mortgaged to various persons who are not made parties to the action, the orders passed in that suit with regard to the management of the property by the Receiver would have the effect of depleting, if not, of entirely destroying the securities held by the mortgagees. Generally speaking no doubt such a result would be liable to be characterised as monstrous. But the law is perfectly clear that when the property is placed in *custodia legis* by the appointment of a Receiver all the orders passed by the Court for the management of such property will be binding on all persons who, if not actual parties to the suit, have so conducted themselves either with regard to the litigation or with regard to the management of the property under the directions of the Court, as to make themselves virtually or constructively parties to the suit or have otherwise submitted themselves to such management by the Court. It is unnecessary for me to say whether or not the appellant in this case was well advised or ill advised in his conduct with regard to the litigation in

question and also with regard to the management of the press by the Court. It seems to me that the observation made by the learned Counsel for the 1st respondent that the appellant was always hovering about the Court and appearing in the case in various proceedings and then disappearing, was a very true and just observation. It is also perfectly clear that the appellant far from disputing or questioning the management of the press by the Court through its Receiver, complained at one stage of the apprehended danger of the Receiver being discharged insisting upon the necessity for continuance of the Receiver and suggesting that the Receiver should be in charge on such terms as to pay of rent, etc., as the Court may deem. In the face of such an application, it is impossible to resist the conclusion that the appellant submitted himself to the management by the Court. If so, it follows that either as party, virtually or constructively, as a mortgagee who submitted himself to the management by the Court, he became bound by all the necessary orders made by the Court in respect of the management. It is true that the application of the appellant for making him really a party to the suit was not ordered by the Court. But, if thereafter the appellant had not intervened in the suit and made himself virtual or constructive party as aforesaid, he might possibly have been in a different position. It is true that the mortgage in favour of the appellant was not of the business as a going concern. But at the same time the covenants in the deed of mortgage make it clear that for the maintenance of the value of the securities it was deemed necessary that the business should be maintained and carried on as a going concern. There can also be no doubt that the appellant himself regarded that not only the carrying on of the press as a going concern, but its being housed in the same premises belonging to the 1st respondent were both necessary for the maintenance of the value of his securities. In these circumstances the amounts directed to be expended by the Court by way of salvage was an expenditure necessary for and binding on all the parties including the appellant. It is no doubt to be regretted that things turned out quite differently to what was expected. I am not also sure whether the equitable doctrines of salvage lien might not require considerable extensions in their applica-

tion to complicated and growing commercial conditions in future. However, that may be, for the reasons already given I agree with my Lord the Officiating Chief Justice in the order made by him.

Appeal dismissed.

CUDDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL NO. 400 OF 1924.

August 18, 1925.

Present:—Mr. Dalal, J. C.

SUKHDEO SINGH AND OTHERS—

PLAINTIFFS APPELLANTS

KASHI SINGH—

RESPONDENTS.

OTHERS—DEFENDANTS

RESPONDENTS.

Contract Act (IX of 1880), s. 65—Transfer of Property Act (IV of 1882), s. 6—Mortgage of reversionary right, validity—Limitation—

Defendants, who had an expectation of reversioners' certain property, mortgaged that property by a registered deed to the plaintiff in 1895. Plaintiff filed a suit in 1923 to enforce the mortgage.

Held, (1) that the mortgage being of a reversionary interest in the property which they purported to mortgage, s. 65 of the Contract Act had no application to the case, and that the plaintiff's claim to a personal decree against the defendants was barred by time.

(2) that plaintiff being aware at the time when he took the mortgage that the defendants had only a reversionary interest in the property which they purported to mortgage, s. 65 of the Contract Act had no application to the case, and that the plaintiff's claim to a personal decree against the defendants was barred by time.

Second appeal against a decree of the First Additional Sub-Judge, Gonda, dated the 12th May 1924, reversing that of the Munsif, Tarabgange, dated the 25th February 1924.

Mr. Hardhian Chandra, for the Appellants.

Mr. S. N. Roy, for the Respondents.

JUDGMENT.—There is no force in this appeal. The suit of the plaintiff for a money decree on a registered deed dated 22nd July, 1895 was certainly time-barred when the present suit was filed on 22nd October, 1923. By that deed the executants purported to transfer a property which did not belong to them but in which they had an expectation as reversioners. The transfer, therefore, of the property was certainly void.

It is argued that upon a proper interpretation of s. 65, limitation should run from the date when a Court of law refused the

prayer of the plaintiffs to take the money due on this deed into account when a prior mortgage was redeemed by the defendants. The ruling in the case of *Harnath Kuar v. Inder Bahadur Singh* (1) of their Lordships of the Privy Council was quoted. The real basis of that ruling is stated at page 227* of the report: "Their Lordships think there are materials on the record from which it may be fairly inferred in the peculiar circumstances of this case that there was a misapprehension as to the private rights of Indar Singh in the villages which he purported to sell by the instrument of 2nd January, 1880 and that the true nature of those rights was not discovered by the plaintiff or Rachpal Singh earlier than the time at which his demand for possession was resisted, and that was well within the period of limitation." No such ambiguity or misapprehension arose in the present case. It was admitted that prior to 1895 (the year of the deed in suit) these very reversioners had sued for a declaration that a former deed of mortgage executed by the widow in possession may be declared to be null and void on the death of the widow. The mortgagees, therefore, fully understood what the rights of the executants were and that they were not present rights but a possibility of future succession. There are no peculiar circumstances in this case to bring it within the provisions of s. 65 of the Contract Act.

Their Lordships have explained the ruling in the case of *Harnath Kuar* (1), in a later ruling *Ananda Mohon Roy v. Gour Mohan Mullick* (2).

I dismiss this appeal with costs.

Appeal dismissed.

Z. K.

(1) 71 Ind. Cas. 629; 26 O. C. 223; (1922) A. I. R. (P. C.) 403; 9 O. & A. L. R. 270; 9 O. L. J. 652; 44 M. L. J. 489; 37 C. L. J. 346; 45 A. 179; 27 C. W. N. 1949; 50 I. A. 69; 18 L. W. 383; 33 M. L. T. 216; 5 P. L. T. 281; 2 Pat. L. R. 237 (P. C.).
(2) 74 Ind. Cas. 499; 21 A. L. J. 718; 4 P. L. T. 609; (1923) A. I. R. (P. C.) 189; (1923) M. W. N. 803; 45 M. L. J. 617; 25 Bom. L. R. 1269; 33 M. L. T. 365; 50 C. 929; 50 I. A. 239; 28 C. W. N. 713; 40 C. L. J. 110 (P. C.).

*Page of 26 O. C.—[44]

RANGOON HIGH COURT. FULL BENCH.

FIRST CIVIL APPEAL No. 223 of 1924.
July 30, 1925.

Present:—Sir Guy Rutledge, Kt., Chief Justice, Mr. Justice Brown and Mr. Justice Maung Ba.

MA NYEIN E—DEFENDANT—APPELLANT

versus

**MAUNG MAUNG AND OTHERS—
PLAINTIFFS—RESPONDENTS.**

Buddhist Law—Inheritance—Hnapazon property of last marriage—Pubbaka children and their step-parents—Practice or decision of long standing erroneous—Duty of Court.

By the Full Bench.—Where a Burman Buddhist, who has married more than once, dies leaving hnapazon property of the last marriage, if there is an issue of the last marriage the step-child or children collectively take one-eighth and the step-parent seven-eighths, but where there is no issue of the last marriage the former take one-sixth and the latter five-sixths. [p. 345, col. 1.]

Nga Po Thit v. Mi Thaing, S. J. 18, *Maung Chit Soya v. Ma Meinkale*, U. B. R. (1892-98) Vol. II, 93, discussed. *Mi So v. Mi Hnigat Tha*, S. J. 177, *Ma Ba We v. Mi So*, U. B. R. 124, overruled.

Obiter.—Where a rule of law is clear, unambiguous and well-founded, and a decision or practice of the Court, though of a long standing and old is based on a misconception, it is but right that the erroneous decision or practice should be overruled and the correct rule of law followed. [p. 344, col. 2.]

Ma On v. Ka Shwe Tho Dun, S. J. 78, *M. Sein Ton v. Ma Son*, 30 Ind. Cas. 588, 8 L. B. R. 501, 8 Bur. L. T. 203, *Ma In Than v. Maung Saw Hla*, S. J. 103, and *Maung Hme v. Me Sein*, 45 Ind. Cas. 953, 9 L. B. R. 191, 11 Bur. L. T. 236, referred to.

ORDER OF REFERENCE.

In this litigation the estate of one U Chit Pon, a Burman Buddhist, was involved. He married three wives in succession. The first one, Ma Mo Tu, was divorced over 30 years ago. By that wife he had two children, Maung Maung and Maung Aung, who are still alive. After divorcing Ma Mo Tu, he married one Ma Kyaw, who died a few years afterwards. There was no issue of that union. After her death, he again married Ma Nyein E (appellant-defendant). Ma Nyein E had a daughter, Ma Hla, by a former marriage. One Maung Shwe Pu, a nephew of the second wife, Ma Kyaw, claims to have been adopted by U Chit Pon and Ma Kyaw. At first only Maung Maung and Maung Aung brought a suit against Ma Nyein E for their share of inheritance. They allege that 3 pieces of paddy land known as Yonbin Le, Tauk-shabin Le and Ponbuehin Le were the *payin* property of their father when he married Ma Nyein E. It is common ground that other properties in Schedule B are the *hnapazon*

property of U Chit Pon and Ma Nyein E. They claim a $\frac{3}{8}$ th share in the *payin* property, and a $\frac{1}{8}$ th share in the *hnapazon* property.

After the institution of the suit, Maung Shwe Pu made an application to the District Court of Yamethin that he might be impleaded as a co plaintiff on the strength of his alleged adoption. The District Judge granted his application, and ordered an amendment of the plaint.

In the new plaint Maung Maung and Maung Aung admit the adoption of Maung Shwe Pu and the three jointly claim the whole of the *payin* property and $\frac{1}{8}$ th of the *hnapazon* property. The defence set up by Ma Nyein E is that Maung Shwe Pu was never adopted, Maung Maung and Maung Aung are not entitled to claim any share because, after divorce of their mother, they have not maintained filial relations with their father, and, lastly, that the pieces of paddy land to which they claim a share are not part of the *hnapazon* property of herself and deceased.

The issues framed are defective, and it is unfortunate that the learned District Judge has not re-cast them. The disputed adoption has not been specifically mentioned in any of the issues, but, as pointed out by the learned District Judge this omission does not appear to have prejudiced either party because they have produced evidence on that point. The allegation is that Maung Shwe Pu was adopted when he was about 7 or 8 years of age. He is now 42. So one cannot expect the evidence tendered to prove it to be entirely free from discrepancies.

The evidence tendered in the present case is that of persons who are old enough and who are also in a position to know about the alleged adoption. The lower Court has been favourably impressed by those witnesses. Their evidence has been strengthened by the admission of Ma Nyein E that, when she and the deceased *shinbueq* Maung Shwe Pu, they referred to him as their son (*tha*) and also by the admission of her witness U Chit Aye (D. W. No. 3) that it was common knowledge, that Shwe Pu was their adopted son. For these reasons we accept the finding of the lower Court on this point of adoption as correct.

As regards the claim of Maung Maung and Maung Aung it must be disallowed in case it is proved that they had severed filial relationship with their father.

There is satisfactory proof that there has not been such a severance. Maung Maung has been blind for some time and Maung Aung has been an invalid for some time. They have latterly lived separately from their father, but there is evidence that they visited him occasionally, and that they stayed with him till they married. Ma Nyein E herself admitted that Maung Aung came and stayed with them for about 1½ months about a year before U Chit Pon's death. U Chit Pon was a *wunthanu*, but his children are not. There is some indication that for some of the visits to the father were not very frequent. We hold that there has been no severance of the filial relationship, that Maung Maung and Maung Aung have not forfeited their right to inherit.

As regards the 3 pieces of paddy land, the evidence tendered by the plaintiffs in convincing that they constitute the *payin* property of the deceased. Even Ma Nyein E, contradicting her own written statement, admitted in her evidence that two of the pieces, namely, *yonbin* and *banbwe* lands, were brought by U Chit Pon when he married her. In her evidence she stated that the remaining piece, *taukshabin le*, was acquired by clearing jungle after his marriage with her. The evidence produced by her in support of that allegation is not satisfactory and cannot be accepted in the face of more reliable evidence produced by the other side. We decide that all the 3 pieces constitute the *payin* property of the deceased.

The learned District Judge has given the plaintiffs the whole of the *payin* property and ¼th of the *hnapazon* property. That allotment has now been disputed by the appellant. We are of opinion that the division of shares is not correct.

As regards the *payin* property, it is settled law that the *pubbaka* children (children of previous marriage) should get ¾th and their step parent ¼th, as decided by the Full Bench of the late Chief Court in 1903 [*Ma Ba We v. Mi Sa U* (1)]. This mode of division is supported by s. 8, Book X of Manukyo.

As regards the *hapazon* property, according to the above ruling, the step-

(1) 2 L. B. R. 174.

children should get ¼th and the step-mother ¼th. We doubt the correctness of this division. As in the present case there was no issue of the last marriage, the division should be in the proportion of 1 to 5 and not 1 to 7. Section 8 of Book X is clear on the point. The division in the proportion of 1 to 7 would be correct according to s. 10 if there was an issue of the last marriage.

The learned Judges, who decided that case, made no differentiation between a case where there was an issue of the last marriage and a case where there was not. When there was an issue some sort of provision for that issue was contemplated and the share of the *pubbaka* children was reduced from ¼th to ⅛th. That issue would get two shares out of 8 as against 1 share for the *pubbaka* children.

The two ex-Ministers, who were great authorities on Buddhist Law, viz., Kinwun Mingyi and Wetmasut Wundauk and who were consulted on this very issue by the late Mr. Burgess in a similar case [*Maung Chit Pon v. Ma Meinkale* (2)] quoted authorities which support the division in the proportion of 1 to 5.

After the decision of the Full Bench case in 1903 the Privy Council in 1914, in the case of *Ma Nhin Bwin v. U Shwe Gon* (3) has given the Manukye a commanding position and has held that "where is not ambiguous other *dhamathats* do not require to be referred to." Manukye is not ambiguous on this point. We are of opinion that this important point requires to be re-considered and we, therefore, refer the following question for the decision of a Full Bench.

"Where a Burman Buddhist, who has married more than once dies leaving *hnapazon* property of the last marriage, what is the law of partition of that property between the *pubbaka* children and their step-parent (1) Where there is an issue of the last marriage and (2) where there is not?"

Mr. Hla Tun Phroo, for the Appellant.

Mr. Mya Bu, for the Respondents.

JUDGMENT OF THE FULL BENCH.

Maung Ba, J.—This reference relates to the estate of one U Chit Pon a Burman Buddhist.

(2) U. B. R. (1892-96) Vol. II 93.

(3) 23 Ind. Cas 433; 8 L. B. R. 1; 7 Bur. L. T. 105; 16 Bom. L. R. 377; 27 M. L. J. 41; 18 C. W. N. 1121; 16 M. L. T. 142; 20 C. L. J. 263; 41 C. 887; 1 L. W. 914; 41 I. A. 121; (1914) M. W. N. 449 (P. C.).

The facts are as set out in the Order of Reference.

U Chit Pon married three wives in succession, the second wife after divorcing the first and the third after the demise of the second. By the first wife he had two sons and the second wife and himself adopted a child. By the third wife he had no issue. On his death he left both kinds of property, namely, *payin* property brought to the last marriage and *hnapazon* property acquired during that marriage.

The reference arose out of a suit brought against the widow by her step-children and relates to the *hnapazon* property.

The question referred to us is as follows:—

"Where a Burman Buddhist who has married more than once dies leaving *hnapazon* property of the last marriage, what is the law of partition of that property between the *pubbaka* children and their step-parent (1) where there is an issue of the last marriage and (2) where there is not."

The law of division in both cases has hitherto been that the step-child takes $\frac{1}{8}$ th and the step-parent $\frac{7}{8}$ th. That law was laid down as early as 1873 in the case of *Nga Po Tit v. Mi Thaing* (4) where Mr. Sandford the then Judicial Commissioner, held that "on the death of the father, who had married two wives in succession, the child of the first marriage is entitled to $\frac{1}{8}$ th share in property acquired during the continuances of the second marriage." He based his decision on the rule of partition given in Book X, s. 10 of the Manukye Dhammathat. That section relates to the partition between the step-parent, the child of the former marriage and the child of the last marriage. It gives the step-parent 5 shares, the child of the former marriage one share and the child of the last marriage two shares. So the decision of Mr. Sandford would be quite justified under the Manukye Dhammathat if, in the case reported, there was a child of the second marriage. That decision of Mr. Sandford was followed by his successor, Sir John Jardine, in 1883 in the case of *Mi So v. Mi Hmat Tha* (5). Unfortunately in that case there was no child of the last marriage. The attention of Sir John Jardine was drawn to s. 8, Book X of

the Manukye Dhammathat, which gives the step-son $\frac{1}{8}$ th and the step-parent $\frac{5}{6}$ th yet with some doubt he decided to adopt the rule of the Manukye Dhammathat as expounded by Sandford, J., as he was of the opinion that Wunnana and Mohavicchedani supported such exposition of the law. This law was again considered by a Full Bench of the late Chief Court in 1903 in the case of *Ma Ba We v. Mi Sa O* (1). In that case third wife, who was childless sued her step-children by the former wives for her shares in the estate left by her husband. The previous rulings were considered. As regards *hnapazon* property the rule laid down in s. 10, Book X, of the Manukye Dhammathat was again followed. In all those cases the presence of a child of the last marriage was in sight of. Apparently the learned Judges were of the opinion that, in view of the settled law that no child except the *orasa* was entitled to claim a share during the life of his own parent, the two were allowed to the child of the last marriage should be included in the share of his parent, s. 8, Book X of the Manukye Dhammathat makes no mention whatever of a child of the last marriage and it gives a larger share namely, $\frac{1}{8}$ th to the step-child; but s. 10 Book X mentions a child of the last marriage and also gives that child two shares out of eight. A comparison of these two sections clearly shows that the share of the step-parent is reduced when there is a child of the last marriage. It cannot be supposed that the framer of the Manukye Dhammathat had had no object in making that reduction. If it were contemplated that the one law laid down in s. 10 were to be indiscriminately applied to all cases no matter whether there was an issue of the last marriage or not, then the writer of the Manukye Dhammathat would be guilty of having laid down two rules of division, one close on the heels of another, prescribing different shares, one greater than the other; but such a charge of inconsistency and indiscriminate application would disappear if s. 8 were taken to refer only to a case where there was no issue of the last marriage and s. 10 to a case where there was such an issue. In my opinion the writer contemplated that some provision should be made for the child of the last marriage who had no immediate right of claiming any share, owing to the presence of his parent.

In a similar case, *Maung Chit Saya v.*

(4) S. J. 18.

(5) S. J. 177.

Ma Mein Kale (2) decided by the late Mr. Burgess, Judicial Commissioner Upper Burma, the late Kinwun Mingyi and the Wetmasut Wundauk who are great authorities on Buddhist Law, were consulted. One of the question referred to them was as to the law of partition between the step-parent and the step-child where there was no issue of the last marriage. In answer to that question the Kinwun Mingyi quoted this law:—"On the partition between the children of the two former marriages and the third wife, who is the step-mother of the said children, the law is this:—On the death of the father leaving a subsequently married wife without children the law of partition between the step-mother and the former children is this. All the acquired property should be divided into six shares, the former children receive one share and the step-mother five shares; In view of the law given in the Attathan-keik Dhammathat coincides with the law given in the following Dhammathats. Commentaries on the Manu Dhammathat; *Umma Viniçchaya Dhamma*, that *Pakainaka Dhammathat* in verse and *Sesidayajji Dipini Dhammathat* in verse." *Attasankhepa Vannana Dhammathat* was compiled by the late Kinwun Mingyi on consideration and comparison of all the available texts, and contains the view of the learned compiler on the law as it actually stood at the time of compilation. It was first printed in Burmese in the year 1882 and has always been regarded as a weighty authority.

The Wetmasut Wundauk also gave the same law of partition, relying upon the *Attasankhepa Vannana Dhammathat*.

The Kinwun Mingyi, however, proposed to take away one share from the widow and give it to the step-child of the second marriage instead of strictly adopting the law pointed out in his *dhammathat*.

The learned Counsel for the widow admitted that the law laid down in s. 8 Book X of the *Manukye Dhammathat* was the correct law; but he urged that the law of division in the proportion of 1 to 7 laid down in 1873 has been accepted and followed ever since by the Burman Buddhist as a settled law on the point, that any sudden change in that law would result in confusion and that, therefore, it would not be advisable to introduce any change but allow the law though incorrect to remain. This argument

though plausible, is not warranted by precedents.

The Law about the widow's powers of disposal over her deceased husband's estate laid down in 1886 in *Ma On v. Ko Shwo Tha Dun* (6) was found to be incorrect and had to be changed in 1915 in *Ma Sein Ton v. Ma Son* (7). Another law that the taking of a lesser wife by the husband does not in itself constitute a ground for a divorce laid down in 1881 in *Ma In Than v. Maung Saw Hla* (8) was also found to be incorrect and changed in 1918 in *Manug Hme v. Ma Sein* (9) and a wife who is not consenting can now obtain a divorce without any further proof of cruelty.

In 1914 their Lordships of the Privy Council in the case of *Ma Hnin Din v. Shwe Gon* (3) made *Manukye* the paramount authority in these words:—"The *Manukye* has held a commanding position since the time of King Alompra and is still to be regarded as of the highest authority. Where it is not ambiguous other *Dhammathats* do not require to be referred to."

In the case under review the *Manukye Dhammathat* is not ambiguous and the rule given there has been adopted by the Kinwun Mingyi in his work. In the case of a large estate the difference in the share by non-observance of this plain law may be considerable.

The Hon'ble U May Oung in his work on Buddhist Law has noticed this misconception of the law and he has urged the reconsideration of the law in the following words:—"It is submitted, therefore, that the question should be re-opened and that the distinction expressly drawn in the *Dhammathats* between a case in which there is issue of the second marriage and one in which there is not should be recognized." The present practice has, it is true, been a long standing one, but where a rule of law is clear, unambiguous and well-founded as shown above, there appears to be no reason why a decision even so old as the one in *Mi So's case* (5) based on a misconception and given with some hesitation should not be overruled.

I am of opinion that it is but right to rectify the errors and lay down the correct

(6) S. J. 378.

(7) 30 Ind. Cas. 588; 8 L. B. R. 501; 8 Bur. L. T. 203.

(8) S. J. 103.

(9) 45 Ind. Cas. 953; 9 L. B. R. 191; 11 Bur. L. T. 236.

law in conformity with the Manukye Dhammathat. Accordingly my answer to the question referred to us will be as follows:—

That in a case where there is an issue of the last marriage the step-child or children collectively take $\frac{1}{8}$ th and the step-parent $\frac{7}{8}$ ths and that in a case where there is no issue of the last marriage the former take $\frac{1}{8}$ th and the latter $\frac{7}{8}$ th.

Rutledge, C. J.—I concur.

Brown, J.—I concur.

S. D.

Answered accordingly.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 328 OF 1923.

May 28, 1925.

Present.—Mr. Simpson, A. J. C.

SHEO BEHARI—PLAINTIFF—APPELLANT
versus

SHEO RATAN SINGH AND OTHERS—
DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Mortgage by father—Necessity—Enquiry by mortgagee—Mortgagee, whether bound to see to application of money—Loan not sufficient to meet necessity; effect of—Appeal, second—Necessity, whether question of fact or law.

A person who lends money on the security of joint family property is bound to enquire into the necessity for the loan and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. If he does so enquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge. Under such circumstances he is not bound to see to the application of the money lent by him. [p. 345, col. 2.]

Hunoomanpersaud Panday v. Babooee Munraj Koonweree, 6 M. L. A. 393; 18 W. R. 81n; Sevestre 253n; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147, followed.

A finding as to the existence of necessity is a finding of fact. When a Court finds in favour of the existence of family necessity for a loan but holds that the lender is not protected on the ground that he did not see to the application of the money, the finding becomes a ground of law and a second appeal is maintainable. [p. 346, col. 1.]

A lender is not obliged to ascertain that the amount of money which he advances is equal in amount to the entire debt which constitutes the family necessity. If there exists a necessity which would justify the use of the whole money borrowed, the lender is then justified

ed in making the advance whether or not other funds will be necessary for the same purpose. [ibid.]

The fact that the interest on a mortgage is higher than the Court interest on the decree for payment of which the mortgage is executed does not vitiate the mortgage, nor does the fact that the amount of the property mortgaged is larger than the amount which was about to be sold under the decree. [p. 346, cols. 1 & 2.]

Appeal against the judgment and decree of the Fourth Additional District Judge, Lucknow, dated the 18th July 1923, reversing that of the Munsif, North Lucknow, dated the 28th March 1923.

Mr. B. N. Sriwastava, for the Appellant.

Messrs. Anant Bihari Nigam and Rajeshwari Prasad, for the Respondent.

JUDGMENT.

This is a second civil appeal. The plaintiff is the appellant. The appeal raises a very new point of law. The suit was one to enforce a mortgage. The mortgage-deed was executed by a Hindu father, and the property mortgaged belonged to the joint Hindu family consisting of the father and his sons. He cannot, therefore, he enforced a charge on the property, unless there was valid family necessity for the loan, adequate enquiry and honest action on the part of the lender. In the words of their Lordships of the Privy Council in the leading case on the subject, *Hunoomanpersaud Panday v. Babooee Munraj Koonweree* (1), "The lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money."

In the present case, there is a recital in the deed that the family property is about to be brought to sale under a decree, and that the money is borrowed for the purpose of satisfying the decree. There is a finding of fact by the lower Appellate Court that there was such a decree in existence, and that the sale of the property under that decree had been fixed for the 21st of October. The date of the loan was the 24th of September. In spite of this finding, both the

(1) 6 M. L. A. 393; 18 W. R. 81n; Sevestre 253n; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

Courts below have decided that the plaintiff is not protected, mainly on the ground that the amount of the decree exceeded Rs. 1,000 while the amount of the money borrowed was only Rs. 325 so that the plaintiff must have known that this amount of money was quite insufficient to save the property. Another point taken is that it was the duty of the plaintiff to see that the money was used for this purpose, and that he ought to have paid it into Court or to the decree-holder. Another point is taken by Counsel for the respondents although I do not find it in the judgment, that the interest on the decree was only 8-arnas per cent. per mensem, while the interest on the mortgage is Rs. 1-6-0 per cent. per month, and that only $1\frac{1}{2}$ pies were to be paid while the mortgage extends over $3\frac{1}{2}$ pie fractional share.

The point for decision is whether a second appeal lies at all. The finding of the existence of necessity is a finding of fact. On this point I find that the appeal does lie. There is no finding of fact here as to the existence of necessity. There is a finding that the plaintiff is not protected, and one of the grounds on which this finding is based is undoubtedly a ground of law, namely, that the lender was bound to see to the application of the money. The decision on this point is directly contrary to the decision already quoted in the leading case on the subject. Having found that the lender did satisfy himself as to the existence of family necessity, the Court was wrong in law in finding that the plaintiff was under an obligation to see to the application of the money.

Coming to the second point, I know of no authority for the proposition that the lender is obliged to ascertain that the amount of the money, which he advances is equal in amount to the entire debt which constitutes the family necessity. If there exists a necessity which would justify the use of the whole money borrowed the lender is then justified in making the advance, whether or not other funds will be necessary for the same purpose. I cannot agree that the only alternative is that the Manager of a family should make up the amount by several other small loans. Surely it is entirely possible that he may have some funds of his own.

The fact that the interest on the mortgage was higher than the Court interest on the decree, does not vitiate the mortgage, nor does the fact that the amount of pro-

perty mortgaged was larger than the amount which was about to be sold under the decree.

I find that, according to the principles which the Courts have always followed, the present plaintiff did all that the law requires from him in the way of satisfying himself of the existence of necessity, and that his mortgage is a valid charge on the joint family property. Accordingly, I set aside the decree of the Court below and I grant plaintiff a decree for Rs. 1,500 with simple interest 6 per cent. per annum from the date of institution to the date of realization. The decree will be in the usual form of a preliminary decree for sale on the basis of a mortgage. The plaintiff-appellant will receive his costs in all three Courts.

Z. K.

G. H.

Decree set aside.

MADRAS HIGH COURT.

APPEAL SUIT No. 218 OF 1923.

November 5, 1924.

Present:—Mr. Justice Phillips and
Mr. Justice Odgers.SANKARAN alias KUNHUNNI
NAMBUDRIPAD AND ANOTHER—
PLAINTIFFS NOS. 2, 3—APPELLANTS

versus

VATAKKIMYEDATH KIRANGHAT
MANAKKA SREEDHARAN alias
ANUJAN NAMBUDRIPAD AND OTHERS

—DEFENDANTS—RESPONDENTS.

Malabar Law—Nambudri Illom—Family karar providing for management of properties—Karnavan, restrictions on rights of, validity of—Suit against Anandravan for acts of mis-conduct—Defendant becoming Karnavan during pendency of suit—Suit, whether can proceed—Principal and agent—Liability of agent to render accounts—Dismissal of agent before time fixed for taking accounts, effect of.

An agreement by an anandravan under a family karar to have his rights as karnavan restricted when he succeeds to the latter office is valid and effective, but the agreement must be clearly expressed. [p. 347, col. 2; p. 348, col. 1.]

Ordinarily a suit for the recovery of tarwad property must be brought by the karnavan and an anandravan cannot sue unless the karnavan is under some disability. Where, however, a suit is brought to recover tarwad property from the karnavan himself and for the removal of the latter from his office, the suit must in the nature of things be brought by persons other than the karnavan. [p. 348, col. 2.]

Where a defendant is charged with mis-conduct as an anandravan the fact that he has become karnavan since the institution of the suit cannot absolve him from his liability for such misconduct. The mere

fact of his becoming a *karnavan* cannot do away with his responsibility for all his previous acts. [p. 348, col. 2; p. 349, col. 1.]

An agent who is bound to render accounts at the end of a year is not absolved from liability for acts committed in the course of that year, and, even if he is dismissed before the time arrives for the rendering of accounts, he would have to make good any mis-appropriations and, in doing so, the Court would call upon him to render an account to ascertain what they were. [p. 349, col. 1.]

The members of a *nambudri illom* entered into a *karar* by which provision was made for the management of the *illom*. The first plaintiff, who was the *karnavan*, gave up practically all his rights as such. The defendant who was then the senior *anandravan* was appointed manager of one set of properties and the third plaintiff was appointed manager of another set of properties. The *karar* provided in detail for the various acts of management and for succession to the managership. One of the conditions of the *karar* was that it should remain in force until it was set aside by means of a registered document executed by all the adult members of the *illom*. After the defendant had been managing the properties allotted to him for sometime, the first plaintiff and plaintiffs Nos. 2 and 3, who were the only adult males in the *illom*, being dissatisfied with the management of the properties by the defendant called upon him to explain his conduct. He failed to do so and thereupon in accordance with the procedure laid down in the *karar*, the plaintiffs dismissed him from his office and brought a suit for a declaration that the defendant was no longer entitled to manage the properties and for an account and other reliefs. After the suit was filed the first plaintiff died and the defendant became the *karnavan* of the *illom*. He thereupon contended that the suit could not proceed against him:

Held, (1) that the *karar* to which the defendant was party was still binding upon him and had not come to an end merely by the death of the previous *karnavan*; [p. 349, col. 1.]

(2) that the defendant having agreed to be bound by the terms of the *karar*, his rights as *karnavan* were restricted in accordance with the terms of the *karar*; [ibid.]

(3) that consequently the suit could proceed against the defendant in accordance with the terms of the *karar*. [ibid.]

Appeal against a decree of the Court of the Subordinate Judge, Ottapalam, in O. S. No. 76 of 1919.

Messrs. C. V. Ananta Krishna Iyer and P. S. Narayanaswami Iyer, for the Appellants.

Messrs. T. R. Ramachandra Iyer and P. S. Ramachandra Iyer, for the Respondents.

JUDGMENT.—The parties in this suit are members of a *nambudri illom* in Malabar. The first plaintiff was the *de jure karnavan* and the other parties are *anandravans*. In 1918 the family entered into a *karar* which is filed as Ex. I and in this *karar*, provision was made for the management of the *illom*. The first plaintiff, the *de jure karnavan* gave up practical-

ly all his rights as such, retaining only certain privileges. The 1st defendant, who was then the senior *anandravan* was appointed manager of one set of properties and the 3rd plaintiff was appointed manager of another set of properties. The *karar* is a very long document and provides in detail for the various acts of management and for the succession to the managership. After the 1st defendant had been managing the properties allotted to him for some time, the 1st plaintiff and plaintiffs Nos. 2 and 3, who were the only adult males in the *illom* were dissatisfied with him and called upon him to explain his conduct. He failed to do so and accordingly the plaintiff sent him a registered notice informing him that he was dismissed from his office. This was in accordance with the procedure laid down in para. 25 of the *karar*. The 1st defendant was still obstructive and accordingly this suit was brought for a declaration that he was no longer entitled to manage and for an account and various other reliefs. After the suit was filed, the 1st plaintiff died and the 1st defendant became the *karnavan* of the *illom*. Plaintiffs Nos. 2 and 3 wished to go on with the suit representing that the cause of action survived to them, but the 1st defendant contended that the suit must abate inasmuch as he was *karnavan* and the legal representative of the 1st plaintiff and that his rights as *karnavan* were not affected by the conditions in the *karar* and that no suit would lie. The Subordinate Judge has accepted the contention of the 1st defendant and has held that inasmuch as he has succeeded to all the rights of a *karnavan*, the practical effect of allowing the suit to continue would be to remove him from his *karnavasthanam* and as that is not the original plaintiff's case, the suit must abate.

It is argued in appeal that, as a matter of fact, the 1st defendant has not got the full rights of a *karnavan* because he being a party to the *karar*, is bound by the terms of it, and has by that *karar* renounced his right to become a *karnavan* in the ordinary acceptation of the term. It is not disputed and it was laid down by a Full Bench in *Kenath Puthen Vittil Tavazhi v. Narayanan* (1) that a *karnavan* can renounce his rights. In that case an *anandravan* under a family *karar* agreed to have his rights

(1) 23 M. 182; 14 M. L. J. 415.

as *karnavan* restricted when he succeeded to the office and it was held that such an agreement was effective. A number of other cases have been cited on this point and this principle has never been disputed, but it has been laid down that such a renunciation must be clearly expressed in the *karar*. In a case in *Krishnan Kidaru v Raman* (2) relied on by respondents, on the terms of the *karar* in question there, it was held that there was no renunciation; but every case must be determined on its own facts and here we have to consider what is the meaning of the *karar*, Ex. 1. The 1st defendant in so many words does not say that he gives up his rights, but he is a party to all the conditions contained in the *karar*, and one of these is that the *karar* shall be in force until it is set aside by means of a registered document executed by all the adult members together. Admittedly the other document has not been executed and *prima facie* the *karar* would still be in force. It is, however, argued for the 1st respondent that the *karar* was not intended to have any force after the death of the 1st plaintiff, the then *de jure* *karnavan*. It is, however, significant that in para. 15 there is a provision that the document shall be in the name of the *karnavan* "for the time being," which clearly contemplates the death of the present *karnavan* and the succession of somebody else. Again in para. 20 there is a provision that both the present and future *karnavans* shall do so and so. Here again it is obvious that the acceptance of the *karar* contemplated its continuing in force after the lifetime of the *karnavan*, the 1st plaintiff. Again there is a provision in cl. 26 which runs as follows:—"At, also, the death of the members, who are managers new members shall be appointed for management in accordance with the consent of the majority; at change of persons or change of office (*sthanom*), all matters shall be conducted in accordance with the *karar*." The word translated as "office" is '*sthanom*,' and it is contended for the appellants that this refers to *karnavasthanam* inasmuch as there is no particular '*sthanom*' or estate attached to this *illom* and it cannot refer to a *sthanom* in that sense. On the other side it is contended that it merely means the office of manager of the two sets of properties mentioned in the *karar*. Those managers are referred to in the first sen-

tence of cl. 26 and the word used is not "*sthanom*." Similarly if it is to be interpreted as office of manager, the recital "at the change of persons" (*viz.*, the persons who are managers) "of the change of office" (*viz.*, the office of manager) is tautological and it seems unlikely that that can be the meaning. Whether we say that it refers to *karnavasthanam*, or *anandrasthanam*, it does not make much difference, because when the *karnavan* died, there is a change in a *karnavasthanam*; and one *anandravan* loses his *anandrasthanam* and becomes a *karnavan*. The word "*sthanom*" seems quite applicable if interpreted in this sense; and taking all the recitals in the *karar* together, especially paras. 15 and 20, and the last part of para. 26, it certainly seems as if the *karar* was intended to have effect not only during the lifetime of the first plaintiff but also until all these executants chose to put an end to it by executing another *karar*. If it is so and we think it is, the first defendant clearly renounced his right to become *karnavan* with unrestricted powers. In that view, he is not necessarily the only representative of the first plaintiff. He is the *de jure* *karnavan*, but this suit does not relate to his acts as such but as manager of one of the two sets of properties or "*sthalams*" as they are called. Ordinarily the *karnavan* ought to bring a suit for recovery of *tarwad* property and it has been held that an *anandravan* cannot sue unless the *karnavan* is under some disability such as cases where he has himself alienated the *tarwad* property [*vide Cherna Pangi Achan v. Unnalachan* (3) on which the lower Court relies]. Here there is a very clear disability in the case of the 1st defendant, for he would be bringing a suit to recover property from himself and for his own removal from office, and this is clearly impossible. The only other persons that can sue are the other members of the *illom* and the only adult members are plaintiffs Nos. 2 and 3; the suit is, therefore, maintainable by them. The Subordinate Judge does not seem to have considered whether apart from the *karar*, the suit would not lie. The first defendant is charged with misconduct as an *anandravan* and the fact that he has become *karnavan* since he misconducted himself cannot absolve him from his liability.

(3) 38 Ind. Cas. 513; 32 M. L. J. 323; (1917) M. W. N. 185; 5 L. W. 302; 21 M. L. T. 329.

(2) 38 Ind. Cas. 638; 39 M. 918.

ity for such mis-conduct. The mere fact of becoming a *karnavan* cannot do away with his responsibility for all the previous acts. He as an *anandravan* is liable, if the plaint allegations are true, to make good certain property to the *tarwad*. It may be that that property will have to be handed over into his own hands as *karnavan*, but it will be handed over to him on behalf of the *tarwad*. He is liable to the *tarwad* and it is on that account that he is sued. It is contended on his behalf that any suit brought by the *illom* must be brought within the provisions of cl. 18 of the *karar* which provides that it must be brought by the manager of each "*sthalam*" and the *karnavan* conjointly. That clearly refers to suits by the *illom* against third parties and cannot refer to suits between the parties based on breaches of the *karar* itself. The further contention that there is no cause of action against the 1st defendant and that the suit is premature because not having been in office for one year, he is not bound by the *karar* to render accounts, cannot possibly be sustained. An agent who is bound to render accounts at the end of a year is not absolved from liability for the acts committed in the course of that year, and, even if he is dismissed before the time arrives for the rendering of accounts, he would have to make good any misappropriation and, in doing so, the Court would call upon him to render an account to ascertain what they were. In this view also, so far as certain of the prayers in the plaint are concerned, the suit would be maintainable.

The appeal is accordingly allowed and the suit remanded for disposal on the merits. The first respondent will pay the appellant's costs of this appeal. The Court-fee will be refunded.

V. N. V.

Z. K.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 381 OF 1923.

July 21, 1924.

Present :—Mr. Baker, J. C.

Lala RATANLAL AND ANOTHER—PLAINTIFFS

—APPELLANTS.

versus

GOVINDA—DEFENDANT—RESPONDENT.

Provincial Insolvency Act (V of 1920), s. 28 (6)—

Mortgage executed prior to insolvency—Payment by fresh mortgage after insolvency—Transaction, whether protected.

If a mortgage executed prior to the insolvency of the mortgagor is satisfied after his insolvency by the execution of a fresh mortgage to a third person, the transaction is protected by s. 28, cl. (6) of the Provincial Insolvency Act of 1920. [p. 350, col. 2.]

Shiam Sarup v. Nand Ram, 63 Ind. Cas. 366; 13 A. 555; 19 A. L. J. 511, followed.

Appeal against a decree of the District Judge, Nagpur, dated the 6th June 1923, in Civil Appeal No. 19 of 1923.

Mr. R. N. Padhye, for the Appellants.

Mr. M. Gupta, for the Respondent.

JUDGMENT—The appellants sued to recover possession of certain absolute occupancy lands. The lands along with some other absolute occupancy fields were mortgaged to one Awachit and his brother Amrit in favour of the Raj Nandgaon Trading Company for Rs. 2,000 by a mortgage-deed dated the 1st April 1904. The amount was payable by instalments and in case of default of three instalments the mortgagee was entitled to take possession of the property, though he did not do so.

There was a partition between Awachit and his brother Amrit, at which the fields in suit fell to Awachit's share. In 1919 Awachit applied to be declared an insolvent and was so declared. The Insolvency Court ordered the sale of the fields in suit for satisfaction of his debts and they were sold subject to the mortgage of 1904 and were purchased by the defendant Govinda who took possession in May 1921.

Awachit died shortly after he was declared insolvent and after his death his minor sons and Amrit's minor sons, through their respective guardians executed a possessory mortgage-deed for Rs. 5,000 on 19th February 1920, mortgaging the fields in suit along with other fields to the plaintiffs. The plaintiffs alleged that they were placed in possession under this mortgage and that they were wrongly dispossessed by the defendant. They, therefore, sued to recover possession of the said fields, alleging that they were the proprietors of the Raj Nandgaon Trading Company who were the mortgagees under the mortgage of 1904, that the mortgage of 1920 was simply a renewal of the mortgage and that the order of the Insolvency Court did not affect their right as they were secured creditors.

The First Court dismissed the plaintiffs' suit. On appeal the District Judge of Nagpur upheld the decision of the First Court, finding that the plaintiffs had failed to prove

that they are the mortgagees under the mortgage of 1904, and that under s. 28 (2) of the Provincial Insolvency Act the property of the insolvent vests in the Court and so on Awachit's death his heirs had no right to mortgage the fields in suit which vested in the Insolvency Court, so as to prejudice the rights of the scheduled creditors. This mortgage, therefore, could not be enforced against the creditors of Awachit nor against the defendant who purchased the fields in suit at the sale held under the orders of the Insolvency Court.

The plaintiffs make this second appeal.

The two points raised in the second appeal are that the lower Appellate Court was wrong in finding that the plaintiffs are not the mortgagees under the mortgage of 1904, as it has overlooked an admission by Awachit to that effect in 1904 and by Venkati, the son of the mortgagor Amrit made as P. W. No. 4, and the fact that the mortgage of 1904 has been satisfied. It is produced by the plaintiffs who have given the heirs of the mortgagors a discharge, so far as this is concerned. Secondly, it is argued that assuming that the plaintiffs are not the mortgagees of 1904, still the mortgage of 1920 would not be invalid because it is for the satisfaction of the previous mortgage of 1904, which has been cancelled.

So far as the first contention is concerned, both the Courts below have found on the evidence that the plaintiffs are not the mortgagees of 1904. That mortgage was passed in favour of the Raj Nandgaon Trading Company who are different persons to the present plaintiffs. Although the District Judge has not referred to the admission on which the plaintiffs rely, he states that on a careful consideration of the entire oral and documentary evidence on record he has come to the conclusion that it has not been established that the mortgagees of the two mortgages dated 1904 and 1920 are identical persons. This is a finding of fact behind which this Court cannot go in second appeal.

So far, however, as the second point is concerned, I am unable to agree with the view taken by the learned District Judge. The mortgage of 1904 gave the mortgagee the right of possession on failure of payment of there instalments. The mortgage of 1920 is with possession and at the same time the mortgage of 1904 was cancelled. The plaintiffs took possession under the mortgage of 1920 and were dispossessed by the

auction-purchaser. The present suit for possession is one to enforce the right of possession under the mortgage. The mortgagee of 1904 was a secured creditor and, therefore, unaffected by the mortgagor's insolvency. Under s. 28, cl. (6) of the Provincial Insolvency Act of 1920 he could realise or otherwise deal with the security without reference to the insolvency proceedings.

If it had been held that the mortgagee of 1920 was the same person as the mortgagee of 1904, there would have been an end of the matter, but the mortgage of 1920 is in re-placement of the mortgage of 1904, which has been cancelled and produced by the plaintiffs with an endorsement of satisfaction on it signed by one of themselves. It would, therefore, appear that the mortgage of 1920 was agreed to by the mortgagee of 1904, whoever he may be and represents the manner in which the secured creditor chose to deal with his security.

In my opinion the case is governed by *Shiam Sarup v. Nand Ram* (1) in which case the mortgage executed prior to the insolvency of the mortgagor was satisfied after the mortgagors had become insolvent by the execution of a fresh mortgage to a third person. It was held that the provisions of s. 16, cl. (5) of Act III of 1907, which corresponds to s. 28 cl. (6) of the present Insolvency Act, protected the transaction in suit. It was further held: "If it is open and legal to a secured creditor to realise his security in any way he prefers, surely, the means that are adopted to realise the security are also valid unless forbidden by any statutory law. If it was open to Bhagwan Das (original mortgagee) to realise his mortgage by suing upon it and enforcing his decree, why should a private settlement come to between him and the mortgagors by which a fresh mortgage was given to a third party and from the proceeds of which Bhagwan Das' mortgage was satisfied be considered to be invalid under Act III of 1907?..... The consideration of the deed was utilized towards the payment and discharge of the mortgage of Bhagwan Das and, therefore, the mortgage in suit is not invalid."

The present case is very similar. The learned District Judge has distinguished it on the ground that this is not a suit to enforce the mortgage. It has already been shown that the plaintiffs being entitled to

(1) 63 Ind. Cas. 366; 43 A. 555; 19 A. L. J. 511.

possession under the mortgage and having been deprived thereof are now really seeking to enforce the mortgage. In view of the production by the plaintiffs of the mortgage of 1904 with an endorsement of satisfaction thereon, there can be no doubt that the present mortgage of 1920 is in substitution of the mortgage of 1904 and it represents the manner in which the secured creditor dealt with his security, that is to say, its consideration was the discharge of the mortgage of 1904.

In these circumstances I am of opinion that the mortgage of 1920 is not affected by the insolvency proceedings and, therefore, is valid and being prior to the sale to defendant the plaintiffs are entitled to possession under it. I, therefore, reverse the decree of the lower Appellate Court and direct that the plaintiffs be put in possession of the mortgaged property with costs in all the Courts.

K. S. D.

Decree reversed.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST MISCELLANEOUS APPEAL No. 40 OF 1925.

August 21, 1925.

Present:—Mr. Wazir Hasan, A. J. C.,
and Mr. Simpson, A. J. C.

Ch. AHMAD HASAN AND OTHERS—
APPELLANTS

versus

KODI LAL AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI,
rr. 54, 66, 67, 69—Execution of decree—Sale, adjournment of—Fresh proclamation—Notice to judgment-debtor, whether necessary.

The issue of the notice enjoined by sub-r. (2) of r. 66 of O. XXI of the C. P. C. relates to cases where a proclamation has to be drawn up. Where a sale is adjourned all that sub-r. (2) of r. 69 of the Order requires is that a fresh proclamation must be made under r. 67, which again requires that the proclamation must be made and published, as nearly as may be, in the manner prescribed by sub-r. (2) of r. 54. Where the latter rule is complied with, the proclamation is duly published and no notice to the judgment-debtor under sub-r. (2) of r. 66 is necessary.

Miscellaneous appeal against an order of the Sub Judge, Bara Banki, dated the 21st March 1925.

Mr. H. Husain, for the Appellants.

Mr. G. N. Misra, for the Respondents.

JUDGMENT.—This is an appeal from the order of the Subordinate Judge of Bara Banki, dated the 21st March 1925, rejecting an application made by the appellants under r. 90 of O. XXI of the C. P. C., for setting aside an auction-sale held in execution of a decree existing in favour of the respondents. The respondents are also the purchasers at the auction-sale.

The only ground which has been pressed upon us in support of this appeal is that the provision of sub-r. (2) of r. 69 of O. XXI, of the C. P. C., was not complied with and that in that contention was sound the omission to issue a fresh proclamation amounted to an illegality and it was not necessary to prove any substantial injury as required by r. 90 of O. XXI of the C. P. C. The argument is that proclamation issued for the second time should have been prepared after notice to the judgment-debtors as required by r. 66, sub-r. (2), of O. XXI of the C. P. C. It is common ground that no such notice was issued to the judgment-debtors after the adjournment of the sale and previous to the public auction of the fresh proclamation.

We are of opinion that the provision of sub-r. (2) of r. 66 is inapplicable to this case. Sub-rule (2) of r. 69 requires a fresh proclamation to be made under r. 67. Sub-rule (1) of r. 67 requires that such a proclamation shall be made and published as nearly as may be, in the manner prescribed by r. 54, sub-r. (2). That rule has been complied with in this case and does not require any issue of notice. The issue of notice enjoined by sub-r. (2) of r. 66, relates to a case where a proclamation is to be drawn up. In this case proclamation was drawn up originally after notice to the judgment-debtors.

The appeal fails and is dismissed with costs.

Z. K.

Appeal dismissed.

PATNA HIGH COURT.APPEAL FROM APPELLATE DECREE No. 688
OF 1922.

April 20, 1925.

Present:—Mr. Justice Das and
Mr. Justice Adami.PRASANA KUMAR BANERJI AND OTHERS
—APPELLANTS

versus

KALEYAN CHARAN MANDAL AND
ANOTHER—RESPONDENTS.*Construction of document—Sale or lease—"Moghli,"*
meaning of.

The term "*moghli*" is a word of doubtful meaning and at the best imports no more than that the rent assessed represents a proportion of the Government revenue assessed on the lands. In no sense of the term does it constitute rent.

Certain lands were conveyed by a document which was described as a *khas kobala*, the consideration money being arrived at by a calculation of annual profits of the land conveyed, deducting therefrom a small sum payable by the transferor as the "*moghli*". The *kobala* recited:—"From this day forth you become fully entitled to the said lands and are empowered to sell and make a gift of the same and paying yearly Re. 1-1-0 *moghli* to me and to my heirs and legal representatives from 1286 B. S. you become entitled from this day from generation to generation cultivating the same yourself or by settlement of tenants and to that I or my heirs and representatives shall never make any objection."

Held, that the transaction was one of sale and not one of lease.

Appeal from a decision of the Subordinate Judge, Purulia, dated the 7th April 1922, confirming that of the Munsif, First Court, Purulia, dated the 18th August 1921.

Mr. A. K. Roy, for the Appellants.

Messrs. A. B. Mukerji and B. B. Mukherji,
for the Respondents.**JUDGMENT.**

Das, J.—The only question in this appeal is whether the transaction of the 3rd Aghran 1285 B. S. was one of sale or one of lease. The document is described as a *khas kobala*; and there is very little doubt to my mind that the parties regarded the transaction as one of sale. The consideration money was arrived at on a calculation of the annual profits of the lands conveyed. It was ascertained that the annual profit was Rs. 7-13-0; and deducting therefrom Rs. 1-1-0 payable by the transferor as the *moghli* the net profit was found to be Rs. 6-12-0. The transferor conveyed the land to the transferee for a consideration which was settled at 18 times the net annual profits of the lands. The critical passage in the document runs as follows:—

"I have myself got the following lands as

bounded below, namely," and the boundaries are given, "In all three items of lands about 17 *bighas* in area the annual profits of these lands amount to Rs. 7-13-0 only out of which deducting Re. 1-1-0 *moghli*, annual rent is Rs. 6-12-0 only and receiving the sum of Rs. 121-8-0 only as 18 times of the annual profit I sell the said lands to you. From this day forth you become fully entitled to the said lands and are empowered to sell and make a gift of the same and paying yearly Re. 1-1-0 only *moghli* to me and to my heirs and legal representatives from 1286 B. S. you become entitled from this day from generation to generation by cultivating the same yourself or by settlement of tenants and to that I or my heirs and representatives shall never make any objection."

It is contended on behalf of the appellants that the respondents were the holders of a subordinate interest since Re. 1-1-0 was payable by them as *moghli* to the appellants; but it is to be pointed out that this *moghli* of Re. 1-1-0 was payable by the appellants who were the transferors to their superior landlord and did not constitute a profit in their hands when paid by the respondents to them. The term "*moghli*" is a word of doubtful meaning and at the best imports no more than that the rent assessed represented a proportion of the Government revenue [*Nawagarh Coal Co. Ltd. v. Behari Lal Trigunait* (I).] There is very little doubt that the sum of Re. 1-1-0 represented the proportion of the Government revenue assessed on the lands conveyed. In no sense of the term does it constitute rent. That being so, there is nothing to show that the respondents were the holders of a subordinate interest in relation to the appellants. In my opinion they are the holders of co-ordinate interest.

In my opinion the question was correctly decided by the learned Judge in the Court below and I must dismiss this appeal with costs.

Adami, J.—I agree.

Z. K.

Appeal dismissed.

(1) 37 Ind. Cas. 450; 20 C. W. N. 1135 at p. 1144; 1 P. L. J. 275; 2 P. L. W. 324.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 44 OF 1925.

July 14, 1925.

Present :—Mr. Justice Sulaiman and
Mr. Justice Daniels.Babu BISHESHAR PRASAD PANDEY—
PLAINTIFF—APPLICANT

versus

RAGHUBIR AND ANOTHER—DEFENDANTS—
OPPOSITE PARTY.*Civil Procedure Code (Act V of 1908), s. 115, O. VII, r. 10, O. XLIII, r. 1(a)—Agra Tenancy Act (II of 1901), ss. 196, 197—Order directing return of plaint for presentation to proper Court—Appeal, dismissal of—Revision, whether lies—Jurisdiction of Civil and Revenue Courts—Procedure.*

Where on an appeal against an order directing the return of a plaint for presentation to the proper Court, the Appellate Court upholds the decision of the Trial Court, it cannot be said to have exercised its jurisdiction illegally or with material irregularity and its order is not open to revision. The order of the Trial Court, however, in such a case, if erroneous, may be revised by the High Court in spite of the fact that an appeal against that order has been dismissed by the Appellate Court, and if the order of the Trial Court is set aside by the High Court, the order of the Appellate Court necessarily falls to the ground with it. [p. 355, col. 2.]

Sections 196 and 197 of the Agra Tenancy Act must be read together. They both deal with a case in which an objection is taken in the Appellate Court that the suit was wrongly instituted in the Court below instead of in a Civil or Revenue Court as the case may be. Section 196 tells the Appellate Court what to do if the objection was not raised in the Trial Court. Section 197 tells it what to do if the objection had been raised. Both sections assume that the Trial Court has entertained the suit and disposed of it on the merits. [p. 355, col. 1.]

Neither section deals with a case where either or both Courts has or have wrongly refused to exercise jurisdiction. [ibid.]

Civil revision from an order of the District Judge, Ghazipur, dated the 1st of December 1924.

Mr. A. P. Pandey, for the Applicant.

Mr. Haribans Sahai, for the Opposite Party.

JUDGMENT.—This revision involves an important question as to the application of s. 115 of the C. P. C.

The applicant was plaintiff in the Trial Court. He had given a perpetual lease of 34 *bighas* 8 *biswas* 18 *biswas* of land to two of his servants on a rent of Rs. 17-1-0 a year. He subsequently gave a *theka* of his *zemin-dari* share to the second defendant Indrasan Singh giving him the right to realise the rent from the perpetual lessees. After the *theka* had been given the perpetual lessees relinquished their lease. According to the plaintiff, the first defendant Raghbir Singh, who is the father of Indrasan Singh,

the second defendant, obtained unlawful possession of the 34 *bighas* odd of land. The plaintiff asserts that on the relinquishment by the perpetual lessees he himself became entitled to actual possession of the 34 *bighas* held by them. He, therefore, brought the present suit for the ejectment of Raghbir Singh as a trespasser, and for mesne profits and rent for three years. In the alternative, in case his first and second reliefs were refused, he asked for a declaration that he and not the second defendant, was entitled to realize rent from Raghbir Singh in respect of this area, and also claimed a sum of Rs. 999 against the second defendant. This was the same amount which in his earlier relief he had claimed against Raghbir Singh. Apparently it consists partly of rent realized by the second defendant from Raghbir Singh and partly of damages. It must be mentioned here that the plaintiff had previously sued Raghbir Singh in the Revenue Court treating him as tenant. Raghbir Singh pleaded that he was the sub-tenant of his son Indarsan Singh and had paid the rent to the latter in good faith. The Revenue Court decided the suit on the issue of payment in good faith under s. 198, and, holding that the rent had been paid in good faith as alleged, dismissed the plaintiff's suit, and directed him to establish his rights in the Civil Court. The plaintiff's position in the present suit is that, in the first place, Raghbir Singh is a trespasser, pure and simple, but that even if this is not the case, and he is to any extent the sub-tenant of the second defendant, the latter is only entitled to realize from him the same rent which he could have realised from the perpetual lessees, namely, Rs. 17-1-0, and that the balance of the rent is payable to the plaintiff. The entire rent of the holding of 34 *bighas* is admittedly Rs. 88.

The suit was filed in the Court of the Subordinate Judge. The defendants resisted the claim on the merits, and also pleaded that it was not cognizable by the Civil Court. The Subordinate Judge adopted a curious course. He framed and decided issues on the merits. Having decided these, he proceeded to direct the plaint to be returned on the ground that he had no jurisdiction. This order has been upheld by the learned District Judge on appeal. The Subordinate Judge held that the defendant was, in fact, a tenant and not a trespasser, having been let into possession of the land by the plaintiff.

iff's father. This was a decision on the merits. The Subordinate Judge did not hold that on the facts alleged in the plaint he had no jurisdiction. He held that the case set out in the plaint was untrue in fact. On this finding he ought to have dismissed the suit on the merits instead of returning the plaint under O. VII, r. 10 of the C. P. C. The Subordinate Judge committed another error. In their written pleadings the defendant took the position that Raghbir Singh was the sub-tenant of his son, the second defendant. In the course of a subsequent oral pleading under O. X, r. 1, the second defendant set up the case that Raghbir Singh was the tenant of the plaintiff himself, having been admitted to the occupation of the holding by the plaintiff's father. Raghbir Singh himself was not examined. If this was the position taken up by Raghbir Singh, as it appears to have been, s. 202 of the Tenancy Act was applicable, and the Subordinate Judge ought to have directed Raghbir Singh to file a suit in the Revenue Court to establish the alleged tenancy. It may be that some of the reliefs claimed in the suit are such as could only have been decreed by a decree of a Revenue Court, but it is quite clear that the main relief asked for, namely, the ejectment of Raghbir Singh as a trespasser, was cognizable by the Civil Court. In view of the decision under s. 198 of the Tenancy Act the plaintiff was also entitled to ask the Civil Court for a declaration that he, and not the second defendant, was entitled to realize rent from Raghbir Singh. On the merits, therefore, it is clear that the Courts below were in error in directing the plaint to be returned, and that the Subordinate Judge in refusing to try the suit failed to exercise a jurisdiction vested in him by law.

The respondents raise a preliminary objection that no revision lies. They claim that, however wrong the order of the Subordinate Judge may have been, his decision has been superseded by the appellate decree of the District Judge. The District Judge had jurisdiction to decide the appeal, and did decide it, and whether his decision is right or wrong on the merits, he cannot be said to have failed to exercise a jurisdiction vested in him by law or to have acted irregularly in the exercise of his jurisdiction.

The plaintiff contests this position on three grounds. He argues

(1) that the District Judge in upholding the erroneous order of the Subordinate Judge failed to exercise jurisdiction he should have exercised, because he did not direct the Subordinate Judge to try the suit on the merits;

(2) that s. 197 of the Tenancy Act applies and that the District Judge should have remanded the case under that section to any Court competent to entertain it; in this view the District Judge failed to exercise a jurisdiction he should have exercised;

(3) that notwithstanding the appeal this Court has power to revise the Subordinate Judge's order.

The first contention though it derives some support from the judgment of Mukerji, J., in *Ganeshi Lal Harnarain v. Debi Das* (1) is, in our opinion, untenable. We fail to see how it can possibly be said that the District Judge failed to exercise the jurisdiction vested in him. His jurisdiction was confined to deciding the appeal under O. XLIII, r. 1 (a), C. P. C. He had only two courses open to him. If he had held that the suit was really cognizable by the Civil Court, he would have set aside the Subordinate Judge's order and directed the latter to try the suit on the merits. Holding as he did that the Subordinate Judge's view was right, he was bound to dismiss the appeal. In either case he exercised the jurisdiction vested in him by law, and there is no case for revision. We think that the remarks of the Privy Council in *Balakrishna Udayar v. Vasudeva Aiyar* (2) were misunderstood in *Behari Lal v. Baldeo Narain* (3) one of the judgments which have been cited to us. Their Lordships said that s. 115 was not directed to conclusions of law or fact in which the question of jurisdiction was not involved. In this passage they were speaking of a question of jurisdiction with reference to the provisions of the section they were discussing. In an earlier portion of the same judgment they had said: "It will be observed that the section applies to jurisdiction alone. The irregular exercise or non-exercise of it, or the illegal assumption of it."

They refer in fact to the case in which a Court, owing to erroneous view of the

(1) 85 Ind. Cas. 470; 47 A. 140 at pp. 145, 146; (1925) A. I. R. (A.) 267.

(2) 40 Ind. Cas. 650; 40 M. 793; 15 A. L. J. 645; 2 P. L. W. 101. 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48; 44 I. A. 261 (P. C.).

(3) 48 Ind. Cas. 14; 16 A. L. J. 717; 40 A. 674.

law, takes cognizance of a case outside its jurisdiction, or refuses to try a suit or appeal which is within its jurisdiction. They do not apply where a Court in the exercise of the jurisdiction vested in it upholds or reverses a decision of an inferior Court on an issue whether the inferior Court had jurisdiction.

We have reluctantly come to the conclusion that the applicant's second contention is also untenable. We say "reluctantly" because if we could hold that s. 197 applied, it would go a long way to prevent these difficult questions of jurisdiction arising. Sections 196 and 197 must be read together. They both deal with a case in which an objection is taken in the Appellate Court that the suit was wrongly instituted in the Court below instead of a Civil or Revenue Court as the case may be. Section 196 tells the Appellate Court what to do if the objection was not raised in the Trial Court. Section 197 tells it what to do if the objection had been raised. Both sections assume that the Trial Court has entertained the suit and disposed of it on the merits. It is only in such a case that the Court could remand the suit or frame issues or direct additional evidence to be taken as contemplated by sub-s. (2). Where the appeal is against an order returning the plaint the Appellate Court, if it agrees with the Trial Court merely affirms its order, and if it differs from the Trial Court directs such Court to restore the case to the file and dispose of it on the merits. Moreover, in the case of an appeal against an order returning the plaint, the appellant's objection is not that the case was instituted in the wrong Court, but that it was instituted in the right Court. The Tenancy Act makes elaborate provisions for the case where the suit is wrongly entertained by a Civil or Revenue Court on the merits, but fails to provide for the case where either or both Courts wrongly refused to exercise jurisdiction. We commend this point for the notice of the Legislature in connection with the revision of the Tenancy Act which we understand to be in contemplation.

If the applicant's third contention were *res integra* we might have felt considerable difficulty regarding it. Section 115 confers revisional jurisdiction on the High Court in cases in which no appeal lies to that Court. Its jurisdiction is not excluded by the fact that an appeal might

lie to a Subordinate Court. The difficulty arises from the principle, which has been affirmed in a large number of decisions, that where an appeal has been preferred and decided, the order or decree of the Trial Court is merged in that of the Appellate Court and no longer subsists. This principle was affirmed with reference to amendment of the Trial Court's decree, in the Full Bench decision of *Muhammad Sulaiman Khan v. Muhammad Yar Khan* (4); with reference to the passing of a final decree in *Gajadhar Singh v. Kishan Jiwan Lal* (5) and with reference to limitation in *Rup Narain v. Shro Prakash* (6) and there are many other decisions to the same effect. It is certainly anomalous that it should be open to us to review the order of the Subordinate Judge when that order has been superseded by an appellate order which is not open to revision. The matter is, however, concluded by the Full Bench decision in *Badami Kuar v. Dinu Rai* (7). That was a decision of a Bench of five Judges with reference to s. 622 of the C. P. C. of 1882, which is substantially identical with s. 115 of the present Code. It is pointed out by the respondents that nothing is said in any of the five judgments as to the effect of the Trial Court's order having been superseded by that of the Appellate Court. This is true, but it cannot be said that the point was overlooked. The referring order, which is printed on page 113* of the report, expressly mentions that the Munsif's order has been upheld by the Judge in appeal, and Straight, J., in the illustration which he gives on page 115* refers to the fact that an appeal would lie to the Judge though there would be no second appeal to the High Court. The Full Bench decision was followed in recent years in *Chandu Lal v. Kokamal* (8) and again in *Ganeshi Lal Harnarain v. Debi Das* (1). The order of the Munsif having been set aside the appellate order of the District Judge must necessarily fall to the ground with it.

We are glad to be able to hold in this case that a revision does lie because the effect of the contrary view might be to

(4) 11 A. 267; A. W. N. (1889) 55; 13 Ind. Jur. 427; 6 Ind. Dec. (N. S.) 598.

(5) 42 Ind. Cas. 93; 39 A. 641; 15 A. L. J. 734.

(6) 61 Ind. Cas. 129; 43 A. 405; 19 A. L. J. 159.

(7) 8 A. 111; A. W. N. (1886) 28; 4 Ind. Dec. (N. S.) 1142.

(8) 61 Ind. Cas. 36; 19 A. L. J. 110; 43 A. 334.

*Pages of 8 A.—[Ed.]

leave the plaintiff without a remedy. If he filed his suit in the Revenue Court, that Court might well hold that it had no jurisdiction to entertain it. This Court would have no power to revise that order. A revision would lie to the Board of Revenue, and if the Board of Revenue upheld the view of the Trial Court, the result would be to leave the plaintiff without any means of redress.

For the reasons already given we allow the application with costs including in this Court fees on the higher scale and direct the Subordinate Judge to restore the case to his file and dispose of it on the merits.

Z. K.

Application allowed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1274 OF 1922.

June 25, 1925.

Present :—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Macpherson.

Shaikh ABDUL GHANI AND OTHERS—

DEFENDANTS—APPELLANTS

versus

HARNAM SINGH AND OTHERS—PLAINTIFFS
—RESPONDENTS.

Easement—Grant—Presumption—Limitation Act (IX of 1908), s. 26.

Section 26 of the Limitation Act is remedial and is neither prohibitory nor exhaustive. Its object is to make more easy the establishment of rights of easement and not to exclude or interfere with other titles and modes of acquiring easements, such as by grant either proved or implied. [p. 357, col. 2.]

When the enjoyment of easement can be traced to a distant past and has continued ever since or at least down to the time of the obstruction complained of, the Court should refer such a long enjoyment to a legal origin, and presume a grant or an agreement. [p. 358, col. 1.]

Rajrup Koer v. Abul Hossein, 6 C. 394; 7 C. L. R. 529; 7 I. A. 240; 4 Shome L. R. 7; 4 Sar. P. C. J. 199; 3 Suth. P. C. J. 816; 4 Ind. Jur. 530; 3 Ind. Dec. (N. S.) 257 (P. C.), referred to.

Appeal from a decision of the Subordinate Judge, Shahabad, dated the 25th August 1922, reversing that of the Munsif, Sassaram, dated the 29th August 1921.

Messrs. L. N. Singh and R. Prasad, for the Appellants.

Mr. P. Dayal, for the Respondents.

JUDGMENT.

Miller, C. J.—This appeal arises out of a suit instituted on behalf of the plaintiff

to enforce a right to irrigate certain lands lying within their estate with water from a *tal* situated within the adjoining lands of the defendants. It is the plaintiffs' case that they have enjoyed this right for a great number of years and that within recent years the defendants have obstructed their right and they claim a declaration and damages for the loss sustained by them by reason of the obstruction.

In order to understand the effect of the decision of the learned Subordinate Judge now under appeal which found that the plaintiffs had acquired a right by a presumed grant some time in the past apart altogether from the mode of acquisition referred to in s. 26 of the Limitation Act, it is necessary to refer shortly to some of the salient facts proved in the case. The estates of the plaintiffs and the defendants adjoin each other and they both form part of *Mouza Malaon*. That village was held in joint ownership until the year 1870 and the *tal* in question had undoubtedly existed long before that time and there can be no doubt upon the facts found that this *tal* which is one of considerable size had been used for the purpose for irrigating not only the lands in its immediate vicinity but certainly the whole or some portion of the lands which are now in the exclusive possession of the plaintiffs. In fact there is a *karha* leading from the lands of the defendants into the lands of the plaintiffs which is found to have existed for a great number of years and which obviously could only have served the purpose of carrying water from the *tal* in question into the lands now held by the plaintiffs. At the partition in 1870 the plaintiffs obtained a *takhta* bearing *Tauzi* No. 5589 whereas the lands of the defendants lie in an adjoining *takhta* bearing *Tauzi* No. 5591. It is within the lands of the defendants' *takhta* that the *tal* is situate.

There was evidence to show that from the year 1870 right up to the year 1905 when the defendants first acquired by purchase an interest in *Tauzi* No. 5591 this right of taking water from the *tal* in the defendants' lands through channels, for the purpose of irrigating the plaintiff's land, had been exercised. A comparatively old man called Gobardhan Bind who had resided for the last 40 years at the place in question said that during that time he had seen the plaintiff

iffs' *takhta* being irrigated with water from this *tal* and that evidence is accepted by the learned Subordinate Judge. It follows, therefore, that up to the time when the defendants first acquired an interest in the property which they now hold, a right to irrigate their lands from the *tal* in question had been exercised by the plaintiffs. In 1905 some friction appears to have occurred. The defendants, the new purchasers, seem to have made some attempt to stop the plaintiffs' right of irrigation; and in 1906 an agreement was entered into between the parties whereby the plaintiffs' right to irrigate their lands was to continue; and a new water channel was to be cut from the south west of the *tal* leading into the old water channel which had been in existence for some years. This was to be carried out at the expense of both parties and a small rental of Rs. 12 a year was to be paid to the defendants for the use of the water.

What subsequently happened is perhaps not very clear but it appears that the new water-course was not in fact constructed at the expense of the parties but it also appears that there was a provision in the agreement that until this was done the plaintiffs should be entitled to irrigate their lands from the *tal* by any such means as might be arranged between the parties. So that the right at all events appears to have been recognised at that date but it is unnecessary in this case to complicate the matter by reference to that agreement, or the terms thereof, because it is the case of both parties that it was not acted upon and neither party in this case relies upon it. They both had in fact at some earlier period repudiated it.

Although some attempt was made, as I have stated, in 1906 to interfere with the plaintiffs' right, according to the findings, by which we are bound, the plaintiffs did manage to get water from this *tal* without any further serious interruption up to the year 1912. The finding of the learned Subordinate Judge upon that matter is to this effect:—"The next point that incidentally arises is if the right of the plaintiffs have become barred by limitation, they not having exercised it since 1912 as appears from the fact that plaintiffs' lessees had to bring a suit in 1912. It would be improbable that after the withdrawal of that suit the defendants allowed the plaintiffs' water from the *tal* for irrigation of their fields. I do not think that there is sufficient evidence

on the record of this suit to show the obstruction of the right before 1912". There is, therefore, a clear finding that there was obstruction of the right in 1912 and that there was no real obstruction of the right before that date.

Upon these facts it was contended by the defendants that the claim for an easement, which is the claim in this case, must fail by reason of the provisions of s. 26 of the Indian Limitation Act. That section provides for the acquisition by peaceable enjoyment without interruption for a period of 20 years of a right of easement either in a water-course or in any other matter, but if one is claiming a right given under that section then you have to prove that the right has been exercised for 20 years and that there has been no interruption of the right at any period further back than two years before the commencement of the suit. In other words you have got to prove uninterrupted enjoyment ending not later than two years before the commencement of the suit and extending not less than 20 years back from that time. It was contended, therefore, that the interruption having taken place in 1912 the present suit must fail. In answer to that the plaintiffs rely upon the decision of their Lordships of the Judicial Committee in the case of *Rajrup Koer v. Abdul Hossein* (1). It was pointed out by Sir Montagu Smith in that case in delivering the judgment of their Lordships that the acquisition of the right of easement referred to in s. 26 of the Act is not the only method of acquiring a right of easement, and that the section is not exhaustive and if you have acquired a right of easement by any other method such as by a grant either proved or implied then s. 26 can have no operation to a suit brought to enforce such a grant. It is pointed out in the judgment there delivered that "the object of the Statute was to make more easy the establishment of rights of this description (that is rights of easement) by allowing an enjoyment of 20 years, if exercised under the conditions prescribed by the Act., to give, without more, a title to easements. But the Statute is remedial, and is neither prohibitory nor exhaustive. A man may acquire a title under it who has no other right at all, but it does not exclude or interfere with other titles and modes

(1) 6 C. 394; 7 C. L. R. 529; 7 I. A. 240; 4 Shome L. R. 7; 4 Sar. P. C. J. 189; 3 Suth. P. C. J. 816; 4 Ind. Jur. 530; 3 Ind. Dec. (N. S.) 257 (P. C.).

of acquiring easements." It then goes on and deals with the facts in the case and points out that there was abundant evidence upon the facts found by the Courts, for presuming the existence of a grant at some distant period of time and having come to the conclusion that, on the facts of that case, a grant at some time or other, between 20 and 60 years earlier, may be presumed, it was decided that s. 26 of the Limitation Act had no application to the case. In dealing with the evidence from which such a grant may be presumed the judgment proceeds as follows:—"This being an artificial *pawn* constructed on the land of another man at the distant period found by the Courts, and enjoyed ever since, or at least down to the time of obstruction complained of, by the plaintiff and his ancestors, any Court which had to deal with the subject might, and indeed ought to, refer such a long enjoyment to a legal origin, and under the circumstances which have been indicated, to presume a grant or an agreement between those who were owners of the plaintiff's *mehal* and the defendant's land by which the right was created. That being so, the plaintiff does not require the aid of the Statute; and his right, therefore, is not in any degree interfered with by the provision in the 27th section, upon which the Munsif decided." I ought to point out that the Act which Sir Montagu Smith in that judgment was referring to was the Limitation Act of 1871, s. 27, but that section is for all material purposes similar to s. 26 of the present Act. In the present case upon the evidence which I have referred to the features are not unlike the features in the case to which I have just referred. The learned Subordinate Judge found, accepting the evidence of long user from 1870 down to 1912 with a slight interruption in 1905 that the plaintiffs' predecessors and afterwards the plaintiffs' use of the water may be attributed to some implied grant made long ago but sometime after the partition in 1870. In my opinion if there was evidence to support a grant made after the year 1870 the learned Judge acting upon the principle referred to in the case of *Rajrup Koer v. Abdul Hossein* (1) was perfectly justified in finding in favour of the plaintiffs and the only question which remains is was there in this case any evidence which would justify the learned Judge in arriving at his con-

clusion. There undoubtedly was evidence from which it might be found that there had been an uninterrupted user for a great number of years; certainly more than 20 years, before the defendants had any interest in the property at all, and although it is unnecessary for us to say at what conclusion we should have arrived upon the evidence before the Court, and indeed we have not the evidence before us in second appeal, still it appears from what has been said by the learned Judge in his judgment that there was some evidence to support his finding. He is the ultimate judge of fact in such a case and I do not think that in the particular circumstances of this case we would be justified in saying that there was no evidence to support his finding. The result, in my opinion, is that the case is one concluded by the findings of fact and this appeal must be dismissed with costs.

Macpherson, J.—I agree.

S. D.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 172
OF 1924.

July 6, 1925.

Present:—Mr. Justice Sulaiman and
Mr. Justice Daniels.

Musammatt KISHAN DEI—DEFENDANT
—APPELLANT

versus

SHEO PALTAN—PLAINTIFF—
RESPONDENT.

Hindu Law—Custom—Succession—Stridhan property of woman married in karao form—Customary marriage, validity of—Approved form—Presumption—Burden of proof.

The rule of succession to *stridhan* property left by a woman married in the *karao* form ought, in the first instance, to be determined with reference to the particular custom of the caste. Where the incidents of such custom can be traced they must be given the force of law. [p. 360, cols. 1 & 2.]

The Hindu Law recognizes custom as a matter of paramount importance, and custom if it is established can override the written law. There may, therefore, be customary forms of marriage which are perfectly valid and which do not strictly come within the definition of any of the eight forms of marriage mentioned in the *Mitakshara*. [p. 360, col. 2; p. 361, col. 1.]

When a customary form of marriage is allowed it may be in any one of the eight forms mentioned in the *Mitakshara*, or an approach to any one of them. It is

not correct to say that unless it is shown that a customary marriage was in the *asura* form, it must always be conclusively presumed that it was in the *brahma* form. When the particulars of a customary form of marriage are known then the question of the presumption that it was in the *brahma* form becomes of very little importance. That presumption substantially arises only when all that is known is that a marriage did take place. In such cases the presumption is that the marriage was in the *brahma* form no matter what the caste of the parties be. But when the incidents and the circumstances attending the customary form of marriage are known the presumption can no longer be applied and the Court must find of what form it is. When facts are proved the question of what form the marriage is becomes a question of law. [p. 361, col. 1.]

Where re-marriage of widows is allowed by the custom of a caste such a marriage may not have any disapprobation attaching to it, on the other hand even among castes which allow the validity of widow re-marriages such marriages may be regarded as not a praiseworthy and superior form but a blameworthy and inferior form of marriage. The rule of succession to the *stridhan* property of a widow who had re-married ought, therefore, to vary according as the marriage is or is not blameworthy. For instance if a virgin widow has not passed out of her parent's family and is still under its control and her parents or other legal guardians in pursuance of the caste custom which allows such marriages give her away in marriage a second time as if she were a maiden the marriage though a widow marriage would undoubtedly be in the *brahma* form if there is no social censure attaching to it. On the other hand if a widow, who is not a virgin, herself enters into a matrimonial alliance in a form considered blameworthy by the caste, though recognised by custom as valid, and there is no gift of her by her legal guardians it may be difficult to see any analogy between such a marriage and the *brahma* form of marriage even though there be no consideration paid to her guardians. It may rather be an approach to the *gantharba* form where the marriage takes place with the mutual desire of the parties. In this latter case, it would be of an inferior form, particularly when such a marriage is looked down upon by the caste people; but if such a marriage is not considered the least blameworthy, it would be deemed to be of the *brahma* form. [p. 361, col. 2.]

When a particular form of marriage is recognised by custom it is to be presumed that the caste approves of it and no social censure attaches to it, unless the contrary is established. The burden lies on the person who asserts the contrary. [p. 362, col. 2.]

Per *Daniels, J.*—Under the Hindu Law a marriage is presumed to be in an approved form unless it is shown to be in a disapproved form. If a marriage is valid at all, the natural presumption is that it is valid in all respects and carries the full privileges and obligations of an approved marriage, and the burden of proving that its results fall short of this is on the person who asserts it. This rule applies equally to marriages which derive their validity from custom. [p. 363, col. 2; 364, col. 1.]

Case-law referred to.

First appeal from an order of the District Judge, Saharanpur, dated the 18th June 1924.

Dr. K. N. Katju and Mr. Saila Nath Mukerji, for the Appellant.

Mr. P. L. Banerji, for the Respondent.

JUDGMENT.

Sulaiman, J.—This is a defendant's appeal arising out of a suit for recovery of possession. The plaintiff had a brother Paltu, who died some six years ago. He married a woman named *Musammam Mano* and executed a deed, dated the 29th of January 1904, under which he stated that he had installed her in his house (*apne ghar men baitha lia hai*) and made a Will that after his death she would inherit the whole estate and that his brothers would have no right. There was a further provision that if he were not to keep her he would pay her Rs. 10 a month regularly. In his lifetime, however, he executed a deed of gift, dated the 29th of April 1917, under which he transferred the property in dispute to *Musammam Mano*. The validity of this deed is accepted by the plaintiff and he admits that the property thereafter became the *stridhan* property of *Musammam Mano*. Paltu died in 1919, and it was a part of the plaintiff's case that after his death there was an agreement between him and *Musammam Mano* as well as some other relations that she would remain in possession of the property for her life and after her death the plaintiff and his brother would get it. Apart from this agreement the plaintiff claimed to be the heir of *Musammam Mano*, who died on the 16th of April 1921 leaving no issue. The defendant is the mother of Anand Prakash, who was the son of Nathu Singh, a brother of *Musammam Mano*. The defendant denied that the plaintiff was *Musammam Mano*'s heir, and pleaded that she having been married in *karao* form her heirs were her relations in the paternal line. It was further pleaded that before her death she had executed a Will dated the 14th of April 1921 under which she had bequeathed the property in favour of Anand Prakash.

The Court of first instance found that the alleged agreement was not established. It found that the marriage of *Musammam Mano* had been a widow re marriage in the *karao* form. It came to the conclusion that her marriage could not be said to have been in the *brahma* form and that, therefore, the plaintiff was not her heir. It, therefore, dismissed the suit considering it unnecessary to go into the question of the alleged Will. On appeal the learned District Judge has affirmed the finding that the agreement has not been established and has also affirmed the finding that *Musam-*

mat Mano's marriage had been in the *karao* form. He, however, came to the conclusion that it must be presumed that her marriage was in the *brahma* form and that, therefore, the plaintiff was the legal heir. He has accordingly remanded the case in order that the other issues may be disposed of.

The argument of Dr. Katju on behalf of the appellant may be summarised as follows:—It is an essential feature of the *brahma* form of marriage that there should be a gift by the father or other legal guardian of the girl and that as on the first marriage she passes into a new *gotra* her paternal relations have no longer any right left to give her away a second time. His contention, therefore, is that a widow re-marriage can never be a *brahma* form of marriage. He argues that unless the plaintiff establishes that the marriage was in one of the four approved forms he cannot succeed. He contends that a *karao* form of marriage does not come within the definition of any of the first four forms and that in fact at the time when the Mitakshara was written re-marriages were absolute and, therefore, not in contemplation.

On the other hand the argument of Mr. Peary Lal Banerji on behalf of the respondent is that no ceremonies are absolutely essential for the validity of a marriage and that if a re-marriage is allowed by custom the wife has the same rights and status as a maiden who has been married. In order to show that in every case, no matter to which caste the parties belong, there is a strong presumption that the marriage was in the *brahma* form, he relies on the cases of *Jagannath Prasad Gupta v. Runjit Singh* (1), *Authikesavulu Chetty v. Ramanujam Chetty* (2) and *Gabrielnathaswami v. Valliammal Ammal* (3). He has gone further and urged that now a days only two forms exist, namely, *brahma* and *asura* and that if it is not shown that the marriage was in the *asura* form, the irresistible conclusion is that it was in the *brahma* form. He has pointed out that the findings of the Courts below being that no price was paid, the marriage could not have been in the *asura* form.

The rule of succession to *stridhan* property

left by a woman married in *karao* form ought in the first instance to be determined with reference to the particular custom of the caste. Where the incidents of this custom can be traced they will have to be given the force of law. The difficulty arises in a case where no particular custom as to inheritance to *stridhan* is established.

The rule of succession to *stridhan* is stated by Vijnaneswara in the Mitakshara as follows:—

"Of a woman dying without issue, as before stated, and who had become a wife by any of the four modes of marriage denominated *brahma*, *daiva*, *arsha*, and *Prajapatya*, the property, as before described, belonged in the first place to her husband. On failure of him it goes to his nearest *sapindas*. But, in the other forms of marriage called *asura*, *gandharba*, *rakshasa* and *paisacha*, the property of a childless woman goes to her parents that is to her father and mother. The succession devolves first (and the reason has been before explained) on the mother, who is virtually exhibited (first) in the elliptical phrase *pitrigami*, implying 'goes' (*gachchhati*) to both parents (*pitarau*), that is, to the mother and to the father. On failure of them, their next of kin take the succession."

This passage is a commentary on the text of Yajnavalkya which is as follows:—
"The property of a childless woman married in one of the four forms denominated *brahma*, etc., goes to her husband; but if she leave progeny, it will go to her (daughter's) daughters; and in other forms of marriage (as the *asura*, etc.) it goes to her father (and mother on failure of her own issue)."

Now if it were possible to say that the *karao* form of marriage is identical with any of the eight forms mentioned above there would be no difficulty in deciding which rule of succession should prevail. The difficulty arises when the customary form of marriage is not identical with any of those forms.

Now if we examine the definitions of the various forms of marriage we will find that the classification into eight forms was not logically exhaustive. It is possible to conceive of a form of marriage which is a mixture and is not strictly identical with any of these eight forms. The Hindu Law recognises custom as a matter of paramount importance, and custom if it is established

(1) 25 C. 354; 13 Ind. Dec. (N. S.) 237.

(2) 3 Ind. Cas. 541; 32 M. 512; 19 M. L. J. 656; 6 M. L. T. 183.

(3) 53 Ind. Cas. 423; 10 L. W. 491; 26 M. L. T. 318; (1920) M. W. N. 158.

can override the written law. It is, therefore, manifest that we may have customary forms of marriage which are perfectly valid and which do not strictly come within the definitions of any of these eight forms. In a vast country like India with so many castes living in so many different places multifarious forms of marriage allowed by custom can and have come into existence. It would, therefore, be inappropriate to put them in any of these eight categories.

Similarly there may be statutory forms, e.g., marriage under the Widows Re-marriage Act which also may be difficult to class under any of the above forms.

I am, therefore, not prepared to accept the contention of the learned Advocate for the appellant that a widow re-marriage can never be deemed to be in the *brahma* form. Nor am I prepared to accept the argument of the learned Advocate for the respondent that only two forms, *brahma* and *asura*, are now in existence and the rest are obsolete. When customary forms of marriage are allowed, they may be (provided such is the custom) in any one of the eight forms, or an approach to any one of them. I do not think it is correct to say that unless it be shown that the customary marriage was in the *asura* form, it must always be conclusively presumed that it was in the *brahma* form. In my opinion when the particulars of a customary form of marriage are known then the question of the presumption that it was in the *brahma* form becomes of very little importance. That presumption substantially arises only when all that is known is that a marriage did take place. In such cases the presumption is that the marriage was in the *brahma* form no matter what the caste of the parties be. But when the incidents and the circumstances attending the customary form of marriage are known the presumption can no longer be applied and the Court must find of what form it is. When facts are proved the question of what form the marriage is becomes a question of law.

It is true that the basic principle underlying the first four forms of marriage as well as the fifth form is the gift of the girl by her father or other lawful guardian. The *asura* form is distinguished from the first four forms because of the pecuniary consideration. On the other hand the last three forms of marriage do not contemplate

any formal gift by the guardian though in the case of *gandharba* marriage the choice by the girl may be followed by the ordinary ceremonies.

When re-marriage is allowed by the custom of a caste such a marriage may not have any disapprobation attaching to it. On the other hand even among castes which allow the validity of re-marriages such marriages may be regarded as not a praiseworthy and superior form but a blameworthy and inferior form of marriage. In my opinion the rule of succession ought to vary according as the marriage is not or is blameworthy. For instance if a virgin widow has not passed out of her parent's family and is still under its control and her parents or other legal guardians in pursuance of the caste custom which allows such marriage give her away in marriage a second time as if she were a maiden the marriage though a widow marriage would undoubtedly be in the *brahma* form if there is no social censure attaching to it. On the other hand if a widow, who is not a virgin, herself enters into a matrimonial alliance in a form considered blameworthy by the caste, though recognised by custom as valid, and there is no gift of her legal guardians it may be difficult to see any analogy between such a marriage and the *brahma* form of marriage even though there be no consideration paid to her guardians. It may rather be an approach to the *gandharba* form where the marriage takes place with the mutual desire of the parties. In this latter case, it would be of an inferior form, particularly when such a marriage is looked down upon by the caste people; but if such a marriage is not considered the least blameworthy, it would be deemed to be of the *brahma* form.

The learned Advocate for the respondent has referred us to the case of *Bhaoni v. Maharaja Singh* (4), where it was remarked that the *gandharba* form which was nothing more or less than concubinage, had become obsolete as a form of marriage giving the status of wife and making the offspring legitimate. What the learned Judges meant was that in the absence of any custom to that effect such a marriage was not valid in law. They could not have meant to lay down that *gandharba* marriages were wholly non-existent, and cannot be recognised even if they are allowed by custom.

(4) 3 A. 738; A. W. N. (1881) 48; 2 Ind. Dec. (N. S.) 413.

That the quality of marriage is also a consideration is apparent from a curious case which came up before the Bombay High Court namely that of *Moosa Haji Joonas v. Haji Abdul Rahim* (5). In that case the parties to the marriage were *Cutchi Memons* who performed their marriages in accordance with the Muhammadan Law but who under a special custom are governed by the Hindu Law of inheritance and succession. The marriage obviously was not in any of the Hindu forms of marriage and yet the learned Judges of the Bombay High Court held that, inasmuch as the particular marriage was in the highest form of union known to *Cutchi Memons* and was free from all that was reprehensible and that could call for censure, it corresponded with the four approved kinds of marriage under the Hindu system and was distinguishable from the four disapproved. They accordingly held that the rule of devolution was the one applied to marriages of the approved form.

Even in the case of *Hira v. Hansji Pema*, (6), where a re-marriage of a divorced Koli woman was held to be of the *brahma* form, the learned Judges remarked "Admittedly re-marriage between parties of the Koli caste is valid, and there is nothing before us to suggest that the people of that caste regard it with any social censure or disapproval. This seems to us to be a capital consideration when we are administering a system of jurisprudence where established custom plays such an important part as it does in Hindu Law."

Similarly, in the case reported as *Authikesavulu Chetty v. Ramanujam Chetty* (2), though it was held that "In the absence of any proof to the contrary the marriage must be presumed to be in one of the approved forms", the learned Judges remarked that the presumption of Hindu Law must be applied only with some caution to marriage among the (*kararais*) "caste...". The case, therefore, has to be decided upon the evidence given by the parties without the aid of any presumption in favour of either side."

The question unfortunately arises before us in the abstract form whether the widow re-marriage in the *karao* form is a *brahma* form of marriage or not. The plaintiff led evidence to prove that *Musammam Mano* was a virgin maiden and that she was

married in the *brahma* form and the ceremony of going round the seven steps was also performed. On the other hand the defendant led evidence to show that she was a widow and that there was no *phera* ceremony and no worship at all and in fact some price was paid for the marriage. Though the Courts below have rejected the plaintiff's evidence that she was a virgin maiden and have accepted the defendant's evidence that she had been a widow, they have not thought it necessary to find in detail the actual ceremonies if any which took place, nor have they found whether a *karao* form of marriage is considered an inferior form of marriage and regarded with disapprobation or not. They have, however, found that no price was in fact paid.

It seems to me that one of the important questions which can enable us to determine whether the marriage is in an approved or disapproved form has been left unanswered. I have, therefore, thought it essential to examine for myself the evidence of both parties.

I find that out of the ten witnesses produced by the plaintiff, only four speak of *Musammam Mano's* marriage. They, however, go so far as to deny that it was in the *karao* form. In cross-examination they were not questioned as to whether *karao* marriages are regarded with disapprobation by the caste. Out of the fourteen witnesses examined by the defendant five speak of her marriage. They say that she was a widow and was married in the *karao* form without any *phera* ceremony. They do not go on to state a *karao* marriage, though recognised by custom as legal, is considered by the *Ahir* caste an inferior form of marriage and is not looked upon with approbation.

When a particular form of marriage is recognised by custom it is to be presumed that the caste approves of it and no social censure attaches to it, unless the contrary is established. The burden lies on the person who asserts the contrary. In the present case when there is no evidence of any kind that a *karao* marriage is regarded by the *Ahir* caste with disapprobation and generally censured, I must hold that the defendant has failed to discharge the burden that lay on her. It must, therefore, be assumed that the marriage was in one of the approved forms, and the plaintiff is the heir to her *stridhan*. I would on this

(5) 30 B. 197; 7 Bom. L. R. 447.

(6) 17 Ind. Cas. 949; 37 B. 295; 14 Bom. L. R. 1182.

ground uphold the order of the District Judge.

Daniels, J.—The property in dispute in this case was the *stridhan* property of *Musammāt Mano* now dead. *Musammāt Mano* was a widow and was married by *karao* marriage to *Paltu Ram*. The parties are *Ahirs* and it is common ground that in this caste the marriage of widows in the *karao* form is recognized and constitutes a valid marriage. It is, therefore, unnecessary to go into the question what formalities are necessary or were observed in this form of marriage. *Paltu Ram* made a gift of the property in suit to *Musammāt Mano* in 1917. *Paltu Ram* died in 1919. *Musammāt Mano* died in 1921. The plaintiff *Sheo Paltan* is *Paltu Ram*'s brother, and his claim so far as it is now in controversy rests on the ground that except where the marriage is in a disapproved form the *stridhan* is inherited in the absence of issue by the husband and his *sapindas*. The original defendant was *Anand Prakash*, a nephew (brother's son) of *Musammāt Mano*. He died during the suit and was succeeded by his mother *Musammāt Kishan Dei*. Her defence so far as it is now material is two-fold. She alleges that *Musammāt Mano* executed a Will in favour of her son, and she asserts the marriage was not in an approved form and that in consequence even on an intestacy the *stridhan* goes to the wife's relations and not to those of her husband. The question of the Will remains to be tried. The Subordinate Judge held that the plaintiff had failed to prove that the marriage was in the *brahma* form, the only approved form now surviving; he was, therefore, not a possible heir even in the absence of a Will and had no cause of action for the suit. The suit was accordingly dismissed. The learned District Judge holds that there is a presumption that every valid marriage is in an approved form and that the defendant had failed to rebut that presumption. It was not suggested before the District Judge that the marriage could be included in either of the four recognised disapproved forms, viz., *asura*, *Gandharra*, *bakshasa* and *paisacha*. The learned District Judge therefore held the marriage to be in an approved form and the plaintiff to be entitled to succeed in the absence of a Will. He, therefore, remanded the case for decision on the merits. Against that order the present appeal has been filed.

In this Court the defendant-appellant relies on the description of a *brahma* marriage given by *Manu* as being "the gift of a daughter, clad only in a single robe, to a man learned in the *Veda*, whom her father voluntarily invites and respectfully receives." He argues that a giving by the father is essential part of this definition, and that it is entirely inapplicable to the marriage of a widow where there is no giving by the father and she herself is a principal in the transaction. As the girl passed into another *gotra* by her marriage, only a virgin could be married in this form. The plaintiff-respondent relies on the line of reasoning adopted by the District Judge, and argues further that a *brahma* marriage cannot be limited by the narrow terms of *Manu*'s definition, which has long become obsolete. The requirement that the husband shall be learned in the *Veda* shows how archaic the description is. As the other forms became obsolete the conception of a *brahma* marriage widened so as to include all valid marriages with the exception of the *asura*, the only disapproved form which still survives, and any valid marriage which is not in the *asura* form will necessarily be treated as a *brahma* marriage.

Now it is obvious that we are dealing here with a state of things not contemplated by *Manu* or *Vijnaneshvara*. In no respect has Hindu society changed and progressed more since the laws of *Manu* than in its conception of marriage. Six of the eight forms mentioned by him have wholly disappeared. It is probable that in very early time widow re-marriage was allowable, but at the era of the *Mitakshara*, and even at the earlier period when the *manava dharma-shastra* received its final form, it had long ceased to be recognised. They do not, therefore, provide for it, and though they do emphatically assert the binding force of custom, they say nothing as to the class in which marriages recognised as valid by caste custom shall fall.

Nevertheless some progress has been made in adapting the law to the modern social conditions, and we ought in dealing with this case to apply the same principles which have already obtained recognition from the Courts. The leading principle is that a marriage is presumed to be in an approved form unless it is shown to be in a disapproved form. This is a reasonable principle and is not contradicted by anything in the Hindu

texts. If a marriage is valid at all, the natural presumption is that it is valid in all respects and carries the full privileges and obligations of an approved marriage, and the burden of proving that its results fall short of this is on the person who asserts it.

The presumption in favour of a marriage being in an approved form is supported by numerous authorities, commencing with *Thakoor Deybee v. Rai Baluk Ram* (7) and including *Jagannath Prasad Gupta v. Runjit Singh* (1), *Authikesavulu Chetty v. Ramanujam Chetty* (2), *Muthan Chetty v. Ramaswamy Chetty* (8) and several Bombay cases. In *Hira v. Hansji Pema* (6), the marriage of a divorced woman of the *koli* caste was treated as being authority in an approved form. This is a strong authority against the view that only the marriage of a virgin can be treated as approved. The same principle has been applied in *Moosa Haji Joonas v. Haji Abdul Rahim* (5) to a marriage which, being between persons who were only partly governed by Hindu Law, was admittedly not strictly in any form contemplated by Manu, and there seems no reason why it should not equally apply to marriages which derive their validity from custom. The binding force of custom among Hindus has been clearly laid down in the Shastras, and it would be superfluous to cite texts or other authorities in support of it.

A suggestion was made in the course of argument in this Court that a *karao* marriage, being contracted by the consent of the parties, should be identified with the *gandhabra* form of marriage mentioned by Manu. No such suggestion was made in the Court below, and it cannot be too strongly repudiated. As Mayne points out in his Hindu Law, Chapter IV, the different forms of marriage enumerated by Manu relate to different stages of social progress and their antiquity is in inverse ratio to the order in which they are mentioned. *Gandharba* is one of the three most primitive, and is really nothing more than the unregulated indulgence of lust. As was pointed out in *Bhaoni v. Maharaja Singh* (4), no ceremonies were necessary (I am aware that the Madras High Court has differed, but the Allahabad view is historically the more correct), and as such

was allowable to soldiers, to whom much was allowed which would not be tolerated in ordinary citizens. To identify modern forms of marriage such as those proposed by Dr. Gour's Marriage Bill or allowed by the Hindu Widow's Re-marriage Act with this primitive and obsolete form would be historically unsound and socially reactionary. To quote Mayne again, "This form belongs to a time when the notion of marriage involved no notion of permanence or exclusiveness. Its definition implies nothing more than fornication. It is difficult to see how such a connection could be treated at present as constituting a marriage, with the incidents and results of such a union" (p. 100, Eighth Edition).

The view taken by the learned Judge is, therefore, in my opinion, correct, and I would dismiss this appeal with costs including fees on the higher scale.

By the Court.—This appeal is dismissed with costs including fees on the higher scale.

Z. K.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 599 OF 1922.

April 16, 1924.

Present:—Mr. Kinkhede, A. J. C.
SHEOBUX—PLAINTIFF—APPELLANT

versus

Seth JAGANNATH AND OTHERS—
DEFENDANTS—RESPONDENTS.

Landlord and tenant—Transfer by tenant, effect of—Suit for ejectment against transferee—Defendant, whether can set up another transfer.

In answer to a landlord's suit for ejectment against a transferee on the ground that a particular transfer of an absolute occupancy holding is voidable for want of consent, it is open to the defendant to contend in the alternative, that even if the transfer sought to be avoided, be voidable, he is entitled to retain possession under another transfer which is binding as against the landlord. [p. 365, cols. 1 & 2.]

Sahasram v. Sheonath, 31 Ind. Cas. 303; 11 N. L. R. 124, relied on.

Ordinarily, the tenant-right, as between the tenant mortgagor and his transferee becomes transferred absolutely to the latter the moment the final decree for foreclosure is passed, and nothing remains which the tenant can claim to be his own. [p. 366, col. 1.]

If the mortgage on the basis of which such foreclosure is obtained, is a legal, a consented or ratified mortgage, then, the transferee's position is secure, not only against the tenant, but also against the landlord. [*ibid.*]

But if the mortgage is neither legal nor consented to by the landlord, nor subsequently ratified by the acceptance of rent by the landlord from the transferee

(7) 11 M. L. A. 139; 10 W. R. P. C. 3; 2 Ind. Jur. (N. S.) 106; 2 Suth. P. C. J. 49; 2 Sar. P. C. J. 231; 20 E. R. 51.

(8) 16 M. L. J. 750.

as such the latter's position is nothing better than that of a mere trespasser liable to be ejected by the landlord. [p. 366, col. 2.]

Baliram v. Ramrao, 4 N. L. R. 57, referred to.

By consenting to a mortgage the landlord consents to a foreclosure also provided it takes place so long as the tenant-right is subsisting. The consent does not enure for the benefit of the transferee if he has not worked out his rights under the transfer so long as the tenant-right subsisted. [p. 366, col. 2; p. 367, col. 1.]

Jaharuddin v. Keshcorao Mahadeo, 6 C. P. L. R. 109, referred to.

If the tenancy is determined by forfeiture the mortgage even if valid as against the landlord is also determined. [p. 367, col. 1.]

Sarjirao v. Tukaram, 46 Ind. Cas. 244; 14 N. L. R. 107 at p. 109, *Rani Bahu Parwar v. Sobha Ram*, 43 Ind. Cas. 912 and *Gorindrao v. Sarjabai*, 89 Ind. Cas. 872, referred to.

Appeal against the decree of the District Judge, Jubbulpore, in Civil Appeal No. 41 of 1922, dated the 25th September 1922.

Sir Bipin Krishna Bose, and R. B. N. G. Bose, for the Appellant.

Mr. M. Gupta, for the Respondents.

JUDGMENT.—The two points which are material for the decision of this second appeal are:—

(1) Whether Ex. D-10 imports any implied consent to or ratification of the defendants' mortgage dated 22nd January 1894 (Ex. P-2).

(2) Whether by reason of plaintiff accepting rent from the defendants in respect of Gurubux's land, before and after foreclosure, the latter's position either under the foreclosure or under their usufructuary mortgage of 1896 has been rendered unsalable as against the former.

As regards the first point, I am clearly of opinion that the lower Courts have gone wrong. They have erroneously assumed that plaintiff took a sub-lease of the land in suit from defendants, through Dulichand as per Ex. D-10. The evidence of Jagannath D. W. No. 9 on which the finding is based does not, however, support it. It appears that the Courts have confused a lease taken by plaintiff's another son Dhanraj, with the sub-lease taken by Dulichand. The mere fact that plaintiff's son Raghurising took part in writing Ex. D-10, does not import any acquiescence in the defendants' title under the foreclosure on the part of the plaintiff in his capacity as landlord. I am not prepared to accept the said finding as correct and binding against me in second appeal.

The second point raises the question whether in answer to a landlord's suit for ejectment against a transferee on the ground that a particular transfer is voidable for want of

consent, it is open to the defendants to contend in the alternative, that even if the transfer sought to be avoided, be voidable, they are entitled to retain possession under another transfer which is binding as against the landlord. Mr. Gupta who appears for the respondents argues that this being an ejectment suit, the plaintiff must succeed only on the strength of his own title, or by proving that an immediate right of re-entry has accrued to him. This practically means that a landlord's suit can be defeated by a transferee from tenant, by pleading the *jus tertii* of the tenant or by proving that the tenant's interest hath in the eye of law a continuance in order to work out his rights as a transferee under some other transfer valid as against the landlord. That such a defence is not available to any one but the transferee of a tenant is established by the ruling reported in *Sahasram v. Sheonath* (1), where it is pointed out that no person who is a pure trespasser, and not a transferee, authorized or unauthorized from a tenant, is allowed to set up against the landlord the rights of the real tenant. Here the defendants are not trespassers pure and simple. They held several mortgages. They, however, sued on the basis of one mortgage, viz., of 1894 Ex. P-2 and obtained a final decree for foreclosure on 10th April 1913 thereon. They hold also a second usufructuary mortgage dated 23rd June 1896 Ex. P-3 for a term of 50 years which is yet to expire. Even though with effect from 10th April 1913 they became the holders of the mortgagors' equity of redemption, and could, therefore, claim to be the owners of the fields and regard their own rights even under the mortgage of 1896 as having come to an end, it is argued that they have got the option to choose between their rights as owners and as possessory mortgagees. They contend that there is no reason why they should be precluded from making their election, even in answer to the landlord's claim to eject them, as they were not bound to make it (the election) earlier, that they have been paying rent of the land even after the foreclosure and the landlord has accepted rent from them, and that in any case they have been accepting receipts for rents paid by them in their capacity of the holders of the usufructuary mortgage or as *zarepeshgi* lessees. In fact they paid rent for land held by them under what is de-

(1) 31 Ind. Cas. 303; 11 N. L. R. 124.

scribed as *theka* as per Ex. D-6 which is a receipt for rent paid on 3rd February 1917.

Under these circumstances, it is argued that having accepted rent from defendants after foreclosure, plaintiff must be deemed to have determined his election to ratify even the mortgage on the basis of which the foreclosure was ordered, and consequently accepted the defendants as tenants of the land. Reliance is placed on Ex. D-7 in support of this argument. I am not, however, prepared to go this length. Exhibit D-7 cannot be read singly. Exhibits D-6, D-7 and D-8 which relate to the years 1917 and 1918 must be read together in order to see how far they support the defendants' aforesaid contention that the plaintiff recognized the defendants' status to be that of tenants in place of the original tenant. There are no clear indications of an intention to treat them as tenants; at the most all that one can spell out in defendants' favour is a recognition of their status as *thekadars* or holders of the usufructuary mortgage under Ex. D-3 as before and nothing more.

The term created by the aforesaid mortgage Ex. D-3 has not yet terminated; it is to last till 2002 *Sambat*. The question is whether that term cannot be said to have been voluntarily drowned by the defendant by his own act of suing or obtaining the decree final dated 10th April 1913 (Ex. P-9). The defendants' contention is that their rights under the mortgage (Ex. D-3) are still kept intact, while the plaintiff contends that the defendants must be deemed to have brought about their extinction by their own voluntary act of suing upon their voidable mortgage and acquiring the mortgagor's equity of redemption on its basis.

Ordinarily, the tenant-right, as between the tenant mortgagor and his transferee becomes transferred absolutely to the latter the moment the final decree for foreclosure is passed, and nothing remains which the tenant can claim to be his own. If the mortgage on the basis of which such foreclosure is obtained, is a legal, a consented or ratified mortgage, then, the transferee's position is secure, not only against the tenant, but also against the landlord, because in that case the tenant-right on which the mortgage encumbrance is engrafted becomes validly transferred to the mortgagee as against both the tenant and the landlord, compare *Baliram v. Ramrao*

(2). But if the mortgage is neither legal nor consented to by the landlord, nor subsequently ratified by the acceptance of rent by the landlord from the transferee as such the latter's position is nothing better than that of a mere trespasser liable to be ejected by the landlord, on the ground that the tenant's interest having come to an end by reason of the land being foreclosed or put to auction in execution of a decree based on a mortgage voidable at the instance of the landlord, a right to immediate re-entry into possession has accrued to the landlord.

Here we are concerned with a foreclosure decree obtained by the defendants on the basis of a voidable mortgage of 1894 (Ex. P-2). If the defendants had entered for the first time into possession on the basis of this foreclosure, and their right to possession had stood solely on such foreclosure, I would not have hesitated to give plaintiff a decree for possession against the defendants, because defendants cannot have a better title to possession. The tenant's interest having ceased to exist, the landlord's right of re-entry came into existence and the defendants being only voidable transferees were mere trespassers. Here the position is somewhat different. The defendants were already in possession of the lands under a possessory mortgage which had been duly ratified by the landlord by acceptance of rent from them for many years in the past. By accepting such rent the landlord determined his election once for all to avoid the said mortgage of 1896, and signified his intention to respect the defendants' right under that usufructuary mortgage so long as it lasts, or to accept them as tenants, in case they were to work out their rights in terms of that mortgage, and thus become the owners of the equity of redemption on the basis of that mortgage. A tenant transfers nothing beyond his tenant-right. It is, therefore, argued that any transfer engrafted on the tenant-right whether it be by a mortgage or by a sublease and whether the same be consented to by the landlord or not must determine with the tenant-right, if the tenant-right comes to an end by operation of law or forfeiture: *Vithal v. Ganpat* (3). By consenting to a mortgage the landlord consents to a foreclosure, also provided it takes place so long as the tenant-right is subsisting. The

(2) 4 N. L. R. 57.

(3) 10 C. P. L. R. 65.

consent does not enure for the benefit of the transferee if he has not worked out his rights under the transfer so long as the tenant-right subsisted: *Jaharuddin v. Kesheorao Mehadco* (4). If the tenancy is determined by forfeiture the mortgage even if valid as against the landlord is also determined: *Sarjirao v. Tukaram* (5), *Rani Bahu Parwar v. Sobha Ram* (6), *Vithal v. Ganpat* (3), and *Govindrao v. Sarjabai* (7). The question is whether the mortgagor's right to redeem having ceased by foreclosure there is such a cessation of the tenant-right in this case as would give the landlord a right of re-entry.

In this case the term created by the mortgage of 1896 is yet to expire and the mortgagees have yet to acquire the mortgagor's equity of redemption with reference to that mortgage. It is argued for the appellant that the equity of redemption foreclosed on the basis of the mortgage of 1894 comprised within its scope the whole of the equity of redemption as it stood in 1894 and also on the day of the mortgage of 1896, and, therefore, the whole of the mortgagor's interest passed to the mortgagees and that no separate foreclosure or sale on the basis of the said mortgage of 1896 is now possible. It is said that if a person who holds two mortgages sues on the first mortgage alone and does not make reference to the second one, he is not entitled to sue upon the second mortgage afterwards. The respondents in their turn submit that although they have acquired the rights of the mortgagor and became absolutely entitled to the property mortgaged with them under the mortgage of 1894, they have on the principle which underlies s. 101 of the Transfer of Property Act, got the option of keeping their rights *qua* holders of the equity of redemption, apart from their rights *qua* mortgagees, and that they can legally fall back upon their rights under such of their mortgages as may be valid as against the landlord, namely, the one of 1896, as an answer to the latter's claim for their ejection as trespassers. I think this contention of the respondents is sound and must prevail.

There is a difference of opinion on the point as to whether a person holding several mortgages over the same property, one a

simple and the other a usufructuary mortgage can sue, on the earlier, or the later mortgage, as the case may be, subject to the rights under the other; the question whether the foreclosure on the basis of one mortgage would necessarily be subject to, the rights under the other mortgage, or would extinguish the rights thereunder, is not free from difficulty. Much depends upon the intention of the person suing, and upon how far that intention has been manifested by him in the plaint and the pleadings, or in the form of relief claimed in the suit. If he wants to keep his rights, under the mortgage not sued upon, intact, he has to disclose, that mortgage. The case of *Govind Pershad v. Harihar Charan* (8), on the contrary, permits a suit on earlier mortgage without reference to the later mortgages. In *Laxman Ganesh v. Mathurabai* (9), it has been held that a purchase by the first mortgagee of the mortgaged property at a sale held in execution of his own decree on that mortgage extinguishes his rights under the second mortgage and he can have no cause of action on the basis of the second mortgage because he cannot sue himself. Here no question of enforcing by suit the second mortgage against himself is involved.

It appears from plaintiff's Ex. P.7 which is the judgment dated 21st October, 1910 in the mortgage Suit No. 196 of 1910 based on the first mortgage of 1894, that the mortgagor demanded an account of the usufruct of the land and prayed that credit may be given for the same in that suit; in answer to this demand the present defendants pointed out that they were in possession under the usufructuary mortgage of 1896 (Ex. D-3) and were, therefore, not accountable for the same in the said suit. The Court upheld this contention and decided that the usufruct could not go towards the mortgage sued upon. This clearly shows that the mortgagees had expressed their intention to keep their capacity of subsequent usufructuary mortgagees separate from their other capacity, *viz.*, that of the last mortgagees under which they sought the decree for foreclosure. Defendants' intention to keep their rights under the second mortgage intact both as against the mortgagor and the landlord was thus clearly manifested. I am not consequently prepared to hold, that the foreclosure in this case

(4) 6 C. P. L. R. 100.

(5) 46 Ind. Cas. 244; 14 N. L. R. 107 at p. 109.

(6) 43 Ind. Cas. 912.

(7) 80 Ind. Cas. 872.

(8) 7 Ind. Cas. 330; 38 C. 60; 13 C. L. J. 21; 14 C. W. N. 1053.

(9) 23 Ind. Cas. 221; 38 B. 369; 16 Bom. L. R. 26.

necessarily involved an extinction of the defendants' rights under the usufructuary mortgage.

No doubt as between the mortgagee and mortgagor the equity of redemption of the first mortgage has become vested in the defendants, and as the tenants have lost their right to redeem by virtue of the foreclosure decree final, the defendants have rather three capacities (1) *qua*-mortgagees under the mortgage of 1894, (2) *qua*-usufructuary mortgagees under the deed of 1896 and (3) *qua*-holders of the equity of redemption, centered in them, with effect from 4th October 1913 the date of the final decree Ex. P-9. So far as the mortgagors are concerned they can say to them *qua* holders of the equity of redemption that they are entitled to appropriate the usufruct of the land as absolute owners and not as usufructuary mortgagees; but so far as the plaintiff who is the paramount owner and landlord of the holding foreclosed is concerned, they can, in answer to his suit for their complete eviction as trespassers, say that (apart from the question that they have become owners of the property and they need not, therefore, split up their different capacities as against the mortgagors) they have a right to keep their capacities separate and split them up and fall back on their rights *qua*-usufructuary mortgagees, if they find it to their benefit to keep their interest as such usufructuary mortgagees alive, by breaking up the confluence or unison in them of the mortgagees' and the mortgagor's rights.

The tenancy-rights with which we are concerned is an absolute occupancy tenant-right which is not liable to forfeiture for non-payment of rent of non-cultivation. It is no doubt capable of being determined by operation of law. Until such a contingency happens it is capable of being transferred to, and enjoyed by, the mortgagee on foreclosure. There being no privity of contract between the landlord and such transferee the former ordinarily gets a right to eject the latter as a trespasser as soon as foreclosure takes place. But where as here an independent equitable defence against ejection has become available to a transferee under a voidable transfer, owing to the landlord's conduct in relation to another transfer in his favour, I fail to see why he should not be allowed to rely on it in the alternative. I have held above,

that by accepting rent from the defendants after the date of the foreclosure and by passing a receipt Ex. D-6, dated the 3th February 1917 for the same describing them as holding the lands under a *theka* (i. e., *zarepeshgi* lease or usufructuary mortgage), plaintiff has clearly recognized the mortgagees' right to continue to hold possession under the tenant, or in other words, he has signified his intention to treat the tenant-right as still subsisting in spite of the foreclosure decree for the purpose of working out the defendants' rights as the possessory mortgagees as such. The tenancy hath, under these circumstances, a continuance in the eye of law and the landlord has no right to immediate re-entry as against the defendants, so long as, the term of 50 years has not expired, or the mortgage is not redeemed, if it permits earlier redemption, or, the tenant-right has not determined by operation of law, or by another mode valid under law.

For all these reasons I hold that the mortgage of 1896, which has been ratified by the landlord by accepting rent from the defendants, is a complete answer to the plaintiff's suit for ejectment, and that the claim was rightly dismissed by the District Judge. I, therefore, dismiss the appeal with costs. The costs in the Courts below will be paid as already ordered.

K. S. D.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 526 of 1924.
January 7, 1925.

Present:—Mr. Justice Wallace and
Mr. Justice Madhavan Nair.
PALANIAPPA CHETTIAR
—RESPONDENT No. 1—PETITIONER

versus

N. K. KRISHNASWAMY CHETTIAR
AND OTHERS—PETITIONERS NOS. 1 AND 2—
RESPONDENTS.

Madras District Municipalities Act (V of 1920), s. 4 (a) Rules for conduct of Elections, rr. 4, 32—Rules for decision of election disputes, r. 11—Vice-Chairman of Municipality acting as Chairman and passing his own nomination paper—Breach of rule—Election, validity of—Result of election, whether materially affected—“Vice-Chairman,” whether “officer”—Erroneous interpretation of rule—Revision—Interference by High Court.

Under the rules framed under the Madras District Municipalities Act, relating to the decision of election disputes, a breach of the Election Rules will not in itself justify an Election Court holding that the election is invalid. It must be further proved that the breach of the rules has materially affected the result of the election. [p. 369, col. 2.]

The result of the election must be affected in some other way than by the mere breach of the rule; the breach must have resulted in and produced some other result which has in itself the effect of invalidating a candidature or a nomination or an election. [p. 369, col. 2; p. 370, col. 1.]

The Vice-Chairman of a Municipality is not an "officer" within the meaning of s. 4 (a) of the Madras District Municipalities Act and is not incompetent to stand for election to the Municipal Council. [p. 370, col. 2.]

Where a Vice-Chairman of a Municipality, who was acting as Chairman during the temporary absence of the Chairman, himself scrutinised and passed his own nomination paper in the matter of nomination of candidates for a vacancy in his Municipal ward:

Held, that r. 32 of the rules for the conduct of elections was thereby broken but such breach would not invalidate the subsequent election unless it was proved that the result of the election was materially affected by such breach. [p. 370, col. 1.]

Where a finding by a Court that the result of an election was materially affected by a breach of the Election Rules is based on no evidence and is contrary to a rule governing the conduct of elections, the Court must be held to have exercised its jurisdiction with material irregularity so as to warrant interference by the High Court in revision. But a mere erroneous interpretation of a rule by a subordinate Court unless it is unreasonable or perverse is a matter quite within its jurisdiction and would not amount to material irregularity. [p. 371, col. 1.]

Petition, under s. 115 of Act V of 1903 and s. 107 of the Government of India Act, praying the High Court to revise an order of the Court of the Subordinate Judge, Coimbatore, dated 4th July 1924, in O. P. No. 7 of 1924.

Messrs. T. R. Ramachanda Iyer and S. S. Ramachandra Iyer, for the Petitioners.

Messrs. T. M. Krishnasawmi Iyer and N. Sivarama Krishna Iyer, for the Respondents.

JUDGMENT.—The petitioner asks this Court to set aside the order of the lower Court in O. P. No. 7 of 1924 on its file. That was a petition under the Election Rules framed under the Madras District Municipalities Act, V of 1920, to set aside the election of the present petitioner held on 11th February 1924 for a ward in the Erode Municipality, and for other incidental reliefs.

The lower Court found that the petitioner, who was the Vice-Chairman of the Municipality and was acting as Chairman

during the temporary absence of the Chairman, had broken r. 32 of the rules for the conduct of elections of Municipal Councillors, in that he, in the matter of the nomination of candidates for the vacancy in this ward, had himself scrutinised and passed his own nomination paper. Whether in thus holding that there was a breach of r. 32 he did find at all or did properly find that this violation had materially affected the result of the election and, therefore, he had jurisdiction to set aside the election, is the chief point argued before us.

At one stage in its order the lower Court seems to hold that the mere breach of the rule itself rendered the election void and, therefore, "there is no need to consider whether the result of the election was materially affected." Later on it holds that, as the result of the petitioner's breach of the rules was that voters voted for a candidate who was not validly nominated, the result of the election was materially affected. The two findings seem different aspects of the same conclusion rather than two different conclusions.

One of us, Wallace, J., as already held in a case reported as *Ahmad Thambi Maricar v. Barasa Maracayar* (1) that a breach of the Election Rules will not in itself justify an Election Court holding that the election is invalid and must be set aside. It has to be further proved that that breach of the rules materially affected the result of the election. That follows from the plain words of r. 11 of the "Rules for decision of disputes as to the validity of an election." We have heard nothing now in the argument to induce us to modify that opinion. It does not then follow that a breach of the rules regarding the nomination *ipso facto* renders void or invalid the election carried through by means of such a breach. There is no rule which says so and if a breach of any such rule automatically carried with it the invalidity of a nomination or candidature so that the election following thereon would be invalid also, r. 11 is a superfluous rule. The result of the election, therefore, must be affected in some other way than by the mere breach of the rule, that is, the breach must in itself have resulted in and produced some other result which has in

(1) 72 Ind. Cas. 902; 46 M. 123; 16 L. W. 898; (1922) M. W. N. 813; 41 M. L. J. 69; (1923) A. I. R. (M.) 251.

itself the effect of invalidating a candidature or a nomination or an election, as for example, the breach must have resulted in the candidature of some one incompetent to stand or the nomination of some one who could not be validly nominated. The real question, therefore, which the lower Court had to put to itself was, supposing that the rule now found to have been broken had not been broken and the nomination proceedings had been conducted by the proper authority properly constituted under r. 32, would the result, namely, the petitioner's nomination, have been different? Would the petitioner's nomination have been invalid either because he was incompetent to stand for election at all or because his nomination paper was in some way defective, or would the result have been just what it was, namely, that the petitioner's nomination was valid and his candidature proper? If the latter, we find it impossible to hold that the result of the election was materially affected by the breach of the rules. We are clear also that the lower Court had not looked at the case from that point of view. It has simply held that as there was a breach of the rules, therefore, the nomination was invalid and, therefore, an election comprising an invalid nomination was itself invalid and its result was, therefore, materially affected.

The next point is whether this failure of the lower Court to look at the question from the right point of view is a mere question of an erroneous interpretation of r. 11 on which the Court has jurisdiction to come to a wrong as well as a right interpretation, or is a matter of the exercise of jurisdiction with material irregularity so as to give this Court jurisdiction to interfere under s. 115 of the C. P. C. It appears to us that this is a case where there is no evidence before the lower Court on which it could come to a finding that the result of the election had been materially affected. The evidence before it was only on the question whether the rules had been broken and the Court found that the rules had been broken. It has really not proceeded further than that, and there was no evidence before it to justify any further finding. The lower Court's finding, therefore, that the result was affected was a finding based on no evidence and contrary to r. 11, and it has, therefore, exercised its jurisdiction with material irregularity. This case appears to us one

really of the same complexion as *Ahmad Thambi Maricari v. Bavasa Maracayar* (1).

We are not impressed with the argument of respondents that the general principle of law that a man shall not be a judge in his own cause should be applied and will, if applied, lead to the result that the Vice-Chairman's proceedings are wholly illegal and invalid and, therefore, the whole election is invalid. That is to introduce a principle at variance with r. 11. We are not also clear why this salutary principle should punish the innocent with the guilty and invalidate nominations of other candidates than the Vice-Chairman's equally with the Vice-Chairman's himself. It was obviously to prevent such untoward results that r. 11 was enacted.

The respondents have contended that by force of s. 49 of the Madras District Municipalities Act the Vice-Chairman is incompetent to stand for election because he is an "officer" of the Municipality, and the lower Court in a sort of aside in para. 12 of its orders seems to accept this contention. It is not very clear whether it considers its finding on this point as sufficient to justify a conclusion that the result of the election had been materially affected, but even if it did, we think here also it has erred in jurisdiction. Its inference no doubt will be correct in law if the Vice-Chairman were an "officer" of the Municipality within the meaning of s. 4 (a) but it is quite clear that he is not. Rule 32 itself clearly contemplates that the Vice-Chairman may himself be a candidate for a ward while he is the Vice-Chairman; and so may the Chairman. Section 12, sub-s. 5 of the Act would also imply that it is not necessary for the Chairman or the Vice-Chairman to resign their posts before they can stand for election as Councillors. This again is not a case of a mere mistake in interpretation of s. 49. It is the question of whether the Vice-Chairman is or is not within the meaning of the word "officer" in that section, and, as we have already pointed out r. 32 itself makes that point quite clear and the lower Court cannot legally base its finding that there has been a breach of r. 32 on a ground which r. 32 itself contradicts. The Rule must be accepted or rejected in its entirety.

The lower Court has found also that the rule directing that four days' notice of the poll should be given has been violated. But there was no evidence before it that this

violation has affected the result of the Election. The lower Court has not in fact recorded any finding that this violation of the rules affected the result of the election, nor has it set aside the election because of its finding on this fact. Its order, therefore, setting aside the election is not based on this finding.

The petitioner has argued that r. 32 does not apply at all when there is a Chairman appointed but he is temporarily absent. He contends that the rule applies only when there is no Chairman appointed at all. But it is quite a plausible and reasonable interpretation of r. 32 that it applies when there is no Chairman in charge, that is, when there is an appointed Chairman but he is temporarily absent. In any case, we consider that the point is a mere matter of the interpretation of this particular rule, and, unless that interpretation was unreasonable or perverse, a mere erroneous interpretation by the lower Court is a matter quite within its jurisdiction and would not amount to material irregularity in the exercise of jurisdiction. We are not prepared to hold that the lower Court in so interpreting r. 32 exercised its jurisdiction with material irregularity.

However, as we find, for reasons already given that the lower Court has not really decided the question whether the result of the election was materially affected, the lower Court's order cannot be supported, and must be set aside and the case sent back to it to be re-heard in the light of the remarks that we have made above as to whether the result of the election has been materially affected by the breach of the rules which it finds did occur. We order accordingly and direct the costs to abide the result.

This disposes also of the memorandum of objections.

V N. V.

Order set aside.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 370 OF 1924.

August 21, 1925.

Present:—Mr. Dalal, J. C.

SAJJAD ALI KHAN—DEFENDANT—
APPELLANT

versus

JAGMOHAN DAS—PLAINTIFF—
RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VII, r. 11 (c), O. XXXIII, r. 3, O. XLIV, r. 1—Application for leave to appeal as pauper, dismissal of—Procedure—Appeal, memorandum of, order on—Court-fees, payment of—Presentation of memorandum of appeal, mode of.

An application for leave to appeal as a pauper and the memorandum of appeal accompanying such application must be treated as two separate documents and if the Court dismisses the application for leave to appeal as a pauper summarily under the proviso to r. 1 of O. XLIV of the C. P. C., or after enquiry on the ground that the applicant is not a pauper, the Court should pass a separate order on the memorandum of appeal directing the appellant to pay the Court-fee within a certain time, with a penalty attached of his appeal being liable to be dismissed for want of such payment. [p. 372, col. 1.]

Rule 3 of O. XXXIII of the C. P. C., read with r. 1 of O. XLIV of the Code, applies only to the presentation of an application for leave to appeal as a pauper and has no application to the presentation of the memorandum of appeal which must accompany such application. [*ibid.*]

Appeal against an order of the District Judge, Lucknow, dated the 21st July 1924, dismissing that of the Additional Judge, Small Cause Court, Lucknow, dated the 31st March 1924.

Mr. M. Wasim, for the Appellant.

Mr. Aditya Prasad, for the Respondent.

JUDGMENT.—The defendant Sajjad Ali took proceedings under O. XLIV, r. 1. That rule lays down that any person entitled to prefer an appeal who is unable to pay the fee required for the memorandum of appeal may present an application accompanied by a memorandum of appeal and may be allowed to appeal as a pauper subject in all matters, including the presentation of such application, to the provisions relating to suits by paupers in so far as those provisions are applicable. There is also a proviso for summary rejection. The application to appeal as a pauper was summarily rejected in terms of the proviso to r. 1. The application was presented with a memorandum of appeal on 30th April 1924 and the application was rejected on 15th May 1924. No order was passed by the learned Judge on the memorandum of appeal.

Subsequently on 8th July 1924 the defendant put in an application that proper Court-fee for the memorandum of appeal may be received. This application was treated as one under s. 149 of the C. P. C. and rejected. The defendant has come here in second appeal.

The first objection taken was that no second appeal lay. In my opinion the proper order for the lower Court to pass was to reject the memorandum of appeal. This would amount to a decree dismissing the appeal and a second appeal would lie from that decree. The lower Court has overlooked the fact that on 30th April 1924 the defendant Sajjad Ali Khan not only presented an application to appeal as a pauper but also a memorandum of appeal on which some decree ought to have been passed. When the defendant applied to pay Court-fee what he stated in substance was that his appeal may be heard and the lower Court passed a decree dismissing the appeal on the ground that the appeal was such as could not be heard for want of payment of Court-fee. Personally I have always adopted the procedure of considering the two documents presented under O. XLIV, r. 1 as separate. Whenever I happened to dismiss the application to appeal as a pauper summarily under the proviso to r. 1 or after inquiry on the ground that the applicant was not a pauper, I passed a separate order on the memorandum of appeal directing the appellant to pay the Court-fee within a certain time with a penalty attached of his appeal being liable to dismissal for want of such payment. In my opinion, that is the correct procedure which ought to be followed having regard to the provisions of O. VII, r. 11 (c) which apply to plaints read with s. 107 (2) of the C. P. C., which makes the provisions relating to suits applicable to appeals.

A point was taken that the application to appeal as a pauper was not presented personally as required by O. XXXIII, r. 3 which also governs the provisions under O. XLIV. This defect was, however, cured by the lower Court accepting presentation of the application and taking action thereon. Apart from that, the rule would apply to the presentation of the application to appeal, as a pauper and not to the presentation of the memorandum of appeal. The difference between O. XXXIII relating to plaints and O. XLIV relating to pauper appeals is that in the case of a suit, no

plaint is to be supplied along with an application to sue as a pauper. If that application is accepted, the application is treated as a plaint and if it is not accepted it is rejected and the law provides for the filing of the plaint subsequently on payment of proper Court-fee under r. 15 of O. XXXIII. The distinction in O. XLIV of presenting a memorandum of appeal along with an application to sue as a pauper is made with an object because the time at the disposal of an appellant is limited and it would be unfair to deprive him of his right to appeal on payment of a proper Court-fee in case of his application to appeal as a pauper being disallowed. For the institution of a plaint the time at the disposal of the plaintiff is comparatively much longer and even after procedure resulting in the dismissal of his pauper application, he would have time to sue on payment of proper Court-fee. I am of opinion that the presentation of the memorandum of appeal through a Pleader was not a breach of the rules and did not entail the penalty of rejection of that memorandum.

When the defendant put in an application to pay Court-fee, his memorandum of appeal was existing without any order being passed thereon, so no question of limitation arose. The only order which the Court could pass would be to fix a time within which the Court-fee was to be paid with the attachment of a penalty that the memorandum would be rejected on non-payment of such fee within the time limited. The matter has been considered at great length by a Bench of the Bombay High Court in *Achut Ramchandra v. Nagappa* (1) and the opinion of that Court has been approved of by the Calcutta and Madras High Courts [*Raaha Kanta Saha v. Debendra Narayan Saha* (2) and *Nellavadijn Ammal v. Subramania Pillai* (3)]. All the contentions of the learned Counsel for the plaintiff-respondent are met in that judgment. The learned Counsel argued that acceptance of Court-fee will be contrary to the provisions of ss. 4, 6 and 28 of the Court Fees Act. Their Lordships of the Bombay High Court explained that in a case like the present there was no question of receiving, or filing, or exhibiting, or acting upon an insufficiently stamped

(1) 21 Ind. Cas. 337; 38 B. 41; 15 Bom. L. R. 902.

(2) 70 Ind. Cas. 101; 49 C. 880; (1922) A. I. R. (C.) 506; 27 C. W. N. 566; 38 C. L. J. 78.

(3) 38 Ind. Cas. 617; 40 M. 657; 31 M. L. J. 269.

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GAJADHAR v. AULAD HUSAIN.

document, as if it were sufficiently stamped but of determining what, if any, opportunity the appellant can claim under the law for removing the objection on the score of the insufficiency of the stamp. On the date when the memorandum of appeal was presented the law did not require any Court-fee stamps because it was accompanied by an application to appeal as a pauper. The payment of Court-fee was rendered necessary subsequently when the application was rejected and then if the lower Court had given the defendant an opportunity to pay Court-fee, he was willing to carry out such an order. Considerations in the ruling of the Patna High Court quoted by the appellant's learned Counsel were different. In *Ram Sahay Ram Pandey v. Kumar Lachmi Narain Singh* (4) the appellant had deliberately and to suit his own convenience paid on his appeal an insufficient Court-fee. Such was not the case here. As already pointed out, when the memorandum of appeal was presented the defendant was privileged to present it without payment of Court-fee.

I set aside the order and decree of the lower Court and direct that if the proper Court-fee is paid by the defendant in the lower Appellate Court within one month of to-day's date his appeal shall be heard by the lower Appellate Court and disposed of according to law. On non-payment of such Court-fee within the time specified this appeal shall stand dismissed with costs. On payment of the Court-fee costs here and heretofore shall abide the result. If the deposit is made in the Trial Court the office shall put up a report as to the refund of the Court-fee on this appeal.

Z. K. *Order set aside.*
(4) 42 Ind. Cas. 675; 3 P. L. J. 75; 5 P. L. W. 18.

ODDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 56 OF 1925.

July 22, 1925.

Present :—Mr. Simpson, A. J. C.

GAJADHAR—DEFENDANT—APPLICANT

versus

AULAD HUSAIN—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Question of fact—Error of law—Revision—Interference by High Court.

The High Court will not ordinarily interfere with a finding of fact in revision.

Where a Court has jurisdiction to decide a question of law, the mere fact that its decision is erroneous is no ground for interference in revision.

The question whether the death of one of the arbitrators to whom a dispute had been referred for decision renders an award made by the remaining arbitrators invalid, is a question of law, and the mere fact that this question is decided erroneously by a Court having jurisdiction to decide it will not render its decision open to interference in revision.

Application against an order of the Additional Subordinate Judge, Fyzabad, dated the 3rd February 1925, confirming that of the Munsif, Akbarpur, Fyzabad, dated the 25th October 1924.

Mr. K. P. Misra for Mr. G. N. Misra, for the Applicant.

ORDER.—This is an application under s. 115 of the C. P. C. in revision. There was an arbitration and a decree in terms of the award. This was in the Court of the learned Munsif of Akbarpur. An appeal from this decree was heard by the learned Additional Subordinate Judge of Fyzabad and was dismissed. The grounds of revision are that the award was signed by only nine out of the twelve arbitrators, that one of the arbitrators having died, the arbitration fell through, and because two arbitrators who were alive but who did not sign the award, did not do so, because they did not agree to the decision. The finding of the learned Additional Subordinate Judge is that the two arbitrators, who were alive and who did not sign, were absent at the time the award was signed, but had previously consented to the decision. This Court will not ordinarily interfere with a finding of fact in revision. As regards the point that one of the arbitrators had died, this means rendering the award invalid. This is a question of law which the Court below had jurisdiction to decide. If it was wrongly decided there is no ground for revision.

The application is dismissed.

Z. K. *Application dismissed.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 267 OF 1923.

July 1, 1925.

Present:—Justice Sir B. K. Mullick, Kt.,
Acting Chief Justice. and Mr. Justice
Kulwant Sahay.

AGENT OF THE BENGAL NAGPUR
RAILWAY COMPANY LTD.—DEFENDANT
—APPELLANT

versus

HAMIR MULL CHAGAN MULL

AND ANOTHER—PLAINTIFFS—RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 31—
Railways Act (IX of 1890), s. 77—Goods entrusted to
Railway for carriage—Non-delivery—Damages, suit
for—Limitation—Notice, whether necessary.*

Where compensation is claimed for non-delivery of goods entrusted to a Railway Company for carriage, the suit, whether laid in tort or contract, is governed by Art. 31 of Sch. I to the Limitation Act and must be brought within one year from the date when the goods ought to have been delivered. [p. 374, col. 2.]

Non-delivery of goods entrusted to a Railway Company for carriage constitutes "loss" within the meaning of s. 77 of the Railways Act and, therefore, notice under s. 77 of the Railways Act must be given before a suit for the recovery of damages for non-delivery can be maintained. [p. 375, col. 1.]

Case-law referred to.

Second appeal from a decision of the District Judge, Manbhum, dated the 2nd January, 1923 setting aside that of the Subordinate Judge, Purulia, dated the 8th June 1922.

Mr. A. B. Mukherji, for the Appellant.

Mr. P. Dayal, for the Respondents.

JUDGMENT.

Mullick, Actg. C. J.—The plaintiffs consigned 25 bales of cloth to themselves by the Bengal Nagpur Railway Company to be carried from Assansol to Barabhum. The goods were entrusted to the Railway on the 25th August 1918. On the 10th September 1918 only 24 bales were delivered and one bale was missing. On the 21st August 1921 the plaintiffs brought a suit before the Subordinate Judge of Manbhum claiming compensation for non-delivery. The Subordinate Judge dismissed the suit.

An appeal was taken by the plaintiffs to the Court of the District Judge and he on the 2nd January 1923 reversed the decision of the Subordinate Judge and gave the plaintiffs a decree for Rs. 950 as compensation with costs.

The present second appeal is preferred by the Agent of the Bengal Nagpur Railway Company.

A preliminary point which was not

taken in the memorandum of appeal to this Court has first to be noticed.

It appears that in the Court of the Subordinate Judge the plaintiffs correctly impleaded the Railway Company as the defendant but in the Court of the District Judge the respondent named was the Agent of the Bengal Nagpur Railway. This was clearly an error, for having regard to the fact that it was the Company that was sued in the Trial Court there can be no doubt that in the District Judge's Court the plaintiffs intended to implead the same party and that they misdescribed him as the Agent of the Railway. The present appeal is preferred by the Agent and in any view of the matter he cannot now be heard to say that the appeal cannot proceed merely because he was impleaded in his personal capacity in the lower Appellate Court.

The next two points are more substantial. The first of these is whether Art. 31 of the Indian Limitation Act or Art. 115 governs the suit. The learned District Judge relying on the case of *Radha Sham Pasa v. Secretary of State for India* (1) held that where the consignee is the plaintiff Art. 31 applies but if the consignor is the plaintiff then Art. 115 operates. Upon the authorities this view cannot be supported. The following decisions show that whether the suit is laid in tort or contract if compensation is claimed for non-delivery of goods entrusted to a carrier the period of limitation is one year as prescribed by Art. 31 and that the residuary Article has no application: *Indian General Navigation Co., Ltd. v. Nanda Lal Banik* (2), *Jaldu Venkatasuba Rao v. Asisatic Steam Navigation Company of Calcutta* (3), *Mutsaddi Lal v. Bombay Baroda and Central Indian Railway Co.*, (4), *Vally Mahomed Haji Gunny v. Nederland S. Navigation Co.*, (5), *Gobind Ram Marwari v. East Indian Railway Co.* (6) [decided by Dawson Miller, C.J., and Kulwant Sahay, J., on the 22nd June 1923]. The *East Indian Railway Co. v. Sagar Mull* (7) decided by

(1) 34 Ind. Cas. 130; 44 C. 16; 20 C. W. N. 790; 23 C. L. J. 547.

(2) 3 Ind. Cas. 469; 13 C. W. N. 851.

(3) 30 Ind. Cas. 840; 39 M. 1; 29 M. L. J. 342; 2 L. W. 805; 18 M. L. T. 236; (1915) M. W. N. 644 (F. B.).

(4) 58 Ind. Cas. 547; 42 A. 390; 18 A. L. J. 377; 2 U. P. L. R. (A.) 84.

(5) 80 Ind. Cas. 612; 27 C. W. N. 806; (1924) A. I. R. (C) 173.

(6) 71 Ind. Cas. 565; 4 P. L. T. 331; (1923) A. I. R. (Pat.) 298.

(7) 89 Ind. Cas. 672; 6 P. L. T. 559; 4 Pat. 482; (1925) A. I. R. (Pat) 611.

Ross and Kulwant Sahay, JJ., on the 23rd January 1925. Here the claim is for compensation for breach of contract on account of non-delivery and should have been made within one year from the date when the goods ought to have been delivered. The suit has, therefore, been brought long after the due date.

The other point is whether a notice under s. 77 of the Indian Railways Act was necessary in this case. It is found as a fact by the learned District Judge that no notice was served but the learned Judge holds that as the suit is brought for non-delivery and not for loss, s. 77 of the Indian Railways Act has no application. For this view he relies upon the case of *East Indian Railway Co., v. Kali Charan Ram Prasad* (8). That judgment, however, has been dissented from in later cases in this Court and also in the Calcutta High Court, see *Great Indian Peninsular Railway Co. v. Jitan Ram and Nirmal Ram*, (9), *East Indian Railway Co. v. Netram Genesh Lal* (10), *Assam Bengal Railway Co. v. Radhika Mohan Nath* (11), *East Indian Railway Co. v. Sheo Prasad and Ram Prasad* (C. R. No. 118 of 1924 decided on the 28th May 1924). These authorities show that non-delivery constitutes loss within the meaning of s. 77 and, therefore, the service of notice under the provisions of that section is essential.

On both these grounds, therefore, the plaintiffs must fail. The appeal is accordingly decreed with costs throughout and the suit is dismissed.

Kulwant Sahay, J.—I agree.

Z. K. *Appeal dismissed.*

(8) 69 Ind. Cas. 103; 3 P. L. T. 215; (1922) Pat. 145; (1922) A. I. R. (Pat.) 106.

(9) 72 Ind. Cas. 440; 2 Pat. 442; 4 P. L. T. 173; (1923) Pat. 82; 1 Pat. L. R. 169; (1923) A. I. R. (Pat.) 285.

(10) 75 Ind. Cas. 26; (1924) A. I. R. (Pat.) 812.

(11) 72 Ind. Cas. 714; 28 C. W. N. 438; (1923) A. I. R. (C.) 397.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND RENT APPEAL No. 23 OF 1924.

May 14, 1925.

Present:—Mr. Simpson, A. J. C.

TAWAKKUL KHAN—DEFENDANT—

APPELLANT

versus

Raja MUHAMMAD MEHDI ALI KHAN—

PLAINTIFF—RESPONDENT.

Oudh Rent Act (XXII of 1886), ss. 32 A, 32 B, 127

—Rent, arrears of, suit to recover—Agreement to pay rent—Relationship of landlord and tenant—Defendant not entitled to possession of land—Findings against plaintiff—Suit, whether maintainable.

Plaintiff brought a suit to recover arrears of rent from the defendant on the allegation that the defendant held the land under a *kabuliyat* executed by him. It was further alleged that even if the *kabuliyat* was not proved, the defendant had been paying rent to the plaintiff and that the relationship of landlord and tenant existed between the parties. The defendant set up a quasi-proprietary title to the land. He did not admit that he was a tenant of the plaintiff at all and denied the *kabuliyat* and the payments of rent alleged by the plaintiff. It was found that the *kabuliyat* was fictitious and that the defendant had never paid rent to the plaintiff. Plaintiff also failed to show that the defendant was not entitled to possession of the land:

Held, that the plaintiff's suit must fail inasmuch as (a) he could set up no case under s. 32 A of the Oudh Rent Act as it had been found that defendant had never agreed to pay rent to him; (b) he could not proceed under s. 32 B of the Oudh Rent Act as he had failed to prove that the relationship of landlord and tenant existed between him and the defendant; (c) he could not succeed under s. 127 of the Oudh Rent Act as he had failed to show that the defendant was a person not entitled to the possession of the land. [p. 378, col. 2.]

Second Rent appeal against a decree and order of the District Judge, Fyzabad, dated the 6th August 1924, reversing that of the Assistant Collector, First Class, Sultanpur, dated the 7th May 1923.

Mr. Ali Muhammad, for the Appellant.

Mr. Niamat U'llah, for the Respondent.

JUDGMENT.—The *taluqdar* of Hasanpur is the plaintiff-respondent. The suit was one for arrears of rent. In the plaint as originally framed the area was 37 *bighas* 9 *biswas* and the annual rent Rs. 175. The date of institution was 12th June 1922. The claim was for three years of rent, allowance was given for realizations in each year, and the balance was sued for. The defendant, who is now appellant, denied that he was a tenant at all. He said that his ancestor had originally been a *taluqdar* and that when his *illaga* was incorporated in that of Hasanpur a large area was reserved as rent free *sir* land. The land in suit was said to be a remnant of this. The written statement was filed on 25th July 1922. On 16th August 1922 plaintiff amended his plaint, and based his claim on a *kabuliyat*, Ex. 1, a document which is not dated. He now stated the area to be 39 *bighas*, 19 *biswas* and 10 *biswansis*, and the rent to be Rs. 225 6 0. The claim became one for Rs. 295-14-0. The following issues were framed:—

1. Whether the defendant has ever paid rent as mere tenant to the plaintiff or not?

The decision was that he had not done so, so that all the payments set out in the plaint were found to be fictitious.

2. Whether the suit is barred by limitation?

I cannot find any decision on this issue.

3. How much rent, if any, is in arrears?

4. What is the correct rent of the holding?

5. Whether there was a contract between the parties for payment of the rent?

On these issues it was found that there was no contract between the parties and that nothing was due. The 5th issue was whether the plaint was defective, because some plots which are not cultivated by the defendant are shown in the plaint as under his cultivation. This issue is no longer of importance. In the result the learned Assistant Collector dismissed the suit. The plaintiff appealed to the District Judge.

The principal point raised in the appeal was evidently the *kabuliyat*. The learned District Judge found that the *kabuliyat* was not proved. He said "As the plaintiff has failed to prove the *kabuliyat*, and has based his claim upon this contract alone, I cannot alter the nature of his suit and give him a decree for arrears of rent for the use and occupation of the plots in suit." He said "It is unnecessary for me to discuss the other issues or to decide whether the suit is barred by limitation, or whether the defendant is a mere tenant of the plaintiff or not, and whether the plaint is defective because it contains plots which are not in the cultivation of the defendant and so on. Plaintiff's suit fails because he does not prove that any rent was agreed upon between the parties or was fixed by any Court of competent jurisdiction."

The plaintiff filed a second appeal in this Court. A Judge of this Court passed an order for remand, and the decision of the present appeal turns entirely on the correct interpretation of that order. In so far as any question was settled finally between the parties by that judgment it cannot now be re-opened. My learned brother pointed out that there were other issues besides the question of a *kabuliyat*, namely, whether the defendant had ever paid rent as a mere tenant to the plaintiff, how much rent, if any, was in arrears, and whether there was any contract between the parties for the payment of rent. He said;

"In his grounds of appeal to the lower Appellate Court, the appellant not only

appealed against the decision rejecting the *kabuliyat*, but referred to the entries in the *patwari's* papers. The lower Appellate Court agreed with the First Court in rejecting the *kabuliyat* and refused to consider the other grounds of appeal, for the reason that the appellant ought not to be allowed to alter the nature of his suit, and obtain a decree for arrear of rent for use and occupation of the plots in suit." It was then decided that this was too strict a view of the law. This is a decision that the appellant can be allowed to alter the nature of the suit and obtain a decree for arrears of rent for use and occupation of the plots in suit. The judgment proceeded to discuss two cases which were referred to by the learned District Judge, and went on "In the present suit, it was the appellant's case that the defendant had agreed to pay rent. He relied in the first place on the *kabuliyat*, but in the event of his being able to prove that the defendant has actually been in possession of the plots in suit, and has actually paid rent to him for them as a tenant, he would at any rate be able to point to an implied agreement to pay rent, and, to claim arrears for any years in which rent had not been paid. There is certainly a finding by the First Court that rent has not been paid. The appellant challenged that finding in his grounds of appeal, and it was open to the lower Appellate Court either to uphold or to reverse that finding. If the lower Appellate Court had reversed that finding, the result would have been that the relationship of landlord and tenant would have been found to subsist between the parties, and in this case, I do not think that the case could have been dismissed on the technical ground that the plaintiff had in the first place relied on the *kabuliyat*." The judgment does not go on to say what the consequences would be if the lower Appellate Court had upheld that finding. This is unfortunate, because that is what the lower Appellate Court has now done. The judgment goes on. "The appellant admits that if there were a definite finding that the defendant is not a mere tenant, but has some kind of proprietary right in the plots, the suit will have to be dismissed." The point is thus narrowed on both sides. On the one hand, if the plaintiff can prove payment of rent he is entitled to a decree. On the other hand, if the defendant can prove any status of a

proprietary nature, higher than that of a mere tenant, the plaintiff's suit must be dismissed. But neither of these points has been so found by the learned District Judge. The judgment goes on "It is objected on behalf of the respondent that the plaintiff-appellant did not sue under s. 127 of the Oudh Rent Act, and that if he wanted to set up that case he should have done so at the earliest possible moment, but it appears to me that the main question between the parties has from the very beginning been whether the relation of landlord and tenant subsists between them. The case set up in the plaint was that the defendant was a mere tenant. The defendant denied this and claimed to have some kind of proprietary title. The plaintiff not only set up his *kabuliyat*, but attempted to prove that rent has been paid to him by the defendant. The case based on the *kabuliyat* has definitely failed, but there is, what seems to me, to be a perfectly legitimate alternate case, namely, that the defendant was in occupation of the land with the consent of the plaintiff, and had been paying rent to him, that he is, therefore, to be treated as a tenant, and whether the actual section of the Oudh Rent Act that is to be applied to the case is s. 32A, s. 32B or s. 127, it should be disposed of on its merits, and not on the technical ground taken by the learned Judge. The First Court has already come to a finding, namely, that no rent has been paid by the defendant to the plaintiff and that the defendant had not been proved to be a tenant of the plaintiff. The appeal against this finding has not been decided by the District Judge. I, therefore, order that the suit be remanded to the lower Appellate Court under O. XLI, r. 23 of the O. P. C. for a decision on this point."

A remand under O. XLI, r. 23 means the re-admission of the appeal and determination by the learned District Judge, but it is open to the Court ordering the remand to direct what issues shall be tried in the case. The issue remanded was on the finding of the First Court that no rent had been paid, and that the defendant had not been proved to be tenant of the plaintiff. It is here that I find some difficulty in determining what the order of remand really means. The learned District Judge decided that no rent had ever been paid by the defendant to the plaintiff, and if he had been free to exercise his own judgment

it seems clear that he would have dismissed the suit on this finding, but he considered that this Court had decided that it was open to the plaintiff to fall back on his position as proprietor of the land in suit being *taluqdar* of Hasanpur estate, and to say that the defendant was liable to pay rent whatever his status might be. Having decided, against his own judgment, that some rent must be fixed, the learned Judge accepted an agreement between the parties that the rent should be Rs. 150, and he gave a decree on the basis of that rental. The amount came for four years to Rs. 600 but as the plaintiff had claimed Rs. 398-1-0 only, the decree was restricted to that amount. I do not think that this was what the remand order meant. We have seen that the remand order was quite clear as to the effect of a finding that rent had been paid, but I conceive that in the event of a finding that no rent had ever been paid, the learned District Judge was to make use of his own judgment and determine the rights of the parties with regard to the rent claimed. The order of remand goes on as follows:—"If the learned Judge comes to the conclusion that the defendant has been paying rent to the plaintiff, and is a tenant of his, he will be able to come to a further decision as to whether a decree for arrears of rent can be given to the plaintiff. If, on the other hand, he finds that the relationship of landlord and tenant has never existed between the parties, he will be able to dispose of the appeal on the basis of that finding, and the appellant will know in what position he is in the event of his deciding to sue for any relief other than that claimed in the present suit."

When the case came before the learned District Judge on this remand he came to a finding that no rent had been paid. He said "There is no evidence on the record which will enable me to give a finding that the relationship of landlord and tenant exists between the parties, or that rent was ever received by the plaintiff from the defendant in respect of the land in suit." That would have sufficed for the dismissal of the suit. It is for the plaintiff to show that the relation of landlord and tenant exists or he cannot get a decree. The only difficulty arises from the existence of s. 127 and from the reference to that section in the order of remand. Section 127 runs as follows:—

"A person taking or retaining possession of land without being entitled to such possession may, at the option of the person entitled to eject him as a trespasser, be treated as a tenant, and shall thereupon be liable for the rent of that land at such rate as the Court may determine to be fair and equitable."

It is also laid down in s. 32B that a suit for determination of rent under s. 32B (1) or s. 127 may be joined with a suit for arrears of rent under cl. (2) of s. 108. There is thus a possible procedure by which a landlord may obtain a decree for arrears of rent from a person who is not a tenant, and who has never agreed to pay him any rent at all, and the learned District Judge has interpreted the order of remand to mean that he was not to exercise his own judgment as to whether the plaintiff in the present case possessed any such right or not. I do not think that is what the order of remand meant. I interpret it to mean that the suit ought not to have been dismissed merely because the *kabuliyat* was not proved. Two other aspects of the case ought to have been considered. The first was plaintiff's allegation that defendant had paid him rent. That case has now been disposed of on the finding of the District Judge that no rent was ever paid. That is a finding of fact which cannot be questioned in second appeal. The other case which was contemplated in the order of remand was that the plaintiff although he had never received rent, might be able to show that the defendant was in fact his tenant, although no rent had been fixed, or that he was a person not entitled to possession at all, a trespasser, who could be attacked under s. 127. But the order of remand did not decide that the plaintiff possessed any of these rights. It merely decided that he was entitled to set up these pleas.

I have now to decide what the proper order is under the circumstances. One course would be to remand the case again in order that the lower Appellate Court should apply its mind to the question whether s. 127 is applicable, not holding itself bound to decide the point in plaintiff's favour. But this is the fifth judgment which has been written in this matter and I am unwilling to prolong the litigation. I find that there are enough findings of fact before me to enable me to dispose of the case. The plaintiff brought a suit for

arrears of rent and he alleged that the terms of the tenancy were contained in a *kabuliyat*. He also alleged that he had received payments of rent from the defendant. The defendant set up a *quasi*-proprietary title. He did not admit that he was plaintiff's tenant at all. He denied the *kabuliyat*, and he denied the payments of rent. We now possess findings of fact, which cannot be challenged in second appeal, that the *kabuliyat* is not genuine, and that no rent was ever paid. The plaintiff can set up no case under s. 32A, because no rent has been agreed upon between him and his tenant, nor can he proceed under s. 32B because he has failed to prove that the defendant is a tenant at all. Lastly he cannot succeed under s. 127, because he has failed to show that the defendant is a person not entitled to possession.

The plaintiff's case fails entirely. I accept the appeal, set aside the judgment and decree of the lower Appellate Court, and dismiss plaintiff's suit with costs in all Courts. He will however get the costs which were awarded to him by the order of remand of my learned brother.

In view of this decision, respondents' cross-objection fails and is dismissed with costs.

Z. K.

Appeal accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 206-B OF 1923.

February 11, 1924.

Present:—Mr. Kinkhede, A. J. C.

Sheikh JAMU—APPLICANT

versus

MUHAMMAD IBRAHIM AND ANOTHER—
NON-APPLICANTS.

Evidence Act (I of 1872), s. 92—Promissory-note—"On demand," meaning of—Oral agreement re exigibility, whether admissible—Oaths Act (X of 1873), scope of—Agreements between parties in pending suits—Court, powers of—Civil Procedure Code (Act V of 1908), O. XXIII, r 3.

A subsequent oral agreement varying the terms of a promissory-note as regards its exigibility on demand is inadmissible in evidence and cannot be proved under s. 92 of the Evidence Act. [p. 379, col. 1.]

Saikh Imam v. Ishak Ali, 10 Ind. Cas. 734; 7 N. L. R. 39, referred to.

An acceptance of the challenge by a party to a suit on a promissory-note to make the declaration about

the existence of such an agreement on oath and the making of such a declaration on oath in pursuance thereof cannot override the provisions of the Evidence Act, as the powers of the Court to record agreements under O. XXIII, r. 3, C. P. C., are restricted to lawful agreements only and cannot be extended to one which is not legally provable. [p. 379, col. 2.]

The usual import of the words "on demand" in the promissory note is that the debt is due and payable immediately. [p. 379, col. 1.]

Meghraj v. Johnson, 31 Ind. Cas. 880; 11 N. L. R. 189 at p. 192, followed.

The provisions of the Oaths Act are not intended to be utilized in such a manner as would abrogate the provisions of the Evidence Act. [p. 379, col. 2.]

Application for revision of a decree of the Small Cause Court, Amraoti, dated the 2nd October 1923, in Small Cause Suit No. 1908 of 1923.

Mr. J. G. Ghose, for the Applicant.

Mr. M. Y. Sharif, for the Non-Applicants.

ORDER.—The only point worth consideration is whether a subsequent oral agreement varying the terms of a promissory-note as regards its exigibility on demand can be legally proved. In *Saikh Imam v. Ishak Ali* (1) it has been held that the maker of a promissory note is not debarred from setting up against the payee a subsequent written agreement by the latter not to enforce it. If the agreement pleaded in this case had been written I think it was provable, otherwise it cannot be proved. Section 92, proviso (4) of the Indian Evidence Act is relied upon as not excluding evidence of a subsequent oral agreement and it is argued that a promissory-note is not such a contract as is required by law to be in writing. To this s. 4 of the Negotiable Instruments Act is a complete answer. The very definition of a promissory-note shows that it must be a promise *in writing*. It is, therefore, of the very essence of a promissory note that the promise to pay must appear in writing. The instrument, therefore, embodies a contract in writing which the law requires should be in writing. The usual import of the words "on demand" in the promissory-note is that the debt is due and payable immediately, *vide Meghraj v. Johnson* (2). To allow evidence of an oral agreement to be given would be to override the express contract embodied in the promissory-note to pay immediately and s. 92 of the Evidence Act would preclude such proof being admissible under law. The contention, therefore, fails. It has been argued that the applicant was challenged to make

the declaration about the existence of the alleged agreement on special oath and he accepted the challenge and made the declaration, and that in view of the statement made on special oath in the course of the proceedings the Court below was bound to give effect to the agreement of the parties arrived at as regards the truth or otherwise of the matter stated. It is pointed out that the statement is conclusive under the Indian Oaths Act.

All this contention is correct, but the learned Advocate ignored one very important circumstance in arguing this point; he forgets that the Indian Oaths Act itself treat this statement or declaration on special oath not merely a statement but "evidence." The only effect of the challenge and of its acceptance was to establish beyond doubt the existence of an oral agreement between the parties and that the plaintiff lost his right to rebut the evidence so given, and nothing more. The provisions of the Indian Oaths Act are not intended to be utilized in such a manner as would abrogate the provisions of the Indian Evidence Act.

The argument that the parties must be deemed to have agreed to have the matter in dispute between them decided by the special oath of one of them and not by any adjudication at the hands of the Court and that the moment the agreement was made and recorded and the oath administered the Courts' jurisdiction became restricted to giving effect to the agreement of the parties and to decide the case in terms of the agreement and on the merits. This argument is also one which cannot prevail. Order XXXIII, r. 3, C. P. C., which deals with the question of Courts' power to record agreements arrived at during the pendency of the suit restricts the Courts' power to only such agreements as are "lawful". If the oral agreement was not legally provable, I would not be prepared to hold that the parties could make it the subject of an adjustment or that the adjustment was such an adjustment as could be said to have been lawfully arrived at and as would oust the Courts' jurisdiction to deal with the merits of the case.

It must, therefore, be held that the oral agreement is conclusively established but that the law of evidence intervenes and says that it is an inadmissible piece of evidence which the Court is precluded from

(1) 10 Ind. Cas. 734; 7 N. L. R. 39.

(2) 31 Ind. Cas. 880; 11 N. L. R. 189 at p. 192.

looking at. The Courts' jurisdiction to decide the case on the merits therefore remained unaffected and I do not see any reasons to interfere with the decision arrived at. I, therefore, reject the petition with costs.

K. S. D.

Petition rejected.

G. R. D.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 179 OF 1924.

March 13, 1925.

Present :—Mr. Justice Suhrawardy and
Mr. Justice Duval.

JOGENDRA NARAYAN DAS—

DEFENDANT—APPELLANT

versus

SATYENDRA CHANDRA GHOSE

MOULIK—PLAINTIFF—RESPONDENT.

Appeal—Mortgage suit—Preliminary decree, ex parte—Final decree—Order refusing to set aside decree—Appeal, whether lies.

No appeal lies against an order refusing to set aside a preliminary decree after the passing of the final decree. [p. 380, col. 2.]

A preliminary decree is an interlocutory order, and the right of appeal against interlocutory orders ceases with the disposal of the suit. [p. 381, col. 1.]

Madhu Sudan Sen v. Kamini Kanta Sen, 32 C. 1023; 9 C. W. N. 895 and *Nanibala Dasi v. Ichhamoyee Dasi*, 81 Ind. Cas. 674; 40 C. L. J. 291; (1925) A. I. R. (C.) 218, relied on.

Appeal against an order of the Subordinate Judge, Birbhum, dated the 16th of February and the 7th of April 1924.

Dr. Sarat Chandra Basak and Babu Mukunda Behary Mullick, for the Appellant.

Babu Panchanon Ghose, for the Respondent.

JUDGMENT.

Suhrawardy, J.—The facts of this case are that the plaintiff-respondent brought a mortgage suit against the defendant-appellant on the 4th May 1922. After several adjournments the case was fixed for hearing on the 24th July 1923. On that day the defendant's Pleader stated that he had no instruction and an *ex parte* preliminary decree was passed in favour of the plaintiff. The defendant thereafter applied for a re-hearing of the case under O. IX, r. 13. That application was registered and the 16th February 1924 was fixed for hearing of the re-hearing case. On that date the defendant applied for

time on the ground of illness. The prayer was rejected and the re-hearing case dismissed for default. On the same day, namely, the 16th February 1924, the Court on the application of the plaintiff passed the final decree for the sale of the mortgaged properties. On the 25th February 1924 the defendant filed an application for setting aside the order dismissing his application under O. IX, r. 13. That application was registered and finally disposed of on the merits on the 7th April 1924. The present appeal was filed in this Court on the 15th May 1924 against the orders dated the 16th February and the 7th April 1924, namely, the orders by which the lower Court dismissed his application under O. IX, r. 13 and the application under O. IX, r. 9 for the restoration of his previous application.

At the hearing of this appeal a preliminary objection is taken by the respondent to the effect that the final decree having been passed before the appeal was lodged in this Court, this appeal is incompetent. In my opinion this objection should succeed. So far as this Court is concerned it is taken to be concluded by authorities that if an appeal is preferred against the preliminary decree after the final decree has been passed, it cannot be heard. The principle upon which this view has been taken is that the right of appeal from interlocutory orders ceases with the disposal of the suit. It has been so held in the case of *Madhu Sudan Sen v. Kamini Kanta Sen* (1). There the appeal was preferred against an order of remand passed under s. 562 of the Code of 1882 (corresponding to O. XLI, r. 23 of the new Code) after the suit on remand was heard and decided by the Trial Court, but there was no appeal from the final decision in the suit. It was held that the appeal to the High Court from the order of remand after the suit was finally decided on remand was not maintainable. Maclean, C. J., observed thus: "If a party desires to avail himself of the privilege conferred by s. 588 (O. XLIII, r. 1) in relation to an order of remand, he ought to do so before the final disposal of the suit. He cannot be permitted to wait until after the final disposal of the suit and then to appeal against the interlocutory order without appealing from the decree in the suit". There are no doubt divergent decisions which have all

(1) 32 C. 1023; 9 C. W. N. 895.

been collected and considered in the case of *Nanibala Dasi v. Ichhamoyee Dasi* (2), to which I was a party where it is laid down that in a suit for partition an appeal against the preliminary decree is incompetent if filed after the preparation of the final decree. It is not questioned that the same principle applies to the present case. But it is argued by the appellant that the right of appeal conferred on a party by law under O. XLIII should not be taken away without any statutory enactment to that effect because he has not taken certain steps under some other proceeding; and it is argued on the authority of some of the cases cited on behalf of the appellant that the final decree must be considered to be dependent upon the preliminary decree and, therefore, if the preliminary decree is set aside on appeal, though filed after the final decree was passed, the final decree must accordingly be set aside. This question was considered in the cases which have taken the view affirmed in the case of *Nanibala Dasi v. Ichhamoyee Dasi* (2). The learned Judges have stated that the principle underlying the cases which have been reviewed in the case of *Nanibala Dasi v. Ichhamoyee Dasi* (2) is that the right of appeal against interlocutory orders ceases with the disposal of the suit and that the preliminary decree is said to be an interlocutory order because it is an order passed before the suit was finally disposed of. If the contention of the respondent is given effect to, it may lead to many absurd results. Every decree depends upon the validity of the procedure followed in the suit and upon the legality of interlocutory order passed in the suit; and if one of such orders is appealable, the aggrieved party may appeal against that order after the decree and cease to care for the decree in the suit which may be had at great waste of time and money. That is not a desirable procedure to follow. I may quote one instance in order to illustrate my view. Under O. XXIII, r. 3 the Court may refuse to pass a decree in accordance with the compromise alleged to have been effected between the parties. There is an appeal provided against that order. The defendant, if aggrieved by that order may appeal from it even after a decree is passed on the merits. This I do not believe can be the policy of the law.

(2) 84 Ind. Cas. 674; 40 C. L. J. 291; (1925) A. I. R. C. 218.

The present case is much weaker than the cases in which the question has been examined. Here the appeal is not against the preliminary decree but against an order refusing to set aside the preliminary decree. The effect of the petitioner succeeding in the appeal will be to revive the application for setting aside the preliminary decree; and if that application succeeds the preliminary decree may be re-opened and the final decree should be taken to be contingent upon the result of those proceedings. I, therefore, hold that this appeal cannot proceed and must be dismissed with costs, three gold mohurs.

Duval, J.—I agree.

Z. K.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 65 OF 1924.

May 18, 1925.

Present:—Mr. Simpson, A. J. C.

RAM PRASAD BABU—PLAINTIFF

—APPELLANT

versus

MESSRS. PAUL BROTHERS—

DEFENDANTS—RESPONDENTS.

Vendor and purchaser—Sale of goods—Delivery to be taken at warehouse of vendor—Property, when passes—Goods despatched at request of buyer—Vendor making delivery conditional on payment of price, effect of—Shortage and breakage, liability for.

Plaintiff purchased certain goods from the defendant at Calcutta and it was agreed that delivery of the goods should be taken from the defendant's warehouse at Calcutta but that if the plaintiff so desired the defendant would forward the goods to Lucknow. Plaintiff asked the defendant to despatch the goods to Lucknow, which the defendant did, but, instead of forwarding the Railway receipt to the plaintiff, the defendant sent it to a Bank in Lucknow with the instructions that it was to be handed over to the plaintiff only on payment of the price of the goods. Plaintiff paid the price of the goods and on taking delivery of the goods found that there was a shortage of goods and that out of those goods which had been despatched from Calcutta a considerable portion had been badly damaged either in transit or before they were despatched. The plaintiff, therefore, sued the defendant for a return of the price of the goods which had not been delivered in safe condition to the former plus proportionate freight:

Held, (1) that delivery having been agreed to be taken at the defendant's warehouse at Calcutta, the property in the goods had passed to the plaintiff and that thereafter the defendant was only the plaintiff's agent for the purpose of forwarding the goods to Lucknow; [p. 383, col. 1.]

(2) but that the defendant having imposed a condition upon the plaintiff that he must pay for the price of the goods before he would be able to take delivery of them at Lucknow, a condition which had

not been agreed upon between the plaintiff and the defendant as his agent, had altered the terms of the original contract, the effect of which was that the property in the goods had gone back to the defendant and that consequently the plaintiff was not liable to pay for more goods than he had actually received at Lucknow in a safe condition; [p. 383, col. 2.]

(3) that, therefore, the plaintiff was entitled to a decree for the return of the price of the goods which had not been delivered to him plus proportionate freight. [p. 384, cols. 1 & 2.]

Appeal against a decree of the Third Additional District Judge, Lucknow, dated the 5th November 1923, modifying that of the Additional Subordinate Judge, Lucknow, dated the 22nd November 1922.

Messrs. Niamat Ullah and Moti Lal Saksena, for the Appellant.

Mr. H. C. Dutt, for the Respondents.

JUDGMENT.—This is a second civil appeal. The appellant Ram Prasad, a retired District and Sessions Judge, was plaintiff in the suit. There is little dispute about the facts, and of course in a second appeal all the findings of fact of the lower Appellate Court must be accepted. The plaintiff, Ram Prasad, had acquired the rights of one Mrs. Willis. She had taken out a patent for a medicine called Splenox, and she had had a business in the sale of this patent medicine. She had ordered a quantity of bottles, complete with capsules, corks and cardboard cases, from Japan, but she had failed to pay for the consignment, so it was sold in Calcutta by the Tata Bank and was bought by Laha & Co. of Calcutta. Ram Prasad got information of the facts, and he sent his manager Mr. Murphy to find out where they were and to see whether he could buy them. Mr. Murphy went to Calcutta where he ascertained that they had been bought from Laha and Co. by the defendants Messrs. Paul Brothers and Co. of Calcutta. He entered into an oral contract with the defendants on behalf of his principal, the plaintiff, which was afterwards ratified by plaintiff. This contract was that the plaintiff would buy these bottles, which were contained in wooden boxes or packing cases, each of which contained one gross of bottles. There were 220 of these boxes.

The price was to be Rs 16 a box.

The most important matter in this contract is about the place of delivery. There is a finding of fact that the contract was that delivery was to be taken at Calcutta at the godown of Paul Brothers. Mr. Murphy says that he tried to get a contract for delivery F. O. R. Howrah, but failed to do so, and the arrangement was that the

plaintiff should take delivery at the warehouse. It was also understood that if this should prove inconvenient to the plaintiff the defendant would send the goods to him at Lucknow. I agree that in these circumstances the defendant's position, at law, was that of plaintiff's agent, and that delivery could be effected by the defendant merely accepting that position and considering himself in possession of the goods no longer as owner but as agent for the buyer. The bargain was struck at the end of July, but some delay occurred and the boxes were not despatched to Lucknow till the middle of October. The plaintiff before despatch sent the defendant a cheque for Rs. 1,000. This was in answer to defendant's letter dated 9th September 1921, Ex. 1. It runs as follows:—

"Dear Sir,

With reference to your telegram dated 6th instant asking for consignment of bottles as ordered we beg to state that it is necessary to pay the freight for empty bottles first here so that we may request you to remit Rs. 1,000 through Tata Bank paid as an advance and also to be applied for the above purpose. On receipt of same we shall be pleased to act according to your instructions immediately."

When the boxes reached Lucknow they were in a bad state. A large proportion of the bottles were broken, some of the capsules and cardboard cases were damaged or missing and there were no corks at all.

We now reach the real difficulty of this case. So far plaintiff could not have succeeded. His man went down and bought certain boxes which he saw. The arrangement was that the plaintiff was to take delivery at Calcutta. Plaintiff then took delivery through the defendant himself as his agent, and apparently gave him no instructions except to despatch the goods to Lucknow. It had been suggested by Mr. Murphy that some wiring might be done to strengthen the boxes provided that this was not too expensive, and it appears from Mr. Murphy's evidence that some wiring had been done. If the boxes were not strong enough to stand the journey, or if the Railway people knocked them about unnecessarily, no liability would attach to the defendant. And this is in substance the decision of the learned District Judge.

The Court of Trial dismissed the suit altogether. The First Court of Appeal held

[90 I. C. 1925]

RAM PRASAD BABU v. PAUL BROTHERS,

that there was no responsibility for breakages and no proof of shortage as distinguished from breakage, except in respect of the corks. Accordingly he gave plaintiff a decree for the price of the corks only. But the important point is this, that the defendant consigned the goods to himself, and sent the Railway Receipt to the Tata Bank at Lucknow, with instructions that it was not to be endorsed over to the plaintiff until he paid the price of the goods. The question is what the effect of this is upon the rights of the parties. The learned District Judge has dismissed the matter with the remark that this arrangement was agreed to by the plaintiff, but in my opinion it cannot be dealt with so lightly. The original agreement undoubtedly was to take delivery at Calcutta, and the defendant when he was asked to forward the goods was merely the plaintiff's agent in doing so. But when he made this fresh stipulation that delivery was not to be taken of the goods until a condition had been complied with, namely, the payment to the Tata Bank as agents of the defendant of the price, he altered the contract. It was no longer possible for the plaintiff to take delivery at Calcutta or to obtain control of the goods at all until he had fulfilled this condition. The condition was not entered into between the defendant, as the plaintiff's agent and the plaintiff. It was clearly a contract between the defendant as seller and the plaintiff. This new contract was for delivery of the goods at Lucknow. The ownership of the goods went back to the defendants, who had assumed control over them adversely to the plaintiff. From this point of view the plaintiff is not bound to pay for anything more than he received. The risk of damage on the Railway becomes the defendant's risk. The goods had become his again. The case is not, I think, distinguishable from the case of *Ford Automobiles (India) Ltd. v. Delhi Motor & Engineering Co. (1)*. In that case the Ford Automobiles made a proposal to the Delhi Motor Co., to sell them 20 Motor Cars. The Delhi firm agreed and the contract was completed. The motors were despatched from Bombay, but they were destroyed by fire on the way. The question for decision was who was to bear the loss.

It was contended on behalf of the Bombay

(1) 70 Ind. Cas. 138; 24 Bom. L. R. 1140; (1923) A. I. R. (B.) 125.

firm that when they took twenty motors out of their stock and appropriated them to this contract the ownership was transferred to the Delhi firm. It was held that this would have been so had not the Bombay firm acted exactly as the defendant did in the case before me, that is to say they consigned the motors themselves and sent the Railway receipt to a Bank in order that the money might be collected before the Railway receipt was made over to the Delhi firm. It was held that if they themselves imposed a condition precedent to delivery, then delivery would not take place in law until the condition had been fulfilled. As it never was fulfilled there was never any delivery. It is impossible to distinguish that case from the case before me. In that case also the arrangement was a matter of contract between the parties. Indeed it had been suggested by the Delhi firm. The Bombay firm set up the case that the contract was for delivery F. O. R., but that was negatived by the consignment to themselves, and the instruction not to hand over the Railway receipt without payment. No doubt in the case before me there had been an original contract by which delivery was to be taken at Calcutta, but the parties destroyed that contract and substituted another when they agreed to contract and substituted another when they agreed to this method of payment.

I hold, therefore, that in law the contract was that delivery should be in Lucknow, and that the plaintiff was only liable to pay for what was delivered to him. He is not bound to pay either for bottles that never reached him or for broken bottles. In his plaint he claimed on the following detailed damages:—

	Rs.	a.	p.
1. Price of 96 gross bottles short	1,536	0	0
2. Proportionately freight	180	0	0
3. Improper charges as specified in para. 10	165	8	0
4. Price of 215 gross capsules at Rs. 2-8 per gross	537	8	0
5. Price of 220 gross of corks Rs. 1-8 per gross	330	0	0
6. Interest on Rs. 2,749 Re. 1 per cent. per mensem from middle of November 1921 to the middle of April 1922	134	10	0
Total	2,883	10	0

In the written statement all knowledge was disclaimed and para. 10 was simply denied. It is necessary, therefore, to see to what extent each item is proved in the evidence. The plaintiff said that he found a shortage of 96 gross of bottles, which is the figure given in the plaint, and that he found it on examining 199 boxes. He says there was no doubt a further shortage in the remaining 21 boxes, but he does not claim for that. The head clerk in the Octroi Office was produced as plaintiff's witness and he said that the 199 boxes which were opened in his presence contained the number stated in his report Ex. 13. That report shows that 199 boxes were opened in his presence, the same number of which the plaintiff speaks. Three cases were found to contain capsules and cardboard pieces. Out of the remaining cases there were 119 gross unbroken bottles. It was on this basis that octroi was paid as appears from plaintiff's Ex. 8, that is to say it was reckoned that 199 boxes yield 199 gross giving a deficiency of 80 gross. This deficiency was deducted from 220, and octroi was paid on 140 gross. It is clear that this calculation contains an error, because only 196 cases contained bottles at all, so that the actual deficiency detected was 77 gross only. It is, of course, possible that the 21 boxes which were not opened also contained breakages or shortage, and it is probably on this basis that octroi was accepted on 140 gross only. I do not think I am likely at this stage of the proceedings to get nearer to the facts than the octroi authorities did at the time. I, therefore, make my decree on the basis that a shortage of 80 gross of bottles has been proved.

As regards the second item which is Railway freight the proportionate Railway freight for 80 gross bottles is Rs. 150-3.

As regards the third item of improper charges there is no evidence on the record relating to it and Counsel has abandoned it.

The fourth item relating to capsules presents some difficulty. Plaintiff has stated that he received only 5 gross capsules instead of 220 gross. In view of the fact that plaintiff has claimed for 96 gross bottles, while his witness gives evidence relating to only 77, or at most 80 gross, I am not prepared to accept plaintiff's unsupported testimony as regards capsules, and I make no decree for capsules at all.

The learned District Judge gave the plaintiff a decree in respect of the corks of which none arrived at all. I accept the finding that no corks arrived. There seems to be no evidence of the value of the corks, but the learned District Judge regarded Rs. 1-8 per gross as a reasonable price, and it certainly does not seem to be too much. It is to be noted, however, that the Rs. 13 per cent. per gross which was paid for the bottles, included corks and capsules, so instead of 220 gross there will only be 140 gross to be paid for in addition to the amount paid for the bottles.

Interest has been claimed at 12 per cent. per annum. I allow interest from the middle of November 1921, to the date of institution of the suit at 6 per cent. per annum. The decree will, therefore, stand.

	Rs.	a.	p.
Price of 80 gross bottles short	1,280	0	0
Proportionate Railway freight	150	3	0
Improper charges	Nil.		
Price of 215 gross capsules	Nil.		
Price of 140 gross of corks Rs. 1-8 per gross	210	8	0
Interest from the middle of November 1921 to date of institution of suit	41	13	0
Total	1,682	0	0

In the result I allow the appeal and decree plaintiff's suit for Rs. 1,682 as detailed above. In view of the fact that the plaintiff has succeeded on his main contentions he will receive costs in proportion to his success, while defendants will not receive any costs at all.

The cross objections are dismissed with costs.

Z. K.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 294 OF 1923.

March 1, 1924.

Present:—Mr. Kinkhede, A. J. C.

SHEOCHARAN—ACCUSED—APPLICANT

versus

EMPEROR—COMPLAINANT—

OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 437—Further enquiry, when to be directed—Evidence Act (I of 1872), s. 30—Confession of co-accused, when admissible

A District Magistrate cannot set aside an order of discharge if there is no irregularity, illegality or impropriety in the proceedings. Further enquiry ought not to be ordered in a case in which the Courts are liable to take different views of the evidence and of the probabilities, especially where the Magistrate has disbelieved the evidence for the prosecution. [p. 386, col. 1.]

Empress v. Bhagwan Malec, 2 C. P. L. R. 82, *Fado v. Emperor*, 34 Ind. Cas. 965; 12 N. L. R. 94 at pp. 97, 98; 17 Cr. L. J. 245, *Empress of India v. Gaya Din*, 4 A. 148; A. W. N. (1881) 159; 2 Ind. Dec. (N. S.) 745, *Queen-Empress v. Chotu*, 9 A. 52; A. W. N. (1886) 281; 5 Ind. Dec. (N. S.) 465, *Prankhang v. Emperor*, 17 Ind. Cas. 76; 16 C. W. N. 1078; 13 Cr. L. J. 761, *Emperor v. Devidas*, 14 C. P. L. R. 161, *Chandan v. Kalla*, 9 Ind. Cas. 274; 8 A. L. J. 45; 12 C. L. J. 45, *Lakshminarasappa v. Mekala Venkatappa*, 31 M. 133; 3 M. L. T. 230; 18 M. L. J. 57; 7 Cr. L. J. 267, and *Bindeshri Dube v. Emperor*, 59 Ind. Cas. 193; 18 A. L. J. 1135; 2 U. P. L. R. (A.) 374; 22 Cr. L. J. 49, referred to.

The statement of one accused cannot be taken as evidence against another accused under s. 30 of the Evidence Act unless the parties are admittedly in *pari delicto*, that is, when a confessing accused implicates himself to the full or as much as his co-accused whom he is criminating. Statements which inculcate the maker more than, or equally with, others alone can afford any satisfactory guarantee of their truth. Less weight must be attached to statements which implicate the maker in a lesser degree than others. Where the principal blame is laid on others the statement is self-serving according to the ideas of the person making it and is entirely excluded from consideration. There is absolutely no guarantee whatever as to its truth where the statement entirely exonerates the maker. Such a statement cannot be held admissible as against the co-accused. [p. 386, col. 2; p. 387, col. 1.]

R. v. Baino Chowdhury, 25 W. R. 43 Cr., relied on.

Criminal revision against an order of the District Magistrate, Betul, in Criminal Revision No. 10 of 1923, dated the 29th October 1923.

Mr. M. B. Niyogi, for the Applicant.

ORDER.—*Musammatt Jhuniah* and the applicant *Sheocharan* were prosecuted for secretly disposing of the dead body of a newly born illegitimate child of *Jhuniah* under s. 318, Indian Penal Code. *Jhuniah* was charged with aiding and abetting the concealment and *Sheocharan* for the conceal-

ment of the birth of the child itself by secret disposal of the dead body.

The Trial Magistrate after taking all the evidence and considering it discharged both the accused. He found that there was no evidence showing that the accused *Sheocharan* had secretly disposed of the dead body. He, however, pointed out that the only thing against him was a statement made by the co-accused *Jhuniah*, but remarked that the same could not be taken into account against him as it did not amount to a confession admissible under s. 30 of the Indian Evidence Act. He also observed that as *Musammatt Jhuniah* was not examined as an accomplice the advantage of s. 133 of the Indian Evidence Act, was not available to the prosecution. As to *Musammatt Jhuniah* the Magistrate held that there was no evidence to show that the body found in the well was the body of the child to which *Jhuniah* gave birth, and that *Musammatt Jhuniah* could not, therefore, be charged either with the commission of the offence or with the abetment thereof. The Magistrate has remarked that *Jhuniah* did seem to him to have helped the accused *Sheocharan* not as a free agent but under some threat, and that she consented under fear of injury and that she could not be said to be intentionally aiding in the secret disposal of the dead body. Thus both the accused were discharged.

The District Superintendent of Police moved the District Magistrate pointing out that the accused were improperly discharged. The District Magistrate thereupon ordered a notice to issue to *Sheocharan* to show cause why the order of discharge should not be set aside. The accused appeared and showed cause, the District Magistrate has set aside the order of discharge, and directed that he be retried under s. 318, Indian Penal Code, in the Court of the Sub-Divisional Magistrate, Multai. In doing so the District Magistrate has differed from the Trial Magistrate in the view of evidence taken by him, and held that the identity of the dead body with the child born of *Jhuniah* was proved and that *Musammatt Jhuniah's* statement showed that the child was illegitimate, that *Sheocharan* was its father, and that he took it away after its birth for secretly disposing it off. He has made use of a remark of the Trial Magistrate, in the body of the order, that *Musammatt*

Jhuniah helped Sheocharan in the matter of the disposal under a threat and fear of injury from him. The District Magistrate has overruled the objection of the accused that the statement of Jhuniah was uncorroborated; after observing that there were grounds for holding that Sheocharan's statements were not worthy of belief he came to the conclusion that there were grounds for further enquiry into the case and has directed him to be re-tried. Against this order of the District Magistrate the accused has come up to this Court in revision. He contends that when once he was discharged by the Trial Magistrate the District Magistrate should not have ordered his re-trial, and that the order is wrong inasmuch as it is mainly based upon the statement of the co-accused Jhuniah which is inadmissible as against him.

In the argument it is brought to my notice that the powers vested in a District Magistrate of ordering further enquiry under s. 437, Cr. P. C., should be used sparingly and with great circumspection; that it is only where the order of discharge is perverse or foolish or the Magistrate has not dealt with the evidence or has not recorded sound reasons for the discharge, that the District Magistrate might exercise his powers of directing further enquiry. There is ample authority for this view in *Empress v. Bhagwan Malee* (1) and *Yado v. Emperor* (2) and reported decisions of other High Courts as well: the leading cases on the point are *Empress of India v. Gaya Din* (3) and *Queen-Empress v. Chotu* (4). In *Yado v. Emperor* (2) and in *Prankhang v. Emperor* (5) it has been held that a District Magistrate cannot set aside an order of discharge if there be no irregularity, illegality or impropriety in the proceedings. Where further enquiry is directed it does not in all cases mean taking of additional evidence but may be re-hearing and re-consideration of the evidence already taken as held in *Empress v. Bhagwan Malee* (1) and *Emperor v. Debidas* (6).

(1) 2 C. P. L. R. 82.

(2) 34 Ind. Cas. 965; 12 N. L. R. 94 at pp 97, 98; 17 Cr. L. J. 245.

(3) 4 A. 148; A. W. N. (1881) 159; 2 Ind. Dec. (N. S.) 745

(4) 9 A. 52; A. W. N. (1886) 281; 5 Ind. Dec. (N. S.) 465

(5) 17 Ind. Cas. 76; 16 C. W. N. 1078; 13 Cr. L. J. 764.

(6) 14 C. P. L. R. 161.

The learned District Magistrate has not pointed out any irregularity, illegality or impropriety in the proceedings, nor do I find any beyond the fact that the nature of the case is such that Courts are liable to take different views of the evidence and of the probabilities. In *Chandan v. Kalla* (7) it has been held that in such a case further enquiry ought not to be ordered especially where the Magistrate has disbelieved the evidence for the prosecution. The Madras High Court has even gone to the length of holding in *Lakshminarasappa v. Mekala Venkatappah* (8) that further enquiry cannot be directed by the District Magistrate even if there be mis-appreciation of the evidence. *Bindesari Dube v. Emperor* (9) is a case which clearly endorses and justifies the view I have taken whether in the present case there was room for interference with the order of discharge must, therefore, be determined with reference to the merits of the evidence on record.

I am asked to hold that the statement of Jhuniah does not amount to a confession within the meaning of s. 30, Indian Evidence Act. The Trial Magistrate had very rightly remarked that it was not a confession within s. 30. As to this the test is laid down in several cases collected under s. 30 of Indian Evidence Act in Ameer Ali's Law of Evidence, 6th Edition. It is to see whether the statement of one prisoner proposed to be used in evidence against another is sufficient by itself to justify the conviction of the person making it, for the offence for which he is jointly tried with the other person against whom it is tendered. The statement of one prisoner cannot be taken as evidence against another prisoner under s. 30 of the Evidence Act, unless the parties are admittedly *in pari delicto*, that is, when a confessing prisoner implicates himself to the full or as much as his co-prisoner whom he is criminalising, compare *R. v. Baino Chowdhry* (10) per Glover, J., who held that this is so only when the confession makes both equally guilty of the offence. The *ratio decidendi* of the cases bearing on this point is that statements

(7) 9 Ind. Cas. 274; 8 A. L. J. 45; 12 Cr. L. J. 45.

(8) 31 M. 133; 3 M. L. T. 230; 18 M. L. J. 57; 7 Cr. L. J. 267.

(9) 59 Ind. Cas. 193; 18 A. L. J. 1135; 2 U. P. L. R. (A.) 374; 22 Cr. L. J. 49.

(10) 25 W. R. 43 Cr.

which inculcate the maker more than, or equally with, others, alone can afford any satisfactory guarantee of their truth. This necessarily means less weight must be attached to statements which implicate the maker in the lesser degree than others. Where the principal blame is laid on others the statement is self-serving according to the ideas of the person making it and is entirely excluded from consideration. There is absolutely no guarantee whatever as to its truth where the statement entirely exonerates the maker. Such a statement cannot be held admissible as against the co-accused.

If the statement of Jhunia as a co-accused were to be carefully read, it will be found that it does not satisfy any of these tests and does not amount to a confession. There is a clear attempt on the part of Jhunia to throw the whole blame of concealment of the birth of the child by secret disposal, on the applicant Sheocharan, and to exculpate herself by stating that she was not acting as a free agent, but as observed by the Trial Magistrate, under fear of personal injury from Sheocharan. This one circumstance alone was sufficient to convince even the District Magistrate that the statement as it stood was inadmissible under s. 30 of the Indian Evidence Act. He, however, writes in his order that corroboration for this statement is not wanting. I have gone through the evidence and I do not find any corroboration from any other legally admissible evidence on record. On the contrary the testimony of witnesses Nos. 3 and 7 which has any bearing on this point is hearsay being based on information supplied by Jhunia to them. There is no other testimony which directly proves that Sheocharan was concerned in the secret disposal of the dead body of this child. Under these circumstances what is said to be independent corroboration of Jhunia's statement is wanting in the case; and it is, therefore, improper to order the re-trial of the accused Sheocharan on such insufficient data, i. e., on Jhunia's inadmissible statement as a co-accused. The applicant complains that now that Jhunia is discharged there is a chance of her being examined as a witness and thus supplementing the evidence on record, and that this will necessarily prejudice him and cause grave injustice to him. There is much force in this contention of the applicant. I, therefore, set aside

the order of the District Magistrate and direct that the accused be set at liberty, and if any proceedings may have been hitherto started against him the same are hereby ordered to be quashed.

Z. K.

*Revision allowed.***CALCUTTA HIGH COURT.**

CRIMINAL REVISION No. 887 of 1924.

March 23, 1925.

Present :—Justice Sir Babington Newbould,
Kt., Mr. Justice Buckland and
Mr. Justice B. B. Ghose.

PRATAP CHANDRA GUHA ROY—

PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

*Penal Code (Act XLV of 1860), ss. 499, 500—
Defamation—Imputations concerning conduct of
members of Police force—Individual member, whether
defamed—Truth of imputations, plea of, proof of—
Good faith, plea of—Defamatory statement, strict
proof of.*

Complainant was the principal officer in charge of a certain Police force which was stationed at a certain place for the purpose of investigating a certain occurrence. There were some complaints against the conduct of the members of the Police force and the accused, after making some enquiries from the villagers, made two speeches at two different places as a consequence of which he was charged and tried at the instance of the complainant for offences under s. 500 of the Penal Code. The charge with regard to the first speech alleged that the accused had stated that not to speak of the Police only but the British Government themselves and the superior officers including from the District Magistrate down to the *daroga* and the *chaukidars* were all beasts and pigs in their conduct, and the charge with regard to the second speech alleged that the accused had stated that the Police force had bitten off the nipple of the breast of a woman and had bitten the cheek of a woman nine months pregnant. In his defence the accused sought to prove the notes taken by him of the statements made to him by the villagers of the ill-treatment accorded to them by members of the Police force, but the notes of statements of those persons who were not called as witnesses at the trial were not admitted in evidence.

Held, (Per Newbould, J.)—(1) that the statement by the accused that the members of the Police force were beasts and pigs in their conduct was defamatory of the complainant who was a member of the Police force and that the imputation having been made against the Police force as a whole employed under the complainant the accused was guilty of the offence of defamation in respect of that statement; [p. 390, col. 1.]

(2) that so far as the second charge was concerned it related to definite acts of brutality by individual members of the Police force and inasmuch as the

complainant personally was not accused of the brutal conduct alleged, the accused could not be convicted of an offence under s. 500 of the Penal Code in respect of the second charge. [p. 390, col. 1.]

Per *Ghose, J.*—(1) that the accused was entitled to prove the notes of the statements made to him by the villagers as evidence of his good faith and that the notes were relevant on the question, although the persons who had made the statements were not examined as witnesses; [p. 391, col. 2.]

(2) that the words in the first charge that not to speak of the Police only but the British Government themselves and the superior officers including from the District Magistrate down to the *daroga* and *chaukidars* were all beasts and pigs in their conduct were too wide to admit of the construction that any particular Police Officer was defamed; [p. 392, col. 2.]

(3) that the second charge related to specific acts of brutality of which the Police force as a body could not have been guilty and that the statement, therefore, referred to the personal conduct of some of the constables and had no reference to the complainant; [p. 393, col. 2.]

(4) that, therefore, the petitioner could not be convicted of an offence under s. 500 of the Penal Code on either charge; [p. 391, col. 2.]

(5) that as the evidence showed that the Police force had been guilty of acts of misconduct, oppression and persecution the accused had reasonable grounds for believing in the truth of the allegations made to him and that the case was, therefore, covered by the 9th Exception to s. 499 of the Penal Code and that on that ground also the accused was entitled to an acquittal. [p. 395, col. 2.]

Per *Buckland, J.*—that there was confusion in the charges between the complainant and the Police force of which he was in charge in relation to the various ingredients of the charges and that consequently there had been no proper trial of the accused and that the accused must, therefore, be re-tried on charges properly framed. [p. 396, col. 2.]

Per *Ghose, J.*—To speak of a person that he is a beast and a pig in his conduct is defamatory. [p. 392, col. 1.]

In a prosecution under s. 500 of the Penal Code the words complained of as constituting the offence must be set out in the charge and proved before the accused can be convicted. When there is a denial the evidence in support of the prosecution must be scrutinized. [p. 392, col. 1.]

When spoken words are alleged to have constituted the offence of defamation, a very slight alteration of a word may give quite a different meaning to the whole statement. [p. 392, col. 2.]

Where the words ascribed to the accused are differently stated by each witness and the petition of complaint also puts them differently it cannot be said to have been proved that the accused spoke the words stated in the charge, and it would not be correct to say that the words given in the different versions have the same meaning. [p. 392, cols. 1 & 2.]

If a person complains that he has been defamed as a member of a class he must satisfy the Court that the imputation complained of is against him personally and that he is the person aimed at, before he can maintain a prosecution for defamation. [p. 394, col. 1.]

All circumstances which were apparent to the bystanders at the time the words were uttered should be put in evidence so as to place the Court as much as possible in the position of such bystanders, and then it is for the Court to say what meaning such words would fairly have conveyed to their minds. [ibid.]

Where the defamation imputes a crime to the complainant and the accused pleads justification there must be the same strictness of proof as on a trial for such crime. [p. 394, col. 2.]

Per *Buckland, J.*—In a case in which Explanation II to s. 499 of the Penal Code is properly called into use the identity of the company or association or collection of persons must be maintained throughout with reference to the imputation said to have been made concerning them as such with the intention of harming their reputation so that thereby they are defamed. An imputation concerning a company or association of persons as such cannot by virtue of this Explanation justify a charge of defaming an individual and a charge cannot combine the Explanation with the definition for such a purpose. [p. 396, col. 2.]

The offence of defamation consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it. It may be that an individual is as much defamed by words apparently only of more general application as by words referring to him by name. [p. 397, col. 1.]

The question for the consideration of the Court is whether it thinks that the libel designates the complainant in such a way as to let those who know him understand that he is the person meant. It is not necessary that all the world should understand the libel: it is sufficient if those who know the complainant can make out that he is the person meant. [ibid.]

Case-law referred to.

Rule against an order of the Sub-Divisional Magistrate, Faridpore, dated the 21st July 1924.

JUDGMENT.

Newbould, J.—The petitioner Pratap Chandra Guha Roy was tried and convicted by the Sub-Divisional Magistrate of Faridpur on three charges of defamation and was sentenced under s. 500 of the Indian Penal Code to one year's simple imprisonment for each offence, the sentences to run concurrently. On appeal to the Sessions Judge of Faridpur his conviction on the third charge was set aside and the sentences were reduced to six months' simple imprisonment on each of the two charges on which the conviction was upheld, these sentences also running concurrently. The petitioner has obtained an open Rule from this Court calling upon the District Magistrate and the complainant to show cause why the conviction of and the sentence passed on the petitioner should not be set aside or such other orders passed as to this Court may seem fit.

The two charges in the respect of which the petitioner's conviction has been upheld are as follows:—

"*Firstly.*—That you on or about the 13th day of June 1923 at Berhamganj, P. S. Sibchar, defamed the complainant by making and publishing the following imputation in your speech at a public meeting concerning the Police force employed at Char Maniar of which the complainant was a member and the principal officer in charge of the investigation to the effect that not to speak of the Police only but the British Government themselves and the superior officers including from the District Magistrate down to the *daroga* and *chowkidars* were all beasts and pigs in their conduct, intending to harm and knowing and having reason to believe that it would harm the reputation of the said complainant and the Police force employed at Char Maniar and that you thereby committed an offence punishable under s. 500, Indian Penal Code, and within my cognizance.

"*Secondly.*—That you on or about the 17th day of June 1923 at Faridpur, P. S. Kotwali, defamed the complainant by making and publishing in your speech at a public meeting the following imputation concerning the Police force employed at Char Maniar of which the complainant is a member and the principal officer in charge of the investigation to the effect that the Police force employed at Char Maniar had bitten off the nipple of the breast of women and had bitten the cheek of a woman nine months' pregnant intending to harm and knowing and having reason to believe that such imputation will harm the reputation of the complainant and the Police employed at Char Maniar, and that you thereby committed an offence punishable under s. 500, Indian Penal Code, and within my cognizance."

The complainant is Rasiduddin Khan, a Sub-Inspector of Police. On the night of the 16th May 1923, a dacoity was committed in the house of one Adu Molla in village Char Maniar. In consequence of information received a body of Police under another Sub-Inspector Badaruddin Ahmed arrived there while the dacoity was going on. For some reason that has not been made clear the Sub-Inspector Badaruddin and his party were attacked and kept confined by the villagers of Char Maniar. Rasiduddin Khan was the Sub-Inspector in charge of Sadarpur Police Station in whose jurisdiction Char Maniar is situated. As such he investigated both

the case of dacoity and the case of assault on the Police mentioned above. The petitioner who is a member of the District Congress Committee made several speeches and the charges set out above relate to statements he is alleged to have made in two of those speeches.

A great deal of time has been wasted in the lower Courts owing to their having investigated issues that did not arise on the charges framed and the defence set up by the petitioner. The charges though not well worded have evidently been framed on the case for the prosecution that the complainant is one of an association of persons, the Police force employed at Char Maniar, and that imputations have been made against this collection of persons as such, so as to amount to defamation as defined in s. 499, Indian Penal Code, with special reference to Exp. 2 of that section. The main defence of the petitioner is a denial that he defamed the complainant. Though he does not deny having made imputations against some members of the Police force employed at Char Maniar he contends that these imputations are not directed against the whole body of members of that force and were not defamatory of the complainant either individually or as a member of that body. His case is that so far as he made general imputations they were criticisms of the acts of the Government and so far as he made imputations of definite acts, they were against Bengali constables only and not against the whole Police force at Char Maniar. He has attempted to justify the accusations of the constables but no attempt has been made to justify any imputation against the complainant. Consequently it is irrelevant whether the imputations against the constables were true or were made in good faith and it is unnecessary to consider the evidence relating to these issues.

As regards the charges on which the petitioner has been convicted the first contains a definite allegation that the complainant was defamed by an imputation concerning the Police force employed at Char Maniar, of which he was a member. The words set out in the charge are not mere abuse and are clearly defamatory. The only defence worthy of serious consideration that is made to this charge

is a denial that such words were used. The principal witness as to the words used in the speech delivered at Berhamganj was Ansar Ali (P. W. No. 6), a Sub-Inspector who took written notes of the speech in long hand Bengali. For the petitioner, it is urged that the defamatory words set out in the charge are not found in these written notes (Ex. 7) and, therefore, the charge must fail. But the written notes do not purport to be a complete report of the speech. I see no reason why this witness with the assistance of these notes should not be able to remember that these words were used. Further the charge is not that the petitioner used these actual words but that he used words to this effect. That he used words imputing bestial conduct to the Police force engaged at Char Maniar appears not only in the written notes but is also supported by the evidence of Mahabat-ulla, an Assistant Sub-Inspector of Police (P. W. No. 7), and three non-official witnesses (P. Ws. Nos. 20, 21 & 22). From their evidence it is clear that these imputations were made against that Police force as a whole and not against the Bengali constables only. This evidence is un-rebutted and justifies the findings of the lower Courts, that the first charge has been established.

In my opinion the conviction on the second charge cannot be upheld. Though the learned Sessions Judge finds that in the speech delivered at Faridpur, the whole Police force at Char Maniar were attacked by the petitioner, this is not sufficient to support a conviction on this charge as framed. The charge does not relate to the whole speech but to portions alleging certain definite acts of brutality. It is not suggested that the complainant personally was accused of these acts. The imputation was not against a collection of persons as such but against some individual members of that collection of persons. To accuse the Police force of biting off a nipple of a woman or biting a woman's cheek is absurd on the face of it and no such absurdity is to be found in the report of this speech, Ex. 12, the accuracy of which is not seriously disputed. The prosecution might have been able to make out a case of defamation by innuendo on the allegation that the speech implied that the officer-in-charge of the investigation was responsible for the acts of his subordinates but the charge

as framed does not require the petitioner to meet such a case.

It was not argued before us that the sentence was too severe.

I would, therefore, make this Rule absolute to this extent and reverse the finding and sentence convicting the petitioner on the second charge, I would not interfere with the conviction and sentence on the first charge.

I regret that I feel compelled to differ from my learned brother. As this difference will necessitate a reference to a third Judge I think it is necessary to express my opinion shortly on some other points though I have held them to be irrelevant to the issues that really arise in the case.

The plea of veritas entirely fails. In both the judgments of the lower Courts good reasons are given for holding that the evidence to support the charges of misconduct against the constables is totally false. No attempt was made at the hearing of this Rule to meet the arguments in these judgments on which these findings were based. I can attach no weight to the argument that so many women could not have made such complaints unless there were some grounds for them. It amounts to no more than saying that if enough mud is thrown some will stick. I am unable to accept the plea that these accusations were made in good faith. It is impossible that a man of the petitioner's intelligence and education could have believed the stories that were told to him. I have no doubt that he made these false imputations not believing them to be true but out of hatred of the British Government.

The learned Sessions Judge has written in his judgment that though he is inclined to hold that there was some kind of rough handling of Gaizulla and also that there might have been some rough handling, such as, the catching hold of women's hand, pulling at their cloth etc., there is no credible evidence to support a judicial finding of these facts. The petitioner may have believed that there was a substratum of truth in the stories that were told to him but even so it was not for the public good to make these false charges. On the contrary by supporting grossly false exaggerations he made it more difficult for the truth to be ascertained and the offenders, if any, to be punished.

As my learned brother and myself are divided in opinion, the case with our opin-

ions thereon will be submitted to the Chief Justice in order that they may be laid before another Judge of the Court under s. 429 read with s. 439 of the Cr. P. C.

Ghose, J.—I regret I have not been able to agree with my learned brother on all the questions and as I have come to different conclusion I give my reasons in some detail.

This Rule was obtained by the petitioner against the conviction and sentence under two charges of defamation under s. 500, Indian Penal Code, by the Sessions Judge on appeal from a conviction by the Trial Court. The Sessions Judge acquitted him of one of the three charges on which he was originally convicted and reduced the sentence from one year's to six months' simple imprisonment on each charge, the sentences to run concurrently. The facts are that there was a dacoity in the house of one Adiladdi or Adu Mollah of village Char Maniar on the 16th of May 1923. When the dacoity was going on six constables, under two Sub-Inspectors, arrived at the place and they entered the house and succeeded in capturing 3 of the dacoits. The villagers turned out and apparently mistaking the Policemen for dacoits assaulted them and kept them tied up in the house of Adu Mollah. Information reached the Sadarpur *thana*, within the jurisdiction of which Char Maniar is situated, next morning, of the dacoity as also of the Policemen having been tied up, and Policemen in two batches arrived at the village. The first batch of Policemen released the men who had been kept tied up the previous night. The complainant Sub-Inspector Rasiduddin arrived at the village with the 2nd batch of men on the 17th May in the afternoon. Other Police Officers also came from other *thanas*. On the arrival of the Police at the village almost all the male population fled away leaving the women behind them. On the 18th May house to house search was made in the village by the Police and the Police remained there for several days making enquiries in both the cases, of assault on the Police and of dacoity. The petitioner heard stories of oppressive acts committed by the Police in the village, came there early in June with some other persons, saw many of the women who were alleged to have been maltreated and other persons and took down notes of what he had been

told. Leaving the village with the information he had obtained he delivered three speeches in three different places in which he is alleged to have made defamatory statements with regard to the complainant. We are not now concerned with the third charge of which the petitioner has been acquitted by the learned Sessions Judge. We have to deal with the first two charges only. I should first dispose of two questions of a preliminary nature. It was urged that the complaint is not sustainable because it was made at the instance and under the orders of the superior officer of the complainant and not of his own motion, I do not think there is any substance in this contention. If the complainant has been defamed it is of no consequence that he complained under the orders of his superior officer in order to clear his character, although if left to himself he might not have taken the trouble of prosecuting the offender. The second question relates to the rejection of the notes taken by the petitioner of the statements made by the villagers which he sought to prove in the Trial Court. The Sessions Judge on appeal admitted the notes of the statements of those persons only who were called as witnesses at the trial presumably as corroborative of their evidence but rejected the rest. In my opinion the petitioner was entitled to prove the notes as evidence of his good faith and they were relevant on the question although the persons who made the statements were not examined. I hold that the notes were wrongly rejected, but I do not think there should be an order for re-trial on that ground as there are sufficient materials on the record for deciding the question.

The charges we have to deal with are these:—

“*Firstly*, that you, etc., etc., defamed the complainant by making and publishing the following imputations in your speech at a public meeting concerning the Police force employed at Char Maniar, of which the complainant was a member and the principal officer . . . to the effect that not to speak of the Police only but the British Government themselves and the superior officers including from the District Magistrate down to the *daroga* and *chowkidars* were all beasts and pigs in their conduct, intending to harm, etc., etc.

Secondly, that you, etc., etc., defamed the complainant by making . . . the follow-

ing imputation . . . to the effect that the Police force employed at Char Maniar had bitten off the nipple of the breast of a woman and had bitten the cheek of a woman, etc."

I shall now deal with the questions raised as applicable only to the first charge. It is urged that the words are merely abusive and not defamatory. General words of abuse may not be defamatory but I cannot hold that to speak of a person that he is a beast and a pig in his conduct is not defamatory. The next plea is that the petitioner did not utter the words set out in the charge but only spoke about the beastly oppression by the constables. There cannot be any doubt that the words complained of as constituting the offence must be set out in the charge and proved before the accused can be convicted. When there is a denial the evidence in support of the prosecution must be scrutinized. The notes of the speech were taken in long hand by P. W. No. 6 who says the accused spoke fluently and he could not take down all that the accused said. In his notes, Ex. 7, the following words occur: "What oppression has been committed on women of 14 to 30 years, for which it is the duty of every one of us to extirpate the Police like dogs, hogs and (illegible). Why the Police only, the barbarous British Government itself from the highest officer the District Magistrate down to the *daroga*, *daffadar* and *chowkidar* all are beasts (illegible)." These words are different from those set out in the charge. In his deposition the witness gives the words in Bengali which may be translated thus, "We should try to extirpate the Police with our heart's blood like despicable dogs, pigs and goats. Why the Police only the *daroga*, Magistrate, *daffadar*, *chowkidar* all behave like beasts and pigs." These also are not the same words as in the charge. The other witnesses who speak about the words uttered by the petitioner are P. W. No. 7, P. W. No. 20, P. W. No. 21 and P. W. No. 22. I need not set out in detail what each witness says. It is sufficient to say that the words ascribed to the accused are differently stated by each witness and the petition of complaint also puts them differently. In this state of the evidence I cannot hold that it has been proved that the accused spoke the words stated in the charge, and it would not be correct to say

that the words given in the different versions have the same meaning. When spoken words are alleged to have constituted the offence, a very slight alteration of a word may give quite different meaning to them. From the petition of complaint and also the evidence of P. W. No. 6, it is clear that a distinction is made between the "Police" and the superior officers, as *daroga* and the *daffadar* as well as *chowkidar*. This supports to some extent the plea of the accused that what he said was in relation to the constables and not with reference to the superior officers. In my judgment the evidence does not substantiate this charge and it must, therefore, fail on that ground. The next point urged is that the words the accused is charged with are too general and cannot be defamatory of an individual such as the complainant. The case of *Eastwood v. Holmes* (1) is cited in support, where it was observed by Willes, J., that if a person wrote all lawyers were thieves, no particular lawyer could sue him for libel. It seems to me that the words in the charge "the British Government themselves, and the superior officers including from the District Magistrate down to the *daroga*, and *chowkidars* were all beasts, etc." are too wide to admit of the construction that any particular Police Officer was defamed.

The other questions raised apply equally to both the charges. The first question is whether the complainant was the person defamed or in other words, whether he is a "person aggrieved" by the offence as contemplated under s. 198 of the Cr. P. C., so as to entitle him to maintain the prosecution. This is what is stated in the petition of complaint: "That it appears, therefore, that in making the above charges Dr. Pratap Chandra Guha Roy has intended to harm the reputation of the Police and other high officials of the British Government and the Government themselves. . . . The allegations are being announced throughout the district and it is, therefore, necessary that their falsity should be proved in the most effective manner, viz., by trial in Court of law, etc." The learned Standing Counsel relies on Expl. 2 of s. 499, Indian Penal Code, as giving the complainant the right to maintain the prosecution. That explana-

(1) (1888) 1 L. & T. 347; 11 L. J. 420.

tion runs as follows:—"It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such." The contention seems to be that in this case there was defamation of the Police force, i.e., a "collection of persons as such." As far as I am aware those words in the Explanation have not been judicially dealt with in any reported case. In my opinion those words mean that a collection of persons as such may be collectively defamed in the same manner as a "company." The general principles on which a company may be said to have been defamed would, therefore, apply equally to the case where it is alleged that a "collection of persons as such" has been defamed. Those general principles were formulated by Chief Baron Pollock in *Metropolitan Saloon Omnibus Co. v. Hawkins* (2), where he said: "It (a corporation) could not sue in respect of an imputation of murder, or incest, or adultery, because it could not commit those crimes. Nor could it sue in respect of a charge of corruption, for a corporation cannot be guilty of corruption, although the individuals composing it may." This was adopted in *Mayor of Manchester v. Williams* (3), where it was laid down that a corporation may sue for a libel affecting property, not for one affecting personal reputation. Similarly, Lopez, L. J., said in *South Hetton Coal Co. v. North Eastern News Association* (4): "A corporation or company could not sue in respect of a charge of murder, or incest, or adultery because it could not commit these crimes. Nor could it sue in respect of a charge of corruption or of an assault, because a corporation can not be guilty of corruption or of an assault although the individuals composing it may be." These observations are quite apposite to the question before us and in my opinion the Police force as such cannot complain of any imputation as regards its personal reputation because it cannot be guilty of beastly conduct nor can the collective body be guilty of the offence of biting off the nipple of the breast of a woman or of hitting the cheek of a woman. The matter may be tested in another way. Suppose somebody laid a complaint before a

Magistrate in terms of the words of the charges in this case would any Magistrate issue process against the Police force as such or any member of the Police force I am sure no Magistrate would. In my judgment, therefore, the charges fail on the ground that they refer to the personal conduct only of a collection of persons as such.

I shall next deal with the case of *R. v. Osborn* (5) on which the learned Standing Counsel relied strongly. I take the report of the case from 2 Swanston as it is fuller than the report in Barnardiston. The report runs as follows:—"The paper on which the information was prayed contained an account of a murder committed on a Jewish woman and child by certain Jews lately arrived from Portugal and living near Broad Street because the child was begotten by a Christian and the affidavits set forth that several persons mentioned therein who were recently arrived from Portugal and lived in Broad Street were attacked by multitudes in several parts of the city, barbarously treated and threatened with death in case they were found abroad any more. Strange showed cause against the information, and that it could not be granted as for a libel because it not appearing who the persons reflected upon are, no judgment can be given for the King, as in *R. v. Orme* (6).

"*Sed per cur.* Admitting an information for a libel may be improper, yet the publication for this paper is deservedly punishable in an information for a misdemeanour and that of the highest kind, such sort of advertisements necessarily tending to raise tumults and disorders among the people, and inflame them with an universal spirit of barbarity against a whole body of men as if guilty of crimes scarce practicable and totally incredible." It seems to me the Court held in that case an information for a libel was improper but it was granted for some other misdemeanour as tending to raise tumults etc. I do not think this case helps the prosecution. Nor does the case of *R. v. Williams* (7) as in that case the imputation was against all the clergy in Durham and the libel was on every one of them. There is no imputation like that

(2) (1859) 4 H. & N. 87 at p. 90; 28 L. J. Ex. 201; 5 Jur. (N. S.) 226; 7 W. R. 265; 157 E. R. 769; 118 R. R. 338.

(3) (1891) 1 Q. B. 94; 60 L. J. Q. B. 23; 63 L. T. 805; 39 W. R. 302; 54 J. P. 712.

(4) (1891) 1 Q. B. 133 at p. 141; 63 L. J. Q. B. 293; 9 R. 240; 69 L. T. 844; 42 W. R. 322; 58 J. P. 196.

(5) (1741) 2 Barn. K. B. 166; 2 Swan. 503n; 94 E. R. 425.

(6) (1792) 1 Ld. Raym. 486; 91 E. R. 1224.

(7) (1822) 5 B & Ald. 595; 106 E. R. 1308; 1 Dowl. & Ry. 197; 24 R. R. 480.

In the present case. I may also refer to the *Nil Darpan* case tried by the Supreme Court of Calcutta cited in Mayne's Criminal Law of India. There the words complained of were "I present the indigo planters, mirrors to the indigo planters' hands..... Sir Barnes Peacock, C. J. is reported to have observed on the words used, "This certainly appears to me to represent to the indigo planters that if they look into this paper they would see a true representation each of himself." The true rule appears to be that if a person complains that he has been defamed as a member of a class he must satisfy the Court that the imputation is against him personally and he is the person aimed at before he can maintain a prosecution for defamation. It is argued on behalf of the Crown that the question whether the words are defamatory or not is a question of construction. This proposition is only partly true. In England the question as to how the words were understood by those to whom they were addressed is a question for the Jury if the Judge holds that there is a *prima facie* case. Here when the case is not tried with the aid of a Jury, the question must be decided by the Judge as a question of fact and in deciding this question the following principle should be borne in mind "All circumstances which were apparent to the by-standers at the time the words were uttered should be put in evidence so as to place the Jury as much as possible in the position of such by standers and then it is for the Jury to say what meaning such words would fairly have conveyed to their minds." Odgers on Libel and Slander, 5th Ed., p. 111. We should not construe the words as we would a document of title according to rule of construction of deeds, and specially when the words spoken have not been proved with certainty; and we have to decide not merely whether the words are defamatory but also whether the words refer to the complainant. Applying these principles and taking all circumstances in consideration I am of opinion that the words complained of in the charges have not been proved to have been used with reference to each and every member of the Police force and the complainant cannot, therefore, be said to be a person aggrieved by the offence complained of. In my opinion the charges are not sustainable against the petitioner at the instance of the complainant.

In my opinion this is sufficient to dispose of the Rule but as the matter must be placed before another Judge on account of our difference of opinion I must record my judgment as to whether the case falls under any of the Exceptions to s. 499, Indian Penal Code, assuming that the complaint is otherwise sustainable. As regards the first Exception *i. e.*, the plea of truth I agree with the learned Sessions Judge where he says that where the defamation imputes a crime to the complainant and the accused pleads justification there must be the same strictness of proof as on a trial for such crime. But in this case no crime was imputed to the complainant himself and the persons against whom the allegations were made were not before the Court. In this case no Court would be justified in pronouncing an opinion that the allegation against persons not before it were true without giving an opportunity to those persons to be heard. I pointed this out to the learned Counsel for the petitioner when he was submitting that the allegations were true. All that the accused could establish in the present case was that there was *prima facie* evidence as to the truth of the allegation and which the accused might reasonably believe to be true or in other words his good faith. It is contended on behalf of the Crown that the petitioner cannot urge the plea of good faith, because he says he spoke only about the conduct of the constables and all that he heard was about the conduct of the constables. If his plea that he spoke only about the constables is not accepted, the plea of good faith on his own statement is not maintainable. I do not think this contention can be accepted, as it seems to me not proper that one part of the statement of the petitioner should be rejected and the other part used as an admission of guilt. In one portion of his argument the learned Standing Counsel said that although the members of the Police force were fluctuating the imputations might be held to be on the complainant because the men were under his control and he was at the place all along. If that be so, the petitioner may establish his good faith by giving evidence with reference to the conduct of the constables. It was, however not argued on behalf of the Crown that the petitioner had no reasonable cause for believing the statements he had heard in the village and that he has not succeeded

in establishing his good faith on that ground. But as the learned Sessions Judge came to a different conclusion I think it right to record my opinion on the question. It appears to me that on the finding of the Sessions Judge himself some acts of oppression were committed there. Dealing with the matter of Gaizuddi who was alleged to have been beaten with the result that he died, the learned Judge observes, "Moulvi A. Quadery has stated in his deposition that although he found no marks of injury on the man and most of the people there said that the man had epilepsy, some people also were saying at the time that Gaizuddi had been beaten by constables. I am, therefore, inclined to hold that there was some kind of rough handling on him."

This witness was the Deputy Superintendent of Police and he saw the man when he was in a dying condition. He also deposed that Deputy Magistrate, Babu Mani Mohan Ghose, P. W. No. 14, who was there also heard about this at the time. It is regrettable that none of these officers made any enquiry at that time about the allegations, which might have enabled them to find out the truth at once. The Sessions Judge further held that there might have been some rough handling, such as catching hold of women's hands, pulling at their cloth, etc. I cannot agree with the Deputy Magistrate, P. W. No. 14 above named, that pulling women by the hands, taking away their cloth, making women naked, prodding them with guns, could be legally justified. It is not necessary for the purpose of this case to examine the evidence regarding the various cases dealt with by the Sessions Judge. But I think it would be right to refer to some of the cases. One Fuljan Bibi came into Court and deposed amongst other things that the nipple of her breast was bitten off. She was not asked whether she was willing to submit to an examination of her person, but was disbelieved because another witness who went to the village to make enquiries stated that the name of another woman was given to that witness as having been so maltreated. I do not think this to be satisfactory. The case of one Haju Bibi also deserves notice. She complained that she had been raped. It was alleged that there was an eye witness a boy of about 16 years named Noai. Noai was examined by the Deputy Magistrate several times, a rather unusual procedure. The matter was adjourned for

the identification of the man. The Deputy Magistrate P. W. No. 14 says, "Noai witness identified constable Mir Ahmed Ali as the ravisher. The constable was mixed up with 30 others." After this identification the case was dismissed. In this case, I think either the constable should have been tried for the offence alleged or the woman for bringing a false charge against an innocent man. But as I have said it is immaterial for the present case whether the stories were true or false. In my opinion, however, the petitioner had reasonable grounds for believing in the truth of the allegations made to him having regard to all the circumstances and as it is also not argued on behalf of the Crown that there were no reasonable grounds for the petitioner's belief, I hold that the case comes under the 9th Exception of s. 499, Indian Penal Code, although the language of the petitioner is otherwise objectionable. On all these grounds I would make the Rule absolute and acquit the accused of the charges. I do not think it necessary to refer to some other points urged by the petitioner's Counsel as, in my opinion, they fall within one or other of the questions I have dealt with.

Messrs. S. N. Halder, B. K. Chowdhury, D. N. Sen, Babus Suresh Chandra Talukdar, Ashitaranjan Ghosh, Bhudar Halder, Manmatha Nath Roy (Jr.) and D. N. Bhattacharjee, for the Petitioner.

Mr. B. L. Mitter, for the Crown.

JUDGMENT.—The petitioner in this case has been tried and convicted by the Sub-Divisional Magistrate of Faridpur on three charges of defamation and was sentenced under s. 500, Indian Penal Code, to one year's simple imprisonment, these sentences to run concurrently.

On appeal to the Sessions Judge of Faridpur his conviction on the 3rd charge was set aside and the sentences were reduced to 6 months' simple imprisonment on each of the two charges on which the conviction was upheld, these sentences also to run concurrently.

He has obtained a Rule from this Court calling upon the District Magistrate and the complainant to show cause why the conviction and the sentence passed upon him should not be set aside or such other orders passed as to this Court may seem fit.

The Rule came on for hearing before my learned brothers, Newbould and B. B.

Ghose, J.J., who are equally divided in opinion. The case with the opinions of the learned Judges has been laid before me under s. 429, Cr. P. C.

The charges in respect of which the petitioner's conviction has been upheld by the Sessions Judge are as follows :—

Firstly.—That you on or about the 13th day of June 1923 at Berhamganj P. S. Sibchar, defamed the complainant by making and publishing the following imputation in your speech at a public meeting concerning the Police force employed at Char Maniar of which the complainant was a member and the principal officer in charge of the investigation to the effect that not to speak of the Police only but the British Government themselves and the superior officers including from the District Magistrate down to the *daroga* and *chowkidars* were all beasts and pigs in their conduct, intending to harm and knowing and having reason to believe that it would harm the reputation of the said complainant and the Police force employed at Char Maniar, and that you thereby committed an offence punishable under s. 500, Indian Penal Code, and within my cognizance.

Secondly.—That you on or about the 17th day of June 1923, at Faridpur P. S. Kotwali, defamed the complainant by making and publishing in your speech at a public meeting the following imputation concerning the Police force employed at Char Maniar of which the complainant was a member and the principal officer in charge of the investigation to the effect that the Police force employed at Char Maniar had bitten off the nipple of the breast of a woman and had bitten the cheek of a woman nine months pregnant intending to harm and knowing and having reason to believe that such imputation will harm the reputation of the complainant and the Police employed at Char Maniar and that you thereby committed an offence punishable under s. 500, Indian Penal Code, and within my cognizance.

It has been submitted on behalf of the petitioner that these charges are defective.

Under s. 499, Indian Penal Code, whoever by words..... makes or publishes any imputation concerning any person, intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person is said to defame that person.

The person concerning whom the imputa-

tion is made, whom it is intended to harm in his reputation, and who in consequence is defamed is the same throughout.

There is confusion in these charges between the complainant and the Police force at Char Maniar in relation to the various ingredients of the charge.

It is charged that the complainant was defamed by imputations made concerning the Police force at Char Maniar, and that the reputation intended to be harmed was that of the complainant and the Police force.

It is obvious that charges so framed do not conform to the requirements of the definition.

The defects seem to have originated in a failure to appreciate Explanation 2 to the section and the principles applicable when the words making the imputation appear to be general expressions but the complaint is that they are directed against a particular individual.

The Explanation in my opinion is intended to include a company or an association or collection of persons as such within the word "person" as used in the definition so that the latter should not be limited to individuals.

In a case in which the Explanation is properly called into use the identity of the company or association or collection of persons must be maintained throughout with reference to the imputation said to have been made concerning them as such with the intention of harming their reputation so that thereby they are defamed. An imputation concerning a company or association of persons as such—and the last two words of the explanation are most material to its correct application—cannot by virtue of this Explanation justify a charge of defaming an individual, and a charge cannot combine the explanation with the definition for such a purpose. Nor does it carry the matter any further to state as has been done by the charges in this case that the complainant was a member of the Police force at Char Maniar.

The charges seem to have assumed that the Police force at Char Maniar is an association or collection of persons such as the Explanation contemplates but without expressing any definite opinion on the point, as it does not directly arise, I have considerable doubt whether such a view is correct. *Aldridge v. Barrow* (8) which is some authority on the point was a civil

(8) 34 C. 662; 11 C. W. N. 680.

suit but that would not appear to affect the principle (*vide* the observations of Fletcher Moulton, L. J. in *Jones v. Hulton & Co.* (9)).

In this case the petitioner is charged with having defamed an individual. The imputations in the charges are general expressions assuming that they concern the complainant. This would appear to be the case notwithstanding the reference in the first to the District Magistrate and the *daroga*, because neither of these officers, who are capable of identification if the investigation referred to in the charge is specified, which has not been done, is the complainant in the case. As regards the second charge though no one is referred to by name or by reference to his office in the imputations charged the nature of the imputations is indicative of the fact that an individual may be meant.

It may be that the general nature of the imputations has led to the confusion in the charges. There is no necessity for that to have occurred.

The cardinal rule is, that the offence consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it [*Per* Lord Loreburn, L. C., in *Hulton v. Jones* (10)] Lord Shaw of Dunfermline in his speech cited *Bourke v. Warren* (11) in which Abbott, C. J. said:—"The question for your consideration is whether you think the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant. It is not necessary that all the world should understand the libel; it is sufficient if those who know the plaintiff can make out that he is the person meant."

Following upon the rule so laid down it becomes a matter of comparative indifference whether the words are general or refer to a specific individual, but lest this be taken too literally I should explain that it may be that an individual is as much defamed by the words apparently only of more general application as by words referring to him by name. The test is that formulated by the learned Judges whose observations I have quoted.

(9) (1909) 2 K. B. 444 at p. 460; 78 L. J. K. B. 937; 101 L. T. 330; 25 T. L. R. 597.

(10) (1910) A. C. 20; 79 L. J. K. B. 198; 101 L. T. 831; 54 S. J. 116; 26 T. L. R. 128.

(11) (1826) 2 Car. & P. 307.

A very good instance of a case where defamatory matter may appear only to apply to a class of individuals yet, if the descriptions in such matter are capable of being, by innuendo, shown to be directly applicable to any one individual of that class an action may be maintained by such individual in respect of the publication of such matter, is to be found in *Le Fanu v. Malcolmson* (12). The defamatory matter is too long to be reproduced here *seriatim*; all that I need quote is a passage from the judgment of Lord Cottenham, L. C.—"If a party can publish a libel so framed as to describe individuals, though not naming them, and not specifically describing them by any express form of words, but still so describing them that it is known who they are, as the jurors have found it to be here and if those who must be acquainted with the circumstances connected with the party described may also come to the same conclusion, and may have no doubt that the writer of the libel intended to mean those individuals, it would be opening a very wide door to defamation, if parties suffering all the inconvenience of being libelled were not permitted to have that protection which the law affords. If they are so described that they are known to all their neighbours as being the parties alluded to; and if they are able to prove to the satisfaction of a Jury that the party writing the libel did intend to allude to them, it would be unfortunate to find the law in a state which would prevent the party being protected against such libels;" and the following passage which is to be found in the judgment of Lord Campbell:—

"The first objection which has been relied on by the Counsel for the plaintiff in error, who certainly has argued the case with his usual ability, and has brought forward all the arguments that learning and talent could supply; the first objection is that this libel applies to a class of persons, and that, therefore, an individual cannot apply it to himself.

"Now I am of opinion that that is contrary to all reason, and is not supported by any authority. It may well happen that the singular number is used; and where a class is described, it may very well be that the slander refers to a particular individual, that is a matter of which evidence is to be

(12) (1848) 1 H. L. C. 637; 8 Ir. L. R. 418; 13 L. T. (o. s.) 61; 9 E. R. 910; 73 R. R. 213.

laid before the Jury, and the jurors are to determine whether, when a class is referred to, the individual who complains that the slander applied to him is, in point of fact, justified in making such complaint. That is clearly a reasonable principle, because whether a man is called by one name, or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on, know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done as would be done if his name and Christian name were ten times repeated."

The confusion of ideas which these charges disclose makes it impossible for a proper trial to be held. To give but one instance the question of the relevancy of evidence will be approached from a different stand point if the charges stand as drawn or if they are drawn as they should be in accordance with the principles applicable to the case. I may even go so far as to say that there has been no trial at all of the petitioner for having defamed the complainant, for a trial on these charges cannot be said to have been such a trial.

In the circumstances the evidence and the merits generally have not been gone into. As I appreciate the situation there should be a new trial upon charges properly drawn, and in that view I ought to express no opinion on the merits even had they been fully argued. The question is as to the form the final order should take, as to which I have now heard learned Counsel for the parties.

The order will be that the conviction and sentences by the Sessions Judge, Faridpur, be set aside and I direct that the case be re-tried by the District Magistrate, Faridpur, or by such Subordinate Magistrate to whom he may assign the case, other than Babu A. R. Bose, Sub-Divisional Magistrate of Faridpur, before whom the previous trial was held.

Z. K.

*Conviction set aside;
Re-trial ordered.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 91 OF 1925.
CRIMINAL REVISION PETITION No. 85 OF 1925.

February 17, 1925.

Present:—Mr. Justice Devadoss and
Mr. Justice Wallace.

In re PERUMAL NAICK—ACCUSED—
PETITIONER.

*Criminal Procedure Code (Act V of 1898), s. 190—
Penal Code (Act XLV of 1860), s. 211—False charge
of dacoity before Village Magistrate—Case struck off
on Police report—Charge by Police of false information,
legality of—Complaint—Procedure.*

An offence under s. 211 of the Penal Code is a non-cognizable one, and the Police are not empowered to investigate into it of their own accord, and to prefer a charge in respect of it.

Accused made a complaint to a Village Munsif of a dacoity having been committed in his house, mentioning certain persons as having taken part in it. The Police on investigation reported the case to be false, and the Sub-Magistrate to whom the papers were sent struck the case off his file. The Police then put in a charge-sheet against the accused before the Sub-Divisional Magistrate for an offence under s. 211 of the Penal Code:

Held, that it was open either to the persons alleged to have taken part in the dacoity or to the Village Munsif, or to any Police Officer, to prefer a complaint against the accused under s. 190 of the Cr. P. C., in which case the Magistrate before whom the complaint was made could take the case on his file after taking a sworn statement from the complainant, but that the Police could not start proceedings of their own accord, and that, consequently, the proceedings must be quashed as illegal.

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise the proceedings of the Court of Second Class Magistrate, Satur, dated the 22nd January 1925, in R. C. No. 1 of 1925.

Mr. K. S. Ramabhadra Iyer, for the
Petitioner.

The Public Prosecutor, for the Crown.

ORDER.—This is an application to quash the proceedings, now pending before the Sub-Magistrate of Satur, on the ground that no complaint was filed in the case to enable the Magistrate to take proceedings against the petitioner. The petitioner made a statement to the Village Munsif of Mela Raja Kularaman, that a dacoity was committed in his house and mentioned certain persons as having taken part in the dacoity. The Village Munsif forwarded the complaint to the Police, who held an investigation and reported the case as false. The Sub-Magistrate of Srivilliputtur to whom the papers were sent, accepted the referred charge-sheet and struck the case off his file. The Police put in a charge-sheet

before the Sub-Divisional Magistrate of Sivakasi, against the petitioner for an offence under s. 211, Indian Penal Code. The Sub-Divisional Magistrate transferred the case to the Second Class Magistrate of Satur. The contention of the petitioner is that there is no complaint from the Second Class Magistrate of Srivilliputtur, who acted on the referred charge-sheet of an offence under s. 211 and, therefore, the proceedings are illegal.

Without expressing an opinion on that contention, we are satisfied that this is not a case in which the Police could start proceedings of their own accord. The offence under s. 211 is a non-cognizable one, and the Police are not empowered to investigate into a non-cognizable offence, and charge the petitioner. It is open either to any of the accused in the alleged dacoity case or to the Village Munsif, or any Police Officer, to prefer a complaint under s. 190, Cr. P. C., in which case the Magistrate before whom the complaint is made may take the case on his file after taking a sworn statement from the complainant. Such a course was not adopted in this case. We think the proceedings before the lower Court are illegal and they are hereby quashed.

V. N. V.

Proceedings quashed.

ODDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 32 OF 1925.

August 13, 1925.

Present:—Mr. Dalal, J. C.

EMPEROR—PROSECUTOR

versus

Nawab NISAR ALI KHAN AND OTHERS—
ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 145, 146—U. P. Land Revenue Act (III of 1901), s. 40 (2)—Order under ss. 145, 146, Cr. P. C.—Mutation in favour of opposite party—Restitution.

An order under s. 145 or s. 146 of the Cr. P. C. does not interfere with an order subsequently made by the Revenue Authorities under s. 40 of the U. P. Land Revenue Act making over possession of the property to the party in whose favour an order of mutation has been passed. If the opposite party wins the mutation case at a subsequent stage, the Revenue Court has power to grant restitution to him. [p. 399, col. 2.]

Reference made by the District Magistrate, Bahraich, under s. 438 of the Cr. P. C. by his order dated the 8th July 1925.

Pandit Gokaran Nath Missra and Mr. S. N. Rizwai, for the Crown.

Messrs. Niamat Ullah and Ghulam Hassan, for the Respondent.

ORDER.—Section 145-proceedings commenced on the 21st of January 1924 and to-day on the 13th of August 1925, I shall certainly not revise them. A competent Court has passed orders under s. 40 (2) of the Land Revenue Act that out of the two claimants Nawab Nisar Ali Khan and Sardar Mohammad Ali Khan the landed property shall be made over to Sardar Mohammad Ali Khan. The order of the Magistrate either under s. 145 or under s. 146 does not interfere with this order under s. 40 of the Land Revenue Act. I am well satisfied that Mr. Thomas did not by his order of 1st June as Magistrate make over any possession to Sardar Mohammad Ali Khan. The possession has been made over to Sardar Mohammad Ali Khan under s. 40 so if Nawab Nisar Ali Khan wins his mutation case at any stage, the Revenue Court will have power to grant restitution.

This disposes of the matter as regards revenue paying property. There are two other properties, the subject of dispute:—

(1) There are two *kothis*.

(2) Three *immambaras* one *parti* land and a *karbala* in addition to the revenue paying land. The parties are agreed here as regards those that they may continue in the possession of the party actually in possession at present. It appears that one *kothi* is in the possession of Sardar Mohammad Ali Khan and the rest in the possession of Nawab Nisar Ali Khan. The parties are in such possession because the manager allowed this possession. This possession shall continue. There is no prospect of any breaking of heads with respect to this property and there is no reason, therefore, to set aside the Magistrate's order of 1st June 1925.

There is a large amount of money collected by the Tahsildar of Nanpara as Manager of the estate during the long period of the litigation. At one time it amounted to 1 *lakh* 31 thousand and possibly it has since increased. As regards that particular amount the order of the Magistrate appears to be that it shall be made over to Sardar Mohammad Ali Khan. This opinion is arrived at on a decision as to title to revenue paying property and it will not be just that this sum should be made over to either party until their claims have been definitely decided at last by the highest revenue tribunal. I, therefore, add to the order of 1st June 1925 of the Magistrate that the cash collected by the Tah-

sildar of Nanpara shall not be made over to any party until the mutation claim has been finally decided in the Revenue Courts. When the claim is finally decided by the highest Revenue Court, the successful party may apply to the Magistrate concerned for delivery of the money. This procedure will enable the opposite party if so inclined to go to the Civil Court and obtain attachment. I may repeat that the money in the custody at present of the Tahsildar of Nanpara shall not be made over to either party until all the conditions fixed by me above have been complied with.

Either party may apply to the Magistrate having jurisdiction for the investment of the money in the hands of the Tahsildar of Nanpara.

I think these orders will satisfy the parties. The order of the Magistrate dated 1st June is amended only so far as the case is concerned, otherwise there has been no interference. Let the papers be returned.

Z. K.

Papers returned.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 10 OF 1924.

February 27, 1924.

*Present:—*Mr. Baker, J. C.

RAHIMANSHAH AND ANOTHER—ACCUSED—
APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 99—Private defence—Plea, whether can be raised in Appellate Court—Right, when can be exercised.

It is open to an accused person to raise the plea of private defence in the Appellate Court even though it was not taken before the Trying Court where he altogether denied the offence, but the plea cannot help him when his object in causing the injury was not to save himself but to beat his assailant and when it was not necessary for the purpose of self-defence to have inflicted the injury actually caused.

Yusuf Husain v. Emperor, 44 Ind. Cas. 675; 40 A. 284; 16 A. L. J. 169; 19 Cr. L. J. 371, and *Veerana Nadan v. Emperor*, 15 Ind. Cas. 310; (1912) M. W. N. 404; 11 M. L. T. 251; 13 Cr. L. J. 470, referred to.

Revision of an order of the Additional Sessions Judge, Balaghat, dated the 7th January 1924, in Criminal Appeal No. 2 of 1923.

Mr. P. C. Dutt, for the Applicants.

Mr. G. P. Dick, for the Crown.

ORDER.—The facts of this case are that the applicants have been convicted under s. 325, Indian Penal Code of causing grievous hurt to one Rakhdia by beating him and breaking both his arms and were sentenced to four months' rigorous imprison-

ment and a fine of Rs. 25 each. The conviction and sentence were confirmed on appeal by the Additional Sessions Judge, Balaghat. The accused apply for revision on the grounds first that they are protected by the right of private defence and secondly that in any case they should be given the benefit of s. 562 Cr. P. C. as was recommended by the Second Class Magistrate who first tried the case and who submitted the proceedings to the Sub-Divisional Magistrate under s. 349, Cr. P. C.

As regards the plea of private defence, this was not taken before the Trying Court where the accused altogether denied the offence. Assuming this defence to be open to them as it may be on the rulings in *Yusuf Husain v. Emperor* (1) and *Veerana Nadan v. Emperor* (2) the present is not a case of private defence. The argument is that the accused were defending one Jaman a Musalman, who was being beaten by Mhars. But the evidence is that the accused pursued and beat the Mhars and their object was not to save Jaman but to beat his assailants. In any case it was not necessary in order to defend Jaman that the accused should beat the complainant so severely as to break his arms.

The plea of private defence will, therefore, not assist the accused. As to s. 562 the Second Class Magistrate who tried the case originally thinks that because a fight took place between both parties this section should be made use of. This section was applied to Jaman because he was himself somewhat severely injured in the fight which took place between the Musalmans and Mhars.

In the last paragraph of his judgment the learned Additional Sessions Judge has pointed out that the accused themselves received no provocation. Their assault was, therefore, deliberate and though they may have been actuated by a desire to help Jaman their guilt is not the less serious.

Rakhdia must have been beaten with considerable force for both of his arms to be fractured.

In these circumstances I see no reason for interference. The applications are dismissed and the applicants who are on bail must serve the remainder of their sentence.

G. R. D.

Applications dismissed.

(1) 44 Ind. Cas. 675, 40 A. 284; 16 A. L. J. 169; 19 Cr. L. J. 371.

(2) 15 Ind. Cas. 310; (1912) M. W. N. 404; 11 M. L. T. 251; 13 Cr. L. J. 470.

MADRAS HIGH COURT.SECOND CIVIL APPEALS NOS. 593 TO 600 AND
1459 TO 1466 OF 1923.

December 3, 1924.

Present:—Mr. Justice Ramesam
and Mr. Justice Venkatasubba Rao.ANNAMDEVULA TATA *alias*
VENKATARAYUDU AND OTHERS—

DEFENDANTS—APPELLANTS

*versus*Khan Saheb Khwaja AHAMADULLA
KHAN SAHIB BAHADUR AND ANOTHER—
PLAINTIFFS—RESPONDENTS.*Landlord and tenant—Suit by landlord against
tenants as trespassers—Occupancy rights, plea of—
Burden of proof—Appeal, second—Finding of fact.*Where in a suit by the landlord to eject a tenant
from the lands held by him, the tenant sets up a
defence that he has a right of permanent tenancy in
the lands, the onus of proving that he has such
right lies upon the tenant. [p. 402, col. 2.]In the Presidency of Madras when a tenancy com-
mences under a terminable contract there is nothing
to prevent the landlord from ejecting the tenant at the
end of the term from the lands which have been let to
him. [p. 403, col. 2.]Where in a suit for damages for use and occupation
by a landlord, on the footing that the defendants were
holding over and were trespassers in law, the latter
plead permanent rights of occupancy, the burden of
making out occupancy rights lies on the defendants.
[p. 402, col. 1.]*Seturathan Iyer v. Venkatachala Goundan*, 56 Ind.
Cas. 117; 43 M. 567; (1920) M. W. N. 61; 27 M. L. T.
102; 11 L. W. 339; 38 M. L. J. 476; 22 Bom. L. R. 578;
18 A. L. J. 707; 25 C. W. N. 485; 47 I. A. 76 (P. C.)
and *Naina Pillai Marakayar v. Ramanathan Chettiar*,
82 Ind. Cas. 226; 47 M. 337; (1924) A. I. R. (P. C.) 65; 19
L. W. 259; 22 A. L. J. 130; 31 M. L. T. 10; (1924) M.
W. N. 293; 46 M. L. J. 516; 10 O. & A. L. R. 464; 28 C.
W. N. 809; 51 I. A. 83; L. R. 5 A. (P. C.) 33 (P. C.),
relied on.Where the tenants by *muchilikas* undertook to
surrender the lands at the end of the term, and there
was constant change of tenants and enhancement of
rent, and alienations by the tenants were few in number
and of recent times:*Held*, that a finding that the tenants had no occu-
pancy rights was justified and that the High Court
would not in second appeal interfere with the finding.
[p. 402, col. 2.]*Chockalinga Pillai v. Vythealinga Pundara
Sunnady*, 6 M. H. O. R. 164, *Suryanarayana v. Patanna*,
48 Ind. Cas. 689; 41 M. 1012; 45 I. A. 203; 25 M. L. T.
30; (1918) M. W. N. 859; 23 C. W. N. 213; 9 L. W. 126;
29 C. L. J. 153; 1 U. P. L. R. (P. C.) 11; 36 M. L. J.
585; 21 Bom. L. R. 547; (1919) M. W. N. 463 (P. C.),
Upadrashtu Venkata Sastrulu v. Divi Setharomudu,
51 Ind. Cas. 301; 43 M. 166; 46 I. A. 123; 17 A. L. J.
725; 37 M. L. J. 42; 21 Bom. L. R. 925; 26 M. L. T. 175;
30 C. L. J. 441; 10 L. W. 633; 24 C. W. N. 129; 2 U. P.
L. R. (P. C.) 16 (P. C.), and *Naina Pillai Marakayar v.
Ramanathan Chettiar*, 82 Ind. Cas. 226; 47 M. 337;
(1924) A. I. R. (P. C.) 65; 19 L. W. 259; 22 A. L. J. 130;
31 M. L. T. 10; (1924) M. W. N. 293; 46 M. L. J. 516; 10
O. & A. L. R. 464; 23 C. W. N. 809; 51 I. A. 83; L. R. 5
A. (P. C.) 33 (P. C.), relied on.*Bhadrayya v. Venkataratnam*, 11 Ind. Cas. 545; 21
M. L. J. 803; 10 M. L. T. 54, held, no longer law.

IN S. A. Nos. 593 TO 600 OF 1923.

Second appeals against the decrees of the
Court of the Subordinate Judge, Rajah-
mundry, in A. S. Nos. 51, 49, 52, 53 and 56
of 1922 and against the decrees of the Court
of the Additional Subordinate Judge,
Rajahmundry, in A. S. Nos. 17, 14 and 15
of 1920, preferred against those of the
Court of the Additional District Munsif,
Rajahmundry, in O. S. Nos. 121, 114, 123,
129, 122, 118, 115 & 116 of 1918 respectively.

IN S. A. Nos. 1459 TO 1466 OF 1923.

Second appeals against the decrees of the
Court of the Subordinate Judge, Rajah-
mundry, in A. S. Nos. 57, 44, 46 and 45 of 1922,
43 of 1922, 55 of 1922, 48 of 1922 and 47 of
1922, respectively preferred against those
of the Court of the Additional District
Munsif, Rajahmundry, in O. S. Nos. 120,
113, 126, 119, 112, 111, 124 and 128 of
1918 respectively.Mr. A. Krishnaswami Iyer, for the Ap-
pellant.Messrs. C. V. Anantakrishna Iyer and
C. Rama Row, for the Respondents.**JUDGMENT.**—These second appeals
arise out of a batch of suits filed to recover
damages for use and occupation in respect
of the two villages of Kadiyam and
Jogurapad in the Godavari District. The
Courts below gave decrees in favour of
plaintiff and the defendants file these
appeals.The two villages though situate within
the ambit of the *zemindari* of Pittapore had
a history of their own apart from the
zemindari. They were granted in *Fasli*
1148 (or 1748) by or on behalf of Asaof
Jah *alias* Nizumulmulk, the first Nizam of
Hyderabad. They were regarded as exclud-
ed from the assets of the *zemindari* at the
time of the Permanent Settlement in 1802
and continued to be held by the grantee's
successors as *inam*. In 1856, they were
resumed by the Government for reasons
not clear but not material. Thus, they
did not get the benefit of the *inam* Settle-
ment in 1862 but continued to be held by
the grantees on *ryotwari* tenure. The de-
fendants or their predecessors were the
tenants of the villages. In 1900, the as-
sessment payable to Government was
enhanced as a result of the re-survey and
re-settlement in which the plaintiffs were
regarded as the *pattadars* of the villages.
No rents were admittedly collected from the
tenants from 1906 to 1910. In 1910, notices
to quit were issued to the tenants but in

vain. In 1917 the present suits were filed for damages for use and occupation on the footing that the defendants were holding over and are trespassers in law.

The defendants pleaded that they had permanent occupancy rights, that they were not trespassers and, therefore, are not liable to pay damages (as opposed to rent). They also pleaded that, as they did not pay rents for 19 years, the suits are barred by limitation. They admitted the payment of assessment due to Government. This must be presumably on behalf of the *pattadar*.

On second appeal, objection has been taken by the respondent, that, in some of the second appeals—those in which the value did not exceed Rs. 500—no second appeals lie. It is unnecessary to decide the point, though we think the objection is well-founded. It is admitted that the objection cannot apply to all the cases and the merits must be gone into.

The only point practically argued in the second appeals is that the trial of the suits relating to Jagurupad has been seriously prejudiced by their being consolidated with the suits relating to Kadiyam, that there is substantial difference between the two villages in the matter of the relations between the landlord and tenants and the Courts below were prejudiced by the facts relating to Kadiyam which, it is admitted, are more favourable to the landlord in certain respects. We say this is the only point argued, for, all other points discussed in argument are subsidiary to and illustrative of this. As to Kadiyam, no doubt the appellants argued that they have acquired a title by adverse possession but we do not think this argument is tenable in view of the points taken up in the written statements. The suit relating to Jagurupad are three in number and their second appeals are S. A. Nos. 593, 596 and 597, and the Vakil for the appellants has strenuously argued that these second appeals should be sent back for fresh findings. Before this point is dealt with, it will be convenient to state the fact and findings about both the villages and dispose of the other second appeals.

The Courts below held that, as the suit villages are *ryotwari* villages, the burden of making out occupancy rights lay on the appellants relying on *Seturathan Iyer v. Venkatachala Goundan* (1). In this connec-

tion *Naina Pillai Marakayar v. Ramathan Chettiar* (2) may also be mentioned as laying down (page 344*) :—"It cannot now be doubted that when a tenant of lands in India, in a suit by his landlord to eject him from them, sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such rights is upon the tenant".

This is not denied for the appellants. The Courts below found that Kadiyam lands were being held under *muchilikas* for terms of years, X series of 1875, N series of 1886, M series of 1891. The last set of *muchilikas* covered the period terminating with June 1896. In all these *muchilikas*, the tenants undertook to surrender the lands at the end of the term and must, therefore, be considered as re-admitted as tenants under the next succeeding set of *muchilikas*. They also found that there was constant change of tenants in the village of Kadiyam and that there were also enhancements of rents. The District Munsif found that rents continued to be paid by the tenants after 1896 upto 1906, in respect of both the villages. But the Subordinate Judge found that the payment of rent has been practically proved up to 1900 only. We allowed reference to the documents and evidence in detail to see if there is any mis construction of a document or a mis statement of fact by the lower Appellate Court. But none has been established. The tenants latterly began to alienate the holdings but it was found these were all after 1900. They are sixteen in number for Kadiyam and of the years 1902-1906 except one in 1912. As to Jugurupad, they were five in number and are of the years 1902, 1905-1907. Some improvements said to have been effected by the tenants were also stated and considered by the Courts below. After stating the facts common to all the cases, the District Munsif stated the facts proved in respect of each case separately and the Subordinate Judge has not re-stated them as it would be only a repetition. On the facts summarised as above, they found that no rights of occupancy have been made out by the *ryots*. The Vakil for the ap-

(1) 56 Ind. Cas. 117; 43 M. 567; (1920) M. W. N. 61; 27 M. L. T. 102; 11 L. W. 399; 38 M. L. J. 476; 22 Bom. L. R. 578; 18 A. L. J. 707; 25 C. W. N. 485; 47 I. A. 76 (P. C.).

(2) 82 Ind. Cas. 226; 47 M. 337; (1924) A. I. R. (P. C.) 65; 19 L. W. 259; 22 A. L. J. 130; 34 M. L. T. 10; (1924) M. W. N. 293; 46 M. L. J. 546; 10 O. & A. L. R. 464; 28 C. W. N. 809; 51 I. A. 83; L. R. 5 A. (P. C.) 33 (P. C.).

*Page of 47 M.—[Ed.]

pellants argued that the facts are similar to those in *Seturathan Iyer v. Venkatachala Goundan* (1) more particularly in Jugurepad. We do not agree with him. In that case there were 43 alienations found ranging from 1859 to 1896—as opposed to the much smaller number in the present cases which are all after 1900—when the Government enhanced the assessment and consequently the landlord neglected the collection of rents. The Courts below have considered all the circumstances that may be relied on in favour of the tenants and have come to a conclusion on a question of fact with which there is not the faintest shadow of justification for interference. In particular the effect of the *muchilikas* of Kadiyam containing a clause that the tenant shall surrender at the end of the term may be stated—a fact totally absent in *Seturathan Iyer v. Venkatachala Goundan* (1). In *Suryanaryana v. Patanna* (3), Sir John Edge stated (at page 1016*): “By these documents of tenancy the defendants or their predecessors-in-title agreed with the *inamlars* to quit possession of their holdings on the determination of the term for which the lands were let to them, and without claiming any *jerayati* right in the lands”. (at page 1021*) “By the *muchilikas* which were executed by the defendants respectively or their predecessors-in-title the term for which the lands were let to them was specified; it was admitted that they held no *jerayati* rights and they agreed to quit the lands at the end of their term it has been proved that, when these tenancy agreements were entered into and the defendants or their predecessors-in-title were let into possession under them, any of the lands were, or had been, held by a *ryot* with a permanent right of occupancy”. In *Upad-raishta Venkata Sastrulu v. Divi Setharomudu* (4), Viscount Cave observed (page 170†) each of these agreements contained a declaration by the tenant to the effect that except the right of cultivating the land for a year under the agreement he had no

(3) 48 Ind. Cas. 689; 41 M. 1012; 45 I. A. 209; 25 M. L. T. 30; (1918) M. W. N. 859; 23 C. W. N. 273; 9 L. W. 126; 29 C. L. J. 153; 1 U. P. L. R. (P. C.) 11; 30 M. L. J. 585; 21 Bom. L. R. 547; (1919) M. W. N. 463 (P. C.).

(4) 51 Ind. Cas. 304; 43 M. 166; 46 I. A. 123; 17 A. L. J. 725; 37 M. L. J. 42; 21 Bom. L. R. 925; 26 M. L. T. 175; 30 C. L. J. 441; 10 L. W. 633; 24 C. W. N. 129; 2 U. P. L. R. (P. C.) 16 (P. C.).

*Pages of 41 M.—[Ed.]

†Page of 43 M.—[Ed.]

other right whatever thereto and accordingly that he agreed to the landlord (the plaintiff) taking possession of the land at the end of the year of tenancy without any relinquishment by the tenant. Page 173*, “When the defendants were admitted as tenants, they severally declared (as stated above) that they had no right of occupancy except such as was given to them by the tenancy agreements”. In *Naina Pillai Marakayar v. Ramanathan Chettiar* (2), it was observed at page 354†: “In 1831, some of the tenants of the temple’s endowed lands, apparently all of them, agreed amongst themselves to cultivate jointly the endowed lands of which they were tenants, and they executed and delivered to the Collector, who was then the manager of the temple and its endowments, a *muchilika* by which they took the endowed lands for a term from *Fasli* 1241. That *muchilika* is absolutely inconsistent with any of the tenants having then any right of permanent occupancy in any of the endowed lands of the temple and with their believing that they had any right of permanent occupancy in any of the temple’s lands. In 1870 Sir C. H. Scotland, C. J., held that when a tenancy in the Presidency of Madras commenced under a terminable contract there was nothing to prevent the landlord from ejecting the tenant at the end of the term from the lands which had been let to him”, thus approving of *Chockalinga Pillai v. Vythealinga Pundara Sunnady* (5) which is thus still good law except where abrogated by Legislature (I of 1908) as to lands in estates.

We are of opinion the appellants have no case as to Kadiyam lands and the Kadiyam appeals fail and are dismissed with costs.

It is argued as to Jugurepad that the facts are different that there were no term *muchilikas*, that there was only one *muchilika* (R) in 1864, that a summary suit against the tenants in 1869 for acceptance of a tendered *muchilika* failed as is seen in (Exs. F and IV). These facts have been stated by the Courts below who also find that, nevertheless the tenants continued to pay rents till 1900, that there were enhancements in 1883, that the original two families who held in 1864 became three families in 1869. In 1874, another family was added (Ex. 21) and a fifth

(5) 6 M. H. C. R. 164.

*Page of 43 M.—[Ed.]

†Page of 47 M.—[Ed.]

family (Ganesula) has since been added. The District Munsif recorded all the evidence in one suit on the agreement of the parties, though later on it was objected to. In his judgment (para. 24) he says "In addition to what has been discussed above, I consider it proper to examine in detail the facts relating to each case to afford no room to suppose that the case of any individual defendant is prejudiced by joint trial". In para. 43, he states the facts relating to Jugurepad separately. The Subordinate Judge takes up Jugurepad separately in para. 19 and states all its facts separately until towards the end of the paragraph where the facts common to both the villages were re-stated for Jugurepad. In para. 20 the alienations have been separately grouped for both the villages. In para. 21, the improvements were stated and the only evidence expressly referred to related to Jugurepad and it was held that the building of small cattle sheds and granaries cannot be accepted as acts indicative of rights of permanent occupancy. It seems to us that not only all facts and circumstances in favour of the tenants have been stated and considered by the Courts below but every possible effort has been made to make it clear that the facts of the two villages have been kept separate in their minds. It is impossible to hold that the defendants suffered the smallest prejudice by the joint trial. It is true that, in Jagurepad, there are no term *muchilikas*, the changes of tenants are fewer. But the tenants have not shown that new tenants came in as alienees of former tenants and not as new admissions by the landlord. We may observe that the case of *Bhadrappa v. Venkataratnam* (6) cannot be regarded as good law after *Naina Pillai Marakayar v. Ramanathan Chettiar* (2). It is also true that there is only one enhancement. In our opinion these facts are enough to negative occupancy rights but if we can conceive that other Judges may come to a different opinion if sitting as Judges of fact, still there is no justification for interference with the findings of the lower Appellate Court in second appeal. We are also of opinion, the Jugurepad second appeals also fail and are dismissed with costs.

V. N. V.

Z. K.

Appeals dismissed.

(6) 11 Ind. Cas. 545; 21 M. L. J. 803; 10 M. L. T. 54.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 215 OF 1924.

July 15, 1925.

Present:—Mr. Simpson, A. J. C.
BHAGWATI PRASHAD—PLAINTIFF
—APPELLANT

versus

LALL BAHADUR—DEFENDANT—
RESPONDENT.

Hindu Law—Joint family—Alienation—Antecedent debt, existence of—Appeal, second—Finding of fact—Recitals in deed, value of.

The question whether an antecedent debt did or did not exist is one of fact and cannot be agitated in second appeal. The fact that the lower Appellate Court has declined to accept the recitals in the deed of transfer as evidence of the existence of an antecedent debt, does not vitiate its finding as to the existence of such a debt. [p. 405, col. 1.]

Under ordinary circumstances and apart from Statute, recitals in deeds can only be evidence as between the parties to the conveyance and those who claim under them. Such recitals cannot by themselves be relied upon for the purpose of proving the assertions of fact which they contain. [*ibid.*]

Nanda Lal Dhur Biswas v. Jagat Kishore Acharjya Chowdhuri, 36 Ind. Cas. 420; 44 C. 186; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 10 Bur. L. T. 177; 43 I. A. 249 (P. C.), followed.

Second appeal against the decree of the Subordinate Judge, Sultanpur, dated the 26th February 1924, reversing that of the Munsif, Sultanpur, dated the 24th November 1923.

Mr. Naimullah, for the Appellant.

Mr. G. N. Misra, for the Respondent.

JUDGMENT.—This is a second appeal. It raises no question of law. The suit was one for foreclosure of a mortgage, and the defence was that the property mortgaged belonged to the joint Hindu family, and that the money was not advanced either for family necessity, or for antecedent debt. It has been found in fact that the property was ancestral. The deed in suit is dated the 17th October 1911. The items set forth in the deed are as follows:—

1. Rs. 150 usufructuary mortgage, dated 13th July 1909.
2. Rs. 56-13 an unregistered bond dated 14th January 1910.
3. Rs. 61-3 an unregistered bond dated 23rd April 1910.
4. Rs. 23 a parcel loan.
5. Rs. 36 rent of 1317F and 1318F.
6. Rs. 48 paid in cash.

In the plaint it is not stated even if the land is ancestral. It appears, however, that the plaintiff, by verbal replication, set up

antecedent debt for the five items. The cash item, of course, could not be said to be antecedent debt. Apparently, no plea has ever been taken of family necessity. The Court of Trial found Items Nos. 2, 3, 4, and 5 proved to be antecedent debt, and gave a decree accordingly. The total of those four items is Rs. 177, but the interest brought the amount up to Rs. 692, and a foreclosure decree was given for this sum. The defendant appealed to the learned Subordinate Judge, and the plaintiff filed a cross-objection. The cross-objection related to the usufructuary mortgage of Rs. 150. It was dismissed. The appeal related to the four items Nos. 2, 3, 4 and 5. It succeeded, and plaintiff's suit was dismissed on a finding that antecedent debt was not proved for any of these four items. Plaintiff comes here in second appeal.

The appeal relates to the usufructuary mortgage, and to the Items Nos. 2, 3, 4 and 5. As I have said, it raises no question of law. The question whether antecedent debt existed is one of fact. It is suggested that a point of law arises because the learned Subordinate Judge declined to accept the recitals in the deed as evidence of antecedent debt, but in doing so he committed no error of law. The point was dealt with by the Privy Council in *Nanda Lal Dhur Biswas v. Jagat Kishore Acharjya Chowdhuri* (1). That was a case of alienations by a widow but the principle is the same. It was said, (page) 195*):

"It is well-established, that such recitals cannot by themselves be relied upon for the purpose of proving the assertions of fact which they contain. Indeed it is obvious that if such proof were permitted, the rights of reversioners could always be defeated by the insertion of carefully prepared recitals. Under ordinary circumstances and apart from Statute, recitals in deeds can only be evidence as between the parties to the conveyance and those who claim under them."

The learned Subordinate Judge, therefore, fell into no error of law in rejecting the recitals as evidence. He considered the evidence before him, and he found as a matter of fact that none of those items was proved to be an antecedent debt.

(1) 36 Ind. Cas. 420; 44 C. 186; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 10 Bur. L. T. 177; 43 I. A. 249 (P. C.).

These findings are binding upon me in second appeal, and they were sufficient for the disposal of the appeal before him and of the cross-objection.

The appeal is dismissed with costs.

Z. K.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1235 OF 1922.

April, 27, 1925.

Present:—Mr. Justice Suhrawardy and Mr Justice Duval.

DURLAV CHANDRA CHOWDHURI
AND OTHERS—DEPENDANTS—APPELLANTS

versus

JAMIRUDDIN AHAMED CHOWDHURI
AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Patni Taluks Regulation (VIII of 1819), s. 11 (1), (2)—Bengal Tenancy Act (VIII of 1885), ss. 167, 195 (e)—Patni lease—Sub-lease, validity of—Zemindar, rights of.

Where a person having purchased the *patni* in execution of a rent-decree under the Bengal Tenancy Act sues for possession on the determination of the defendant's tenancy by service of notice under s. 167 of the Act the rights of the plaintiff as *patnidar* under the Bengal Patni Taluks Regulation are not affected in view of the provisions of s. 195 (e) of the Bengal Tenancy Act. [p. 406, col. 2.]

Sundari Dassee v. Mudhoo Chunder Sircar, 14 C. 592; 7 Ind. Dec. (N. S.) 392 and *Kristo Das Laha v. Jatindra Nath Basu*, 14 Ind. Cas. 115; 16 C. W. N. 501, relied on.

The mere mention of a right to create a sub-lease in the *patni* lease does not vest the *patnidar* with a higher right than is granted to him under the Patni Law. [p. 407, col. 2.]

Sub-clause (2) of s. 11 of the Bengal Patni Taluks Regulation VIII of 1819 requires that in order that the *zemindar* should be bound by the sub-lease created by the *patnidar*, and to defeat the *zemindari* right to hold the tenure of his creation answerable in the state in which he created it for his rent, the *patni* lease must confer on the *patnidar* the right to create such an under-tenure as will bar this indefeasible right of the *zemindar*. [ibid.]

Appeal against a decree of the Additional District Judge, Dinajpur, dated the 20th of February 1922, affirming that of the Subordinate Judge of that District, dated the 18th of February 1921.

Messrs. B. Chuckerbutty, Girija Prasanna Sanyal and Babu Indu Prokas Chatterjee, for the Appellants.

Babus Joges Chandra Roy and Asitaranjan Ghose, for the Respondents.

JUDGMENT.—This appeal by the *dar patnidars* raises important questions relating to the rights of the *zemindar* as

against the *darpatnidar*. The predecessor of the plaintiff-respondent granted a *patni* settlement to one Lakshmi Narain in 1293 B. S. in respect of three *mouzas*. The rent reserved was Rs. 256 a year. Of two of these *mouzas* Lakshmi Narain granted in 1303 to one Masraf Ali, now represented by defendant No. 9, a *darpatni* lease on a yearly rent of Rs. 228. Lakshmi Narain died leaving four sons defendants Nos. 10 to 13. In 1321 defendants Nos. 12 and 13 executed a *darpatni* lease in favour of one Madan Mohan of their share in the third *mouza* on a yearly rent of Rs. 20. In 1322 the other two sons of Lakshmi, the defendants Nos. 10 and 11, granted a *darpatni* lease in respect of their shares in the third *mouza* Mahabasi to their own sons defendants Nos. 1 and 2 for a yearly rent of Rs. 20. Plaintiff's case is that his predecessor had obtained a decree against the *patnidar* for arrears of rent in execution of which the *patni* was sold and purchased by the decree-holder. When attempting to collect rent the plaintiff discovered the existence of the *darpatni* leases and served the *darpatnidars* with notices under s. 167 of the Bengal Tenancy Act. In the present suit the plaintiff seeks to avoid the *darpatnis* on the grounds, first, that as incumbrances they have been annulled and, secondly, that they are liable to be set aside as fictitious and *benami* transactions.

The Trial Court found that the service of notice under s. 167, Bengal Tenancy Act was not proved but held that under the Patni Law the leases were not binding on the plaintiff. It further found that the two leases in favour of Madan Mohan and defendants Nos. 1 and 2 were fictitious and not *bona fide*. Madan Mohan did not appeal against this decree and on the appeal by the other defendants the learned District Judge agreed with the Trial Court in all its findings. This second appeal is by the defendants Nos. 1, 2 and 9 representing two of the three *darpatnis* defendants Nos. 1 and 2's *darpatni* interest being alleged to be in respect of the share of *Mouza* Mahabashi held by two sons of Lakshmi Narain and defendant Nos. 9's interest being in the other two *mouzas*. With regard to the *darpatni* held by defendants Nos. 1 and 2 the finding of the fact of both the Courts is that it is a *benami* and fictitious one. This finding of fact cannot be assailed in second appeal and the appeal by these defendants must

stand dismissed. As regards Masraf Ali's *darpatni* the question of law raised has to be examined and determined.

Mr. Chuckerbutty has said all that can be said on behalf of the appellants.

It is first contended that the plaintiff having purchased the *patni* in execution of a rent-decree obtained under the Bengal Tenancy Act, the provisions of the Patni Regulation VIII of 1819 do not apply in this case which must be governed by the Bengal Tenancy Act. It is also pointed out that the plaintiff himself has treated the case as coming under the Tenancy Act and based his claim for possession on the determination of appellant's tenancies by service of notice under s. 167, Bengal Tenancy Act. It is accordingly argued that service of notice under s. 167 not having been proved the plaintiff's suit must fail. It is further maintained that the defendant's tenancies are protected interests within the meaning of s. 160 (g), Bengal Tenancy Act. This latter argument is founded on the recital in the *patni patta* to the effect that the *patnidar* would be "entitled to make a gift or sale or grant *darpatni* and *sepatni* settlement, etc."; and there can be no question that if the relation between the parties is governed by the Bengal Tenancy Act and nothing more the defendant's tenure must be deemed to be a 'protected interest' having been created under the express permission given in the *patni* lease as required by cl. (g) of that section. In support of this view reference may be made to *Bidhumukhi v Asmatullah* (1), where the tenure concerned was a *sepatni* created by a *darpatnidar* and the provisions of the Tenancy Act were, on the authority of *Mohamed Abbas Mondal v. Brojo Sundari Debia* (2) rightly applied. But the Bengal Tenancy Act does not in view of the provisions in s. 195 (e) affect the rights of *patnidars* under the Patni Regulation and so the rights of the parties have to be determined under it. The plaintiff has doubtless in the present case based his cause of action of the Bengal Tenancy Act, but if his right to recover possession is found to exist under some other provision of law it would be sacrificing substance to form to deny him such right: see *Sundari*

(1) 36 Ind. Cas. 669; 21 C. W. N. 829; 24 C. L. J. 180.

(2) 18 C. 360; 9 Ind. Dec. (N. S.) 240.

Dassee v. Mudhoo Chunder Sarkar (3). For the course that commends itself to us we have the authority of *Kristo Das Laha v. Jatindra Nath Basu* (4), where under similar circumstances the provisions of the Patni Regulation were held applicable to a case arising from a sale under the Bengal Tenancy Act. We accordingly propose to examine the law as laid down by the Regulation as affecting the rights of the parties.

The preamble to the Regulation declares, among the objects of the enactment, the objects "to define to relative rights of *zemindars* and *patni talukdars*". In s. 1 this object with reference to the under-leases by the *patnidar* is thus amplified:—"It has accordingly been deemed necessary to regulate and define the nature of the property given and acquired on the creation of a *patni taluq* as above described, also to declare the legality of the practice of under-letting in the manner in which it has been exercised by *patnidars* and others, establishing at the same time such provisions as have appeared calculated to protect the under-lessee from any collusion of his immediate superior with the *zemindar* or others, for his ruin, as well as to secure the just rights of the *zemindar* on the sale of any tenure under the stipulations of the original engagements entered into with him". To secure the last object it is enacted in the second clause of s. 3 that the *patni talukdars* are "to possess the right of letting out the lands composing their *taluks* in any manner they may deem most conducive to their interests; and any engagements so entered into by such *talukdars* with others shall be legal and binding between the parties to the same, their heirs and assignees: Provided, however, that no such engagements shall operate to the prejudice of the right of the *zemindar* to hold the superior tenure answerable for any arrear of his rent, in the state in which he granted it, and free of all incumbrances resulting from the act of his tenant". Section 11 partly qualifies the stringent rule contained in the above proviso. The first paragraph of the 1st clause of s. 11 does not help us as it applies to sales held under the rules of the Regulation. The second paragraph of that clause runs thus "No transfer by sale, gift, or otherwise, no mortgage or other limited assign-

ment, shall be permitted to bar the indefeasible right of the *zemindar* to hold the tenure of his creation answerable in the state in which he created it for the rent, which is in fact his reserved property in the tenure, except the transfer or assignment should have been made with a condition to that effect, under express authority obtained from such *zemindar*." The first paragraph defines the right of the *zemindar* as against the transferee or sub-lessee of the *patnidar* in case the sale of *patni* is held under the Regulation. The second paragraph states the general right of the *zemindar* as against the transferee or the sub-lessee in all cases; otherwise this sub-clause would appear redundant. It accordingly becomes necessary to construe the words 'condition to that effect.' The phrase 'to that effect' occurs also in the 1st sub-clause where it means to make incumbrances as are mentioned in that sub-clause. In the 2nd sub-clause the phrase 'to that effect' must by logical interpretation mean to make such transfer by sale, etc., as to bar the indefeasible right of the *zemindar* to hold the tenure of his creation answerable in the state in which he created it for the rent of the tenure. It demands something more than mere license to create sub-leases by the *patnidar*, a right, as has been observed in *Kristo v. Jotindro* (4) reserved to the *patnidar* by the Regulation itself, and the mere mention of such right in the *patni* lease does not vest the *patnidar* with a higher right than is granted to him under the Patni Law. The sub-clause, therefore, requires that in order that the *zemindar* should be bound by the sub-lease created by the *patnidar*, and to defeat the *zemindar's* right to hold the tenure of his creation answerable in the state in which he created it for his rent, the *patni* lease must confer on the *patnidar* the right to create such an under-tenure as will bar the above indefeasible right of the *zemindar*. It looks anomalous that in the case of sale under the Regulation an incumbrance created under a stipulation in the written engagement conferring on the *patnidar* the right to create it is protected whereas if the *zemindar* acquires the *patni* in any other way a more stringent condition is necessary to make the incumbrance binding on him. But the law can only be construed as it stands.

It is, however, argued on behalf of the appellant that the 2nd sub-clause above

(3) 14 O. 592; 7 Ind. Dec. (N. S.) 392.

(4) 14 Ind. Cas. 145; 16 O. W. N. 561.

quoted contemplates cases of complete transfer such as transfer by gift or sale, except mortgage, and not leases which are transfers of a part of the interest of the *patnidar*. Learned Counsel, however, has not been able to assign any such meaning to the word 'otherwise' following the words transfer by sale, gift or to the words 'other limited assignment' in that sub-clause as to exclude leases. In our judgment the above expressions include also a lease which is a transfer or limited assignment. If this construction is not correct, under the 2nd clause of s. 3 above quoted no engagement (including a lease) by the *patnidar* shall operate to prejudice the right of the *zemindar* to hold the *patni* tenure as it originally existed answerable for any arrear of rent. In any view, therefore, we hold that the *darpatni* created by the *patnidar* Lakshmi Narain in favour of Masraf Ali is of no avail as against the plaintiff. It is not necessary in this connection to consider the 2nd clause of s. 11 which deals with rent—farming leases, the authority to grant which should also have been 'specially transferred', it being neither party's case that this clause has any application in the present suit.

The result of the above considerations is that the *darpatni* leases created by Lakshmi Narain are not binding on the plaintiff and he is entitled to obtain possession of the *mouzas* in the state in which they were when the *patni* lease was granted. In this view we hold that the decision of the Court below is correct and this appeal should be dismissed with costs.

Z. K. *Appeal dismissed.*

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 20 OF 1924.

July 17, 1925.

Present :—Mr. Wazir Hasan, A. J. C.

DUNYA SINGH AND OTHERS—DEFENDANTS

—APPELLANTS

versus

GANGA DHAR—PLAINTIFF—

RESPONDENT.

Contribution—Property belonging to deceased person recovered by some of his heirs—Suit by other heirs to recover their share—Liability to pay proportionate share of costs.

Some of the heirs of a deceased person brought a suit to recover his estate from a person who claimed to be entitled to it under the terms of a Will left by the deceased and the suit was eventually compromised, the heirs being allowed to take possession of the estate on payment to the claimant of a certain sum of money, which under the circumstances of the case was not unreasonable. Subsequently the remaining heirs of the deceased brought a suit against those heirs who had recovered the estate of the deceased for their share of the estate:

Held, that the plaintiffs were entitled to their share in the estate of the deceased only on payment to the defendants of their proportionate share of the sum which the defendants had spent in the former litigation for the purpose of obtaining possession of the estate. [p. 410, col. 1.]

First appeal from the judgment and decree of the Additional Sub Judge, Lucknow, dated the 26th November 1923.

Mr. Ali Zaheer for Mr. Rajeshwari Prasad, for the Appellants.

Mr. L. S. Misra, for the Respondent.

JUDGMENT.—This is the defendants' appeal from the decree of the Additional Subordinate Judge of Lucknow, dated the 26th November 1923. The property in suit belonged to one Jang Bahadur Singh. On his death his sister's son, Shamsher Bahadur Singh, obtained mutation of names in his favour and entered into possession of the estate of Jang Bahadur Singh. Shamsher Bahadur Singh produced a Will alleged to have been executed by Jang Bahadur Singh in his favour under which he claimed title to the whole estate. The Court of Revenue accepted the Will and ordered mutation of names in his favour as already mentioned. Thereupon the defendants appellants brought a suit for possession of the entire estate of Jang Bahadur Singh as against Shamsher Bahadur Singh on the ground that title to that estate had devolved on them and some other persons arrayed as defendants by the law of inheritance. The suit was eventually compromised and the present appellants obtained possession of the property in terms of that compromise on payment of a sum of Rs. 7,300 to Shamsher Bahadur Singh.

The plaintiffs to the present suit are purchasers from Nage Singh, Narpat Singh, Sheo Singh and Subba Singh of one moiety of the estate of Jang Bahadur Singh under two sale-deeds dated the 11th March 1921 and the 17th March 1921. The other moiety admittedly belongs to the defendants-appellants. The defence to this simple suit proceeded on numerous and various grounds. The pedigree showing the relationship of the vendors of the plaintiffs was

disputed. The sales were challenged as opposed to public policy, a custom was set up to the effect that the succession devolved *per stirpes* and not *per capita*, plea of *res judicata* was raised, Jang Bahadur Singh's Will in favour of Shamsheer Bahadur Singh was also put forward and finally in this Court an additional defence was raised that the sale-deeds of the 11th March 1921 and the 17th March 1921 were invalid under cl. (e) of s. 6 of the Transfer of Property Act. All these defences were more or less insisted upon in the course of the arguments advanced in this Court in support of the appeal but except two they were all disposed of by me in the course of the arguments and I heard the respondent's Counsel in reply only on those two grounds.

On the question of the pedigree, the finding of the Court below is absolutely unassailable. Apart from other evidence the pedigree is supported by the admission of the present appellants in the previous suit and I hold that it is fully proved.

On the question of custom, reliance is placed upon a passage in the statement of Sheo Singh (P. W. No. 9). The learned Additional Subordinate Judge has considered that statement carefully. I am of opinion that that statement is neither definite nor sufficient to prove the alleged custom. The only other evidence on which reliance was placed is the statement of Gangadin, one of the appellants in that case. In the absence of any other reliable and independent evidence Gangadin's statement cannot be accepted as sufficient proof of the custom in question. In agreement with the Court below I hold that the custom is not proved.

On the question of *res judicata*, much need not be said. The plaintiff's vendors were parties to the previous litigation but they were discharged on a compromise having been reached between the plaintiffs of that suit and Shamsheer Bahadur Singh. There is no question of the applicability of the rule of *res judicata* on those facts.

As to the Will of Jang Bahadur Singh, the Court below has discussed the evidence now produced by the defendants carefully and fully and in agreement with the opinion of that Court I hold that that Will is not proved.

The additional ground of appeal was not pressed.

It now remains to consider the two grounds which were seriously pressed on

behalf of the appellants. The first of them is that the sales of the 11th March 1921 and the 17th March 1921 were opposed to public policy. The arguments submitted with reference to this ground proceeded on the lines that the earlier sale-deed is for a sum of Rs. 500 only out of which only Rs. 50 were paid in cash before the Sub-Registrar. The second sale is for a sum of Rs. 200 out of which Rs. 140 only were paid. The value of the share sold in each case was about Rs. 30,000. These facts show that the sales were merely gambling transactions and unconscionable. As to the value of the property the evidence is not clear. Some of the witnesses say that the sales were merely gambling transactions and unconscionable, the entire estate of Jang Bahadur Singh was worth between a lac and eighty thousand rupees. The evidence, however, shows one thing clearly enough that there were incumbrances of the value of over Rs. 40,000 and that besides those incumbrances Jang Bahadur Singh was heavily indebted. In the circumstances, therefore, it might well be considered that it was not a gamble but a prudent transaction on the part of the parties thereto. The argument of the learned Counsel is, in my opinion, entirely negatived by the decision of their Lordships of the Privy Council in the case of *Bhagwat Dayal Singh v. Debi Dayal Sahu* (1). I, therefore, reject this ground of appeal.

The second ground urged was that the present defendants recovered the estate for the benefit of themselves and the entire body of heirs from the hands of a trespasser on payment Rs. 7,300 as part of the compromise and Rs. 295 as costs of the suit and that they are entitled to a contribution in proportion to the share, that is, 4/9th decreed to the plaintiff by the Court below. I am of opinion that this ground prevails. There is no evidence, indeed there is no defence, that the terms of the compromise were in any manner intended to injure the interests of the other heirs to the estate of Jang Bahadur Singh. Every thing points to the reasonableness of the compromise. Shamsheer Bahadur Singh had a Will in his favour which was accepted as genuine by the Court of Revenue. He had also possession of the estate sanctioned by the order of mutation made in his favour

(1) 35 C. 420; 7 O. L. J. 335; 12 C. W. N. 393; 18 M. L. J. 100; 5 A. L. J. 184; 14 Bur. L. R. 49; 3 M. L. T. 344; 10 Bom. L. R. 230; 35 I. A. 48; (P. O.).

by the same Court. He had also challenged the pedigree on which the then plaintiffs relied to establish their relationship with Jang Bahadur Singh. The value of the property as admitted in the pleadings of that suit was Rs. 80,000. I hold, therefore, that the present appellants reasonably incurred the expenditure of Rs. 7,535 for recovering the entire estate from the hands of Shamsheer Bahadur Singh. The plaintiff, who now desires to recover 4/9th share of that estate, must contribute to the costs of the previous recovery of the estate.

I, therefore, order that the plaintiff shall pay to the defendants appellants a sum of Rs. 3,375 within six months from this date, otherwise his suit shall stand dismissed with reference to the properties now under appeal. I maintain the order of costs in the Court below but as regards the costs in this Court I direct that in any event the plaintiff-respondent shall pay to the defendants-appellants such costs as are taxable in relation to the sum of Rs. 3,375 only. The decree of the Court below will be modified in the light of the preceding order.

Z. K.

Decree modified.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 773 OF 1923.

October 21, 1924.

Present:—Mr. Justice Devadoss.

K. N. KRISHNASWAMI
BHAGAVATHAR—DEFENDANT No. 4—
APPELLANT

versus

N. A. THIRUMALAI IYER

AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Prior and subsequent mortgagees—Suit by prior mortgagee—Puisne mortgagee not made party—Sale in execution of mortgage-decree—Surplus proceeds after discharging prior mortgagee's claims—Puisne mortgagee, right of, whether confined to sale of property—Right to surplus proceeds in prior mortgagee's suit—Attaching creditor, rights of—Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 1, 13.

Where a prior mortgagee makes a puisne mortgagee a party to his suit and brings the property to sale, the puisne mortgagee can only proceed against the balance of the sale-proceeds in Court after satisfying the claim of the prior mortgagee. His right of suit against the

mortgagor is taken away by his being made a party to the suit of the prior mortgagee. But where a puisne mortgagee is not made a party to the suit, a sale in execution of the prior mortgagee's decree cannot affect his title. In such a case he has an option either to proceed against the mortgaged property by bringing it to sale or to proceed against the sale-proceeds in Court in the prior mortgagee's suit after satisfying the claims of the prior mortgagee. [p. 411, col. 2.]

Case-law reviewed.

Although r. 1 of O. XXXIV of the C. P. C. requires all puisne mortgagees to be brought on the record in a prior mortgagee's suit, r. 13 of the Order does not restrict the right of a puisne mortgagee, not made a party to the suit, to claim any amount in Court on the ground that he has an interest in the mortgaged property. [p. 414, col. 1.]

The right of a subsequent mortgagee to the sale-proceeds of the mortgaged property is only subject to that of the prior encumbrancer, but he has a prior claim over any simple money creditor and the mortgagor. A simple money creditor who attaches the money in Court attaches it as the property of the mortgagor and the mortgagor certainly is not entitled to the money in Court in preference to the mortgagee whose debt he is liable to discharge. [p. 415, col. 1.]

Second appeal against a decree of the Court of the First Additional Subordinate Judge, Madura, in Appeal Suit No. 6 of 1922, (A. S. No. 220 of 1921, on the file of the District Court, Madura), preferred against that of the Court of the District Munsif, Madura Town, in Original Suit No. 66 of 1920.

Messrs. S. Varadachariar and K. S. Jaya Rama Iyer, for the Appellant.

Mr. K. V. Krishnaswamy Iyer, for the Respondents.

JUDGMENT.—Defendants Nos. 1 to 3 mortgaged their property on 24th April 1912 by two deeds in favour of defendants Nos. 5 and 6 and defendant No. 7. First defendant executed a third mortgage in favour of the plaintiff on 5th September 1916. Defendants Nos. 5 and 6 brought O. S. No. 3 of 1908 impleading the 7th defendant-second mortgagee and obtained a mortgage decree. The third mortgagee, the plaintiff, was not a party to that suit. The property was sold in October 1919 and was purchased by the 4th defendant for Rs. 20,000. The 1st and 2nd mortgagees defendants Nos. 5 and 6 and 7 were paid the amount due on the mortgages. Eighth defendant who had obtained a money-decree against defendants Nos. 1 to 3 attached the surplus amount in Court and was paid by a cheque for Rs. 4,585. The plaintiff attempted to prevent the 8th defendant from cashing the cheque but his

attempts were of no avail. The money now in Court is about Rs 1,000. The plaintiff has brought this suit on his mortgage and prays that the amount due to him on his mortgage may be paid out of the sum in Court and that the 8th defendant be directed to pay back into Court the sum drawn by him and that in the alternative the mortgaged property be sold for satisfying his debt and also prays for a personal decree against defendants Nos. 1 to 3. The District Munsif gave a mortgage-decree in favour of the plaintiff and held that the plaintiff was entitled to the surplus in Court realized in execution of the decree obtained by defendants Nos. 5 and 6, and that the 8th defendant must refund the amount drawn by him. Against this decree 8th defendant appealed. On appeal the Subordinate Judge held that the plaintiff could only proceed against the property mortgaged to him and purchased by the 4th defendant and the proceeds of the sale held in execution of the decree in favour of the defendants Nos. 5 and 6 were not subject to the mortgage right of the plaintiff and the amount remaining after meeting the claims of the 1st and 2nd mortgagees, defendants Nos. 5, 6 and 7 was the property of the mortgagor and as such could not be proceeded against by the plaintiff. With regard to the amount in Court he held that it would be available to the plaintiff in case he is unable to realize his debt by the sale of the hypotheca. Fourth defendant has preferred this appeal.

The contention of Mr. Varadachari is that the sale proceeds in Court represent the mortgaged property and the plaintiff is entitled to proceed against the money in Court after the claims of the prior mortgagees have been satisfied. The surplus proceeds of the sale are sufficient to meet the claim of the plaintiff. It is urged that inasmuch as the plaintiff was not a party to the suit of the prior mortgagees, his right to proceed against the property is unaffected and the proceeds in Court have been realized by the sale of the mortgaged property and the lien of mortgage right against the property attaches itself to the money in Court. It is also urged that the plaintiff has an option either to proceed against the mortgaged property by bringing it to sale or to proceed against the surplus sale-proceeds in Court if the proceeds are sufficient to satisfy his claim. On the other hand, Mr. K. V. Krishnaswami

Iyer contends that the remedy of the puisne mortgagee who was not a party to the suit of the prior mortgagee is only against the mortgaged property. He could either redeem the prior mortgagees or ask for the sale of the property and bring the property to sale; but he cannot claim to be paid out of the surplus sale-proceeds in Court as they are the property of the mortgagor. He further contends that the sale was subject to the encumbrance of the plaintiff and what was sold represented the interest of the prior mortgagees as well as that of the puisne mortgagee together with the equity of redemption and the puisne mortgagee should only look to the purchaser for payment of his mortgage-debt and has no claim against the surplus in Court as his mortgage has been included in the sale in Court auction.

What are the rights of the puisne mortgagee who was not a party to the suit and the execution proceedings under the prior mortgage? If the prior mortgagee makes the puisne mortgagee a party and brings the property to sale, it is well settled that the puisne mortgagee could only proceed against the proceeds in Court after satisfying the claim of the prior mortgagee. In other words, his right of suit against the mortgagor is taken away by his being made a party to the suit of a prior mortgagee. Where a puisne mortgagee is not made a party to the suit of the prior mortgagee, does the puisne mortgagee lose any of his rights which he had as a mortgagee? When property is sold under a mortgage decree, what is sold is the interest of the mortgagor at the date of the mortgage on which the suit is brought. If the subsequent mortgagees are made parties to the suit, the sale in execution of the decree would convey the interest of the mortgagor as it was at the date of the suit. In other words, what is sold under such a decree is the property of the mortgagor and the proceeds of the sale have to be applied in discharge of all the encumbrances and the mortgagees have to be paid in the order of priority. But the sale cannot affect the title of a mortgagee who has not been made a party to the suit.

Section 75 of the Transfer of Property Act says that every second or other subsequent mortgagee has, so far as regards redemption, foreclosure and sale of the mortgaged property, the same rights against the prior mortgagee or mortgagees as his

mortgagor has against such prior mortgagee or mortgagees and the same rights against the subsequent mortgagees as he has against his mortgagor. A puisne mortgagee has the right to redeem the prior mortgage or mortgages and has the right to bring the property of the mortgagor to sale and such a sale will be subject to the right of the prior mortgagee or mortgagees. A prior mortgagee cannot redeem the puisne mortgagee without his consent but if he acquires the equity of redemption, he will be entitled to redeem the puisne mortgagee. The plaintiff was not a party to O. S. No. 3 of 1918 and the sale in execution of the decree in that suit cannot take away the rights of the plaintiff as mortgagee. The contention of the appellant is that the plaintiff has an option either to proceed against the mortgaged property by bringing it to sale or to proceed against the sale-proceeds in Court after satisfying the claims of the prior mortgagees. The objection of the 8th defendant (respondent) is that the security for the debt cannot attach itself to the sale-proceeds in Court merely by the volition of the plaintiff; that the plaintiff's remedy is against the mortgaged property; and that when that mortgaged property was sold, it was sold subject to the plaintiff's encumbrance and he could not by making an election proceed against the money in Court realized by sale in which his own mortgage was included.

The contention that when property is sold in execution of a mortgage decree, it is sold subject to all the mortgages on it, is based upon two stray observations in *Chinnu Pillai v. Venkatasamy Chettiar* (1). Mr. Justice Coutts Trotter (as he then was) laid down two principles as governing the cases. The first is that what passes to a mortgagee is a right to sell the mortgagor's interest as it stood at the date of the mortgage subject only to this, that in his suit he must make all subsequent mortgagees parties if he wishes the sale to be free of their encumbrances. The other principle is that of any number of mortgagees, the later can always redeem the earlier, but cannot be compelled to do so and the earlier cannot redeem the later except by consent. Mr. Justice Srinivasa Iyengar in the course of his judgment observed: "To the suit of the second mortgagee the plaintiffs were not made parties. The second defendant's

position is, therefore, that of an assignee of the first two mortgages and of the equity of redemption subject to the charge of the plaintiffs." At page 89* he further observed: "The second mortgagee is entitled to, and must bring a fresh suit against the purchaser in the first sale to sell the property to the satisfaction of the second mortgage-debt subject to which the first purchaser took." Mr. K. V. Krishnaswami Iyer contends that these observations make it quite clear that the sale in execution of a mortgage-decree is subject to the mortgage in favour of a puisne mortgagee and, therefore, the puisne mortgagee can only proceed against the property in the hands of the auction-purchaser and cannot proceed against the sale-proceeds in Court if a surplus remains after satisfying the claims of the prior mortgagee and that if it was possible to hold that the puisne mortgagee could proceed against the surplus assets in Court, the learned Judges would have said so. I do not think this is the correct way of interpreting the decision. The question whether the puisne mortgagee could proceed against the assets in Court was not raised before them. Nor were they called upon to consider whether the puisne mortgagee had any other right than that of proceeding against the mortgaged property. The question in that case was whether a puisne mortgagee could bring the property to sale after it was sold in execution of a decree obtained by a prior mortgagee. Mr. Justice Srinivasa Iyengar sets out the rights and liabilities of the mortgagees at the end of his judgment and the 7th principle he lays down is as follows:—"If the first mortgagee sues first without making the second mortgagee a party, the second mortgagee is not affected and can bring his own action for sale making the mortgagor a party, if there had been no sale in the first mortgagee's suit, or if there had been a sale, making the purchaser a party in his capacity of the ultimate owner of the equity of redemption." Reliance is also placed upon *Mula Veetil Seethi v. Achuthan Nair* (2). In that case a Full Bench of this Court held that the second mortgagee was entitled to the same rights as the first mortgagee with reference to his security having regard to the nature of his mortgage. After an exhaustive review of a

(2) 9 Ind. Cas. 513; 21 M. L. J. 213; 9 M. L. T. 431; (1911) 1 M. W. N. 165.

(1) 34 Ind. Cas. 507; 40 M. 77; 30 M. L. J. 347; (1916) 1 M. W. N. 245; 19 M. L. T. 217.

*Page of 40 M.—[Ed.]

number of decisions, certain propositions were considered as established. (1) A second mortgagee is entitled to the same rights as the first mortgagee with reference to his security, having regard to the nature of the mortgage. (2) The purchase of the equity of redemption after the first mortgage and the second mortgage both stand on the same footing with respect to their respective rights against the first mortgagee when they have not been impleaded in the suit instituted by him on his mortgage. (3) Those rights are unaffected by the suit of the first mortgagee to which they are not made parties and the decree passed therein and the sale made in pursuance thereof. (4) The purchaser in such a suit, whether it is a first mortgagee or a stranger, does not acquire the rights of the mortgagor as at the date of the first mortgage but only those that subsist in him at the date of the suit." This decision does not support the contention that the only remedy of the puisne mortgagee is against the mortgaged property. The words used by Mr. Justice Srinivasa Iyengar in *Chinnu Pillai v. Venkatasamy Chettiar* (1) subject, to the charge of the plaintiffs at page 20* can only mean subject to such rights as the puisne mortgagee has. It does not mean that the property is sold subject to the charge in favour of the puisne encumbrancer. The expression is not tantamount to saying that the purchaser has undertaken to pay the subsequent encumbrancer but means that the purchaser buys the property subject to the rights which a puisne encumbrancer has in regard to that property. In applying case-law to the case before us, care should be taken not to take one or two sentences of a judgment, apart from their setting and give to them a meaning which the Judge who delivered that judgment did not intend to convey or did not think it would be capable of conveying. It should also be borne in mind when the decisions are sought to be applied to new facts to see in what connection and with reference to what facts the decisions or rulings were given. The contention of Mr. Krishnaswami Iyer is that these two decisions support his contention by their silence as to the right of the puisne mortgagee to proceed against what is realized in execution of a decree obtained on a prior mortgage. I do not think that the Judges who decided them had that

point argued before them nor do I think they intended to lay down the broad proposition that the puisne mortgagee's right is only to proceed against the property in the hands of the purchaser.

The facts in *Barhamdeo Prasad v. Tarachand* (3) are these:—Certain immoveable property was mortgaged in May 1887 to the appellants in that case. The same property was mortgaged in September 1887 to the respondents. Again in July 1889 the property was mortgaged to the appellants. The appellants brought a suit in 1890 impleading the respondents and obtained a decree in execution of which the property was sold. After satisfying the decree the sale-proceeds were deposited in Court. The appellants obtained a decree on their mortgage of 1889 without impleading the respondents as parties and in execution of that decree, without notice to the respondents they drew out of Court the surplus proceeds of the former sale. The respondents brought a suit in 1900 and claimed the money in Court. The question was whether that suit was within time. Their Lordships of the Privy Council held that Art. 132 of the Limitation Act applied and that "The surplus sale-proceeds in execution of the previous mortgage-decree represented the security which the plaintiffs had under their mortgage of the 19th September 1887, and did not cease to represent that security owing to the fact that Ram Burhamdeo Prasad and Ram Sumran Prasad had wrongfully and in fraud of the plaintiffs drawn them out of the Court in which they had been deposited". They also held that they were not against the view that there was a charge in favour of the plaintiffs in the hands of the appellants. Though the respondents were parties to the suit of the first mortgage, they did not take the trouble to appear. Notwithstanding that, their Lordships of the Privy Council held that the sale-proceeds in Court represented the security which they had and, therefore, they were entitled to proceed against the surplus money in Court. This decision was on appeal from the decision in *Berhamdeo Pershad v. Tarachand* (4) wherein two Judges of the Calcutta High Court differed as to the right of the puisne mortgagee to proceed against the

(3) 21 Ind. Cas. 961; 41 C. 654; 15 M. L. T. 62; (1914) M. W. N. 38; 12 A. L. J. 82; 18 C. W. N. 345; 19 C. L. J. 132; 16 Bom. L. R. 89; 26 M. L. J. 243; 41 I. A. 45 (P. C.).

(4) 33 O. 92; 9 O. W. N. 989.

assets realized in execution of a decree in a prior mortgagee's suit, and Sale, J., agreed with Henderson, J., in holding that when property is sold under a decree obtained by the first mortgagee the puisne encumbrancer has a right to follow the surplus sale-proceeds after the decree-holder's claim has been satisfied. These two cases lay down that the rights of the subsequent mortgagee who is not a party to the mortgage-decree under which the property is brought to sale is entitled to be paid out of the surplus sale-proceeds, if any, remaining after the decree holder is paid. In *Gobind Lal Roy v. Ramjanam Misser* (5), Lord Macnaghten in delivering the judgment of their Lordships observed in dealing with the contention of the Counsel for the appellant that the puisne mortgagee should only look to the proceeds realized by the sale under a decree obtained by a prior incumbrancer: "That, however, in their Lordships' opinion is not the necessary consequence of a sale under a decree obtained by a prior mortgagee against the mortgagor in a suit to which the puisne encumbrancers are not parties." It follows from this that the remedy of the puisne mortgagee against the property is not taken away by a sale.

It is well settled now that the puisne encumbrancer who is not a party to a mortgage decree under which the sale is held can bring the property again to sale; and from the ruling in *Gobind Lal Roy v. Ramjanam Misser* (5), it is also clear that the right of such mortgagee can also be enforced against the sale-proceeds in Court. After the consideration of a number of cases on the point, the Full Bench of the Calcutta High Court held in *Debendra Narain Roy v. Ramratan Banerjee* (6), that a puisne mortgagee was entitled to sell the property secured by his mortgage where the property has been sold in execution of a decree obtained by the first mortgagee in a suit to which the puisne mortgagee was not a party.

In *Padmanabh Bombshenvi v. Khemu Komar Naik* (7), the facts were these: *P* held a mortgage on a certain land belonging to the 1st defendant. The mortgage was not registered. *M* obtained a registered mortgage on the same property from the 1st

defendant, *M* obtained a decree upon this mortgage and applied for sale. *F* intervened but his claim was rejected on the ground that his mortgage was an unregistered mortgage. The land was sold by auction to the 4th defendant and the proceeds of the sale were applied partly in satisfaction of *M*'s claim and a further sum of Rs. 164 was paid to one *S* who had obtained a money-decree against the mortgagor defendant No. 1. The balance of Rs. 103 was paid into Court and subsequently returned to No. 1. *F* sued for payment of his mortgage-debt out of the proceeds of sale or from defendants. The lower Court held that the plaintiff could not be called upon to refund the money which had been paid to him out of the proceeds and the plaintiff had a cause of action only against the mortgagor and not merely for the balance of Rs. 103-8-11 but for the whole claim. The High Court held that *F* was in the position of a puisne mortgagee and as second mortgagee he had a right over the balance in Court. Sargent, C. J., in delivering judgment of the Court observed: "Although plaintiff's earlier mortgage was postponed to that of defendant No. 2 by reason of its non-registration, the plaintiff still had the same rights over the balance as if he had been the second mortgagee in point of date. The proceeds which are paid into Court after satisfying the first encumbrance become payable first to the other encumbrancers (if any) and then to the mortgagee, and so it is virtually provided by s. 97 of the Transfer of Property Act which directs that 'the residue is to be paid to the person proving himself to be interested in the property sold.' The learned Chief Justice relied upon the decision of the Privy Council in *Raja Kishendatt Ram v. Raja Mumtaz Ali Khan* (8) to the effect that when the sale is effected under a power of sale in the mortgage-deed, the mortgagee exercising such power is a trustee so far as the surplus proceeds are concerned and held that the Court was not in a better position than he. When the mortgagee exercises his power of sale, he sells it free of encumbrances and the purchaser gets it free of all subsequent encumbrances. But when a Court sells the pro-

(5) 21 C. 70; 20 I. A. 165; 17 Ind. Jur. 536; 6 Sar. P. C. J. 356; 10 Ind. Dec. (N. S.) 679 (P. C.).

(6) 21 C. 599; 7 C. W. N. 766.

(7) 18 B. 681; 9 Ind. Dec. (N. S.) 965.

(8) 6 I. A. 145; 5 C. 198; 5 C. L. R. 213; 4 Sar. P. C. J. 17; 3 Suth. P. C. J. 637; Rafique & Jackson's P. C. No. 58; 3 Ind. Jur. 426; 3 Shome L. R. 1; 2 Ind. Dec. (N. S.) 737 (P. C.).

property under a decree to which the subsequent mortgagee is not a party, it does not sell it free of the subsequent encumbrances. But that does not alter the principle of the decision. The attaching creditor in that case could not keep his hold on the money when the mortgagee came along, because the mortgagee had a prior claim by reason of his mortgage right. The mortgage right against the property is available against the proceeds into which it was converted. His right is only subject to that of the prior encumbrancer, but he has a prior claim over any simple money creditor and the mortgagor. A simple money creditor who attaches the money in Court attaches it as the property of the mortgagor and the mortgagor certainly is not entitled to the money in Court in preference to the mortgagee whose debt he is liable to discharge.

The facts in *Karan Singh v. Ishtiaq Husain* (9) are: A mortgaged the same property first to B and then by the separate mortgage deeds to C. B and C both sued on the mortgages, each party without impleading the other, and obtained decrees. B's decree was executed first. The mortgaged property was sold and was purchased by K. B's mortgage was paid up and considerable surplus money remained which was deposited in Court. C then endeavoured to execute his decree against the surplus sale-proceeds. He failed and the money was ultimately withdrawn by the mortgagor. C next proceeded with the execution of his decree against the property in the hands of K, the auction-purchaser, and K in order to retain possession paid up the amount of his decree. He then sued the representative of A to recover and the amount was paid. A Bench of the Allahabad High Court held that K was entitled to a decree. The learned Judges observed at page 269*: "In our opinion upon the sale of the property the security held by Mahabbat Bahadur and others was transferred to the surplus sale-proceeds which represented the mortgaged property." And they go on to say: "It cannot be said that the plaintiff purchased the property subject to the subsequent mortgage held by Mahabbat Bahadur and others. The sale was in execution of a decree obtained upon the prior mortgage held by Khurshed-un-nissa and others. The only defect in the plaintiff's title was

that it was still open to the second mortgagees who had not been made parties to the first mortgagee's suit, to redeem the prior mortgage, but it cannot be said that the plaintiff did not acquire the property itself but only such rights as remained in the mortgagors and subject to the subsequent mortgages." This case is an authority for the position that the mortgagee's right to proceed against the surplus proceeds in Court is unfettered if he was not a party to the decree in execution of which the sale was effected. No doubt in that case it was found that the surplus proceeds were sufficient to meet the claims of the subsequent mortgagee, but that was not the ground upon which the learned Judges held that the mortgage right attached to the proceeds in Court.

It is urged by Mr. Krishnaswami Iyer that the Bombay and Calcutta decisions should be read in the light of the previous decisions of those Courts. His contention is that it was considered at one time that the first mortgagee alone could bring the property to sale and not any subsequent mortgagee and such sale was clear of all encumbrances and they naturally took the view that then the property was sold in execution of a decree obtained by a prior mortgagee, the puisne mortgagees could only look to the sale-proceeds to satisfy their decrees. I am unable to accept this contention. Whatever might have been the view before, the law is settled as to the right of the puisne mortgagee to proceed against the mortgaged property sold in execution of a mortgage decree obtained without his being a party to it and it cannot be said that the learned Judges overlooked such a well-established principle and laid down the ruling that the subsequent mortgagee could only look to the sale-proceeds realized in execution of the decree of a prior mortgagee for the satisfaction of his claim.

When the mortgaged property is sold and is converted into money, the right of the puisne mortgagee is not thereby lost. I am assuming in this connection that he was not a party either to the suit or to the execution proceedings in which the assets were realized. The property was his primary security and when that is converted into money, his security is not thereby lost, but is transferred from the property to the sale-proceeds, and his right is only subject to that of a prior mortgagee or mortgagees,

(9) 61 Ind. Cas. 376; 43 A. 268; 19 A. L. J. 16.

*Page of 43 A.—[Ed.]

The objection to the puisne mortgagee proceeding against such assets is that the assets represented only the value of the equity of redemption remaining at the date of the sale and, therefore, the puisne mortgagee cannot proceed against the proceeds in Court. This argument overlooks the fact that the equity of redemption, whatever be its value, is liable either in the hands of the mortgagor or of a purchaser from him to satisfy the claim of the mortgagee. Suppose two items of property are mortgaged to two persons first to A and then to B, and if A brings a suit on his mortgage without impleading B and brings one of the items to sale and some surplus remains after satisfying A's decree, can it be said that B cannot proceed both against the other item not sold in execution of A's decree as well as the proceeds in Court? Take another instance; if a village or a large estate is mortgaged first to A and then to B, if A brings a suit and obtains a decree on his mortgage without impleading B and asks for a sale of the property, the Court would sell such portion of it as would be sufficient to meet A's claim. And if after a portion of the property is sold and A is satisfied and surplus remains, can it be said that B cannot proceed against the rest of the property as well as the surplus money in Court? His right is not in any way affected by the state in which he finds the property after the prior mortgagee's claim is satisfied. He could certainly proceed against the rest of the property covered by his mortgage as well as against the money in Court. The contention of Mr. Krishnaswami Iyer is that he cannot have a right to both the property as well as against the surplus money in Court in this case. But I do not think there is any objection in principle to the plaintiff proceeding both against the mortgaged property in the hands of the 4th defendant as well as against the surplus funds in Court. Reliance is placed upon the observation of Mr. Ghose in his well-known book of *Mortgages*, page 292, 5th Edition, for the contention that the property must be lost to the subsequent encumbrancer so as to enable him to proceed against the surplus sale-proceeds: "It is hardly necessary to point out that if the mortgaged property is converted into money under circumstances which would prevent the mortgagee from following such property, security would attach to the money unless

the conversion is attributable to the default of the mortgagee." Section 73 gives the right to a mortgagee to proceed against the surplus sale-proceeds of a sale held on account of default of payment of revenue, provided the default was not occasioned by the mortgagee. This section applies only to sales for arrears of revenue and does not restrict in the case of sales under mortgage decrees the right of the mortgagee to the proceeds in Court, and cannot be interpreted as laying down the principle that it is only when the property cannot be pursued by the mortgagee that he cannot proceed against the money in Court. Reference is also made to a passage in Gour's Book on the Law of Transfer in British India, s. 1683. Referring to s. 73 of the Transfer of Property Act, he says the section is inaccurately worded, but it is evidently intended to provide only for cases in which the sale is made free from all encumbrances. In any other view, the mortgagee would have both the surplus as well as the right to follow the land in the hands of the purchaser and this confers on the mortgagee an additional security merely because the mortgaged property is brought to sale. It is difficult to see how it can be said that the mortgagee gets additional security when the property mortgaged to him is sold and the proceeds are held in Court. The property mortgaged to him was liable for his debt and if that property is sold and the sale-proceeds are held in Court it cannot be said that he gets additional security for his debt. Supposing in this case the plaintiff brings the property to sale and in consequence of the fall in price or the state of the money market, the mortgaged property goes to the prior encumbrancers or the price offered is just sufficient to cover the claim of the prior mortgagees, can it be said that he is to be without any remedy? The surplus sale-proceeds in Court cannot become the property of the mortgagor till all the mortgages are paid off. The sale-proceeds in Court cannot be said to represent the equity of redemption for the whole of the property is security; the so-called equity of redemption is not merely the right of the mortgagor to redeem the property, but it also represents the difference between the value of the property and the amount due on the mortgage, and the difference in value cannot be absolved from the liability for the mortgage amount. That being so, it is difficult to see how the sale-proceeds in

Court in this case can be said to be additional security for the debt of the plaintiff. When the property was sold, the 4th defendant purchased it, probably at its market value. But his title to the property is liable, to be defeated when the plaintiff brings a suit to enforce his remedy under the mortgage. The question is not what the purchaser pays for the property. Whether he pays full value or not he only buys the interest of the mortgagor and the property which he buys is security for the debt of the puisne mortgagee who was not a party to the decree under which he purchased. Whatever may be the number of mortgages created on the property, the mortgagor can only have the surplus after meeting the claims of all his mortgagees. Supposing a mortgagor mortgages the property to three different persons and supposing the first mortgagee brings the property to sale and the property is sold for a very large sum and after satisfying the claim of the first mortgagee the surplus money is drawn out by the mortgagor and supposing the second mortgagee who was not a party to the prior suit brings the property to sale without impleading the third mortgagee and sells the property and is not able to realize his debt in the second sale after meeting the claim of the first mortgagee, what is to become of the third mortgagee? Is the third mortgagee to go without any remedy for the simple reason that the mortgagor has withdrawn the money from Court which was subject to the mortgage rights of the second and third mortgagees? To hold that the mortgagor is entitled to the surplus money in Court in such a case would be going against the law of mortgages under which the property as well as cash into which the property is converted is security for the debt due on the mortgages. In this case, therefore, there is no such thing as additional security by the mere fact that the property was sold and the sale-proceeds are more than sufficient to meet the claims of the prior mortgagees. There is no warrant in law for holding that in such a case as this that the sale-proceeds are additional security. After a careful consideration of the cases quoted at the bar, I could not find any thing in equity or in law which militates against the right of the puisne mortgagee in a case like this to proceed both against the property in the hands of the purchaser as well as against the sale-proceeds in Court.

It is not necessary in this case for the plaintiff to proceed against the property, as the surplus proceeds in Court were more than sufficient to satisfy the claims of the plaintiff under the mortgage. The 8th defendant who withdrew the money from Court must pay it back as the amount was subject to the mortgage rights of the plaintiff and the 8th defendant who obtained only money-decree against the mortgagor could not claim any preference over the plaintiff.

It is contended for the respondent that O. XXXIV, r. 13 can only apply to cases where all the mortgagees are parties. Under the C. P. C., O. XXXIV, r. 1 all persons having an interest on the mortgage security or in the right of redemption should be joined as parties. Mr. Krishnaswami Iyer's contention is that O. XXXIV, r. 13 could only apply to cases where a subsequent encumbrance is party to the suit and to the decree in execution of which the sale-proceeds have been realized, and that when a puisne mortgagee is not a party to the suit; r. 13 cannot apply. No doubt O. XXXIV, r. 1 requires all mortgagees to be brought on record but that would not take away the right of puisne mortgagee to claim any amount in Court on the ground that he has an interest in the mortgaged property. For the last clause of r. 13 (1) says "The residue (if any) shall be paid to the person proving himself to be interested in the property sold." It does not say that such person should be a party to the suit. All it says is that after meeting the legitimate demands mentioned in cls. 1 to 4 the balance shall be dealt with in a certain way and the last clause does not restrict it to persons who are parties to the suit in which the assets are realized.

Mr. Krishnaswami Iyer next contended that in this case the property was sold subject to the mortgage. Exhibit II the sale certificate does not support this contention. Though the hypothecation in favour of the plaintiff is mentioned therein it is distinctly stated that that hypothecation is subsequent to that of the plaintiffs in that suit and does not affect them. It is difficult to see how this can be construed into a sale subject to the encumbrance in favour of the plaintiff. What was sold under the decree in O. S. No. 3 of 1918 was the right of the mortgagor as it stood at the date of the second mortgage. This is clear from all the authorities and it

is unnecessary to go over the ground again. Exhibit II cannot be construed into meaning that the sale was subject to the encumbrance in favour of the plaintiff.

Another point was urged on behalf of the respondent that the present appeal is not by the plaintiff but by the purchaser and, therefore, incompetent. It is urged that the purchaser who is the 4th defendant has no right to come in and ask that the money in Court be paid to the plaintiff. Inasmuch as the plaintiff is also a party to the appeal this Court has power to pass a proper decree in a case like this. It is unnecessary that the 4th defendant should first pay up the amount due to the plaintiff on his mortgage and then proceed against the 8th defendant and defendants Nos. 1 to 3 as was done in *Karan Singh v. Ishtiaq Husain* (9). This will only multiply proceedings in Court. The Court has power in order to avoid further litigation to give a decree in favour of the plaintiff.

The last contention is that the 8th defendant could not be compelled to pay into Court the amount drawn by him as there was neither a charge nor a trust in favour of the plaintiff. I have already held that the plaintiff had a mortgage right over the money in Court. The 8th defendant is bound to pay back the money into Court which was subject to the mortgage right of the plaintiff.

In the result I set aside the decree of the Subordinate Judge, and restore that of the District Munsif. The 8th defendant will pay the costs of the 4th defendant in this Court as well as in the lower Appellate Court. The other parties will bear their own costs.

V. N. V.

Decree set aside.

Z. K.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 126 OF 1924.

January 22, 1925.

Present:—Mr. Dalal, A. J. C.

BHAWANI PRASAD SINGH—

PLAINTIFF—APPELLANT

versus

RAM RATI KUNWAR AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 8—Transfer of Property Act (IV of 1882), ss. 92, 93—Preliminary decree for redemption—Payment not made on due date—Mortgagee, possession of, if adverse—Payment after due date—Terms, imposition of.

The right of a mortgagor to pay the amount due under a preliminary decree for redemption is a continuous right, and can be exercised at any time until a final decree for sale is passed. The possession of the mortgagee does not become adverse if the mortgagor does not deposit the amount fixed by the preliminary decree on the due date [p. 419, cols. 1 & 2.]

Banke Behari Lal v. Ghani Ahmad, 66 Ind. Cas. 944; 9 O. L. J. 14; (1922) A. I. R. (O.) 33, relied on.

A Court has no power to impose terms on a mortgagor who comes forward to make payment of money due under a preliminary decree for redemption after the due date, when the mortgagee has taken no action himself. [p. 419, col. 2.]

Second appeal from a decree of the Subordinate Judge, Sultanpur, dated the 14th December 1923, reversing that of the Munsif, Sultanpur, dated the 11th September 1923.

Messrs. M. Wasim and H. K. Ghosh, for the Appellant.

Pandit Gokaran Nath Misra, for the Respondents.

JUDGMENT.—Bhawani Prasad the plaintiff was mortgagor of the property in suit which was mortgaged to one Mahadeo Singh, deceased husband of the defendant Musammatt Ram Rati. The other defendant Sahdeo has interest in the mortgagee rights. Bhawani Prasad formerly sued for redemption of this mortgage and obtained preliminary decree from the Trial Court of the Munsif of Sultanpur on 17th August 1908. The dispute between the parties at that time related to certain deeds of further charge, payment of which was claimed by the mortgagee at the time of the redemption of the usufructuary mortgage to which the suit related. The Trial Court had held in favour of the defence. The usufructuary mortgage which was sought to be redeemed secured a sum of Rs. 460 and the decree was passed for redemption on payment of Rs. 1,243 with costs Rs. 29-8-0, total Rs. 1,272-8-0.

Bhawani Prasad appealed and objected to the Trial Court's order relating to the payment of the deeds of further charge. A compromise was effected between the parties on 20th November, 1908, and they agreed that redemption may be obtained on payment of Rs. 949 in the following *Jeth* of 1316 *Fasli* corresponding to May-June, 1909. On the 24th November 1908, a preliminary decree for redemption was passed by the Appellate Court which directed that the decree of the Trial Court should be amended in two particulars (1) the amount was to be altered from Rs. 1,272-8-0 to Rs. 949 and (2) the date of payment from 17th February 1909 to *Jeth* 1316 *Fasli*.

On 25th May, 1923, Bhawani Prasad tendered the amount of Rs. 949 and prayed to the Trial Court for the passing of a final decree for redemption under O. XXXIV, r. 8 (1). The defendants objected that the plaintiff had lost the right of redemption because no money having been deposited by him on the due date the possession of the defendants became adverse and had continued to be such for a period of over 12 years. In the alternative it was pleaded that interest at the bond rates of the bonds of further charge should be allowed up to date if the plaintiff is permitted to redeem.

The Trial Court of the Munsif of Sultanpur rejected the objections and passed a final decree for redemption.

On appeal the learned Judge of the Appellate Court held that under the compromise the decree passed was not a preliminary decree for redemption but a totally different kind of decree under which the plaintiff was bound to redeem on a certain date or in default lose his right of redemption.

This is a second appeal. Having regard to the appellate decree of 24th November, 1908, I consider the argument of the lower Appellate Court to be devoid of any substance. It appears to me that the Court of Appeal in November 1908 only modified two terms of the preliminary decree and did not pass a decree which was something different from a preliminary decree for redemption. The decree of the 24th November, 1908, is subject to all the provisions mentioned in r. 8 of O. XXXIV. Instead of one preliminary decree the Appellate Court substituted another preliminary decree. The period for payment was extended to *Jeth 1316 Fasli* by agreement between the parties because that day happened to be removed from 24th November, 1908, by a period of 6 months approximately.

When such was the preliminary decree there can be no doubt that the plaintiff would be entitled to obtain a final decree for redemption.

In a judgment delivered by me in 1921 [*Banke Bihari Lal v. Ghani Ahmad* (1)] I considered the question of limitation and held that the right of a mortgagor to pay the amount due under a preliminary decree was a continuous right and could be exercised at any time until a final decree for

sale was passed. In that case I considered the provisions of ss. 92 and 93 of the Transfer of Property Act. In my opinion the provisions of O. XXXIV, r. 8 do not limit the right of the mortgagor in any direction from what it was after the passing of a decree under the Transfer of Property Act. Clause (1) of r. 8 lays down that where on or before the date fixed the plaintiff pays into Court the amount declared due under the preliminary decree together with subsequent cost the Court shall pass a decree ordering the plaintiff to be put in possession of the property. It is nowhere laid down that the plaintiff shall be debarred from paying the amount at any subsequent time so long as the mortgagee has not taken action under cl. 4. It is not laid down that the mortgagor before paying money is to make any application to Court, so the provisions of Art. 181 of the Limitation Act would not apply to the payment of money.

The learned Counsel for the defence desired that the plaintiff should be put upon terms before he could make a deposit. I do not think that the Court has any such power. The proviso that the Court may upon good cause shown and upon such terms, if any, as it thinks fit, from time to time postpone the date fixed for payment applies only to cl. 4 and not to cl. 1 of r. 8. Where a mortgagee applies that the mortgaged property be sold on non-payment of the money by the mortgagor within the time fixed, the Court may, under this proviso, extend the time and put the mortgagor on terms. When the mortgagee has taken no action himself the proviso would not apply when the mortgagor makes payment of the money due under the decree.

I do not think that the respondent's learned Counsel is justified in raising a plea on the score of equity. The mortgagee was given the right to get the property sold when payment was not made in *Jeth 1316 Fasli* and it was due to his negligence that he has suffered the loss in interest. No doubt he has lost interest on the sum of Rs. 489 because he has been holding possession in lieu of Rs. 460 only. This loss is due to his own negligence in not taking action at the proper time. Possibly he was hoping to cling on to the property in default of his taking action. Thus, in my opinion, no equity arises in his favour.

I set aside the decree of the lower Appel-

(1) 66 Ind. Cas. 944; 9 O. L. J. 14; (1922) A. I. R. (O.)

late Court and restore the decree of the Trial Court. I, however, direct that parties shall bear their own costs of this Court and of the lower Appellate Court.

N. H.

Decree set aside.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1521 of 1922.

January 16, 1925.

Present:—Mr. Justice Ramesam and
Mr. Justice Venkatasubba Rao.

SHANMUGA MUDALIAR—PLAINTIFF—
APPELLANT

versus

KUMARASWAMI MUDALI—DEFENDANT
—RESPONDENT.

Contract Act (IX of 1872), s. 23—Chit-fund, whether lottery—Suit on pro-note passed by one chit-fund holder to another, maintainability of—Penal Code (Act XLV of 1860), s. 294A.

Plaintiff and defendant formed a partnership to promote a "chit-fund". A capital fund of Rs. 500 was raised from 500 subscribers subscribing each one rupee per mensem. At the end of the month there was a drawing by lot and the subscriber who drew the ticket was paid Rs. 50 and his connection with the transaction forthwith ceased. This process was repeated month after month till the end of the 49th month. At the close of the 50th month each of the remaining subscribers was paid Rs. 50 and the stakeholders divided the profit and the fund was dissolved. In settlement of the accounts of the partnership, defendant executed a pro-note in favour of the plaintiff. In a suit to recover the amount of the note:

Held, (1) that the right of the subscribers to the return of their contributions not having been made a matter of risk or speculation the transaction was not a lottery and did not fall within the mischief of s. 294A of the Penal Code; [p. 424, col. 1.]

(2) that the plaintiff's suit was, therefore, maintainable. [p. 422, col. 2.]

Iyyanar Kone v. Bidoomada Kone, 1 S. D. 1858, p. 54, *Kamakshi Achari v. Appavu Pillai*, 1 M. H. C. R. 448, *Vasudevan Nambudri v. Mammad*, 22 M. 212; 8 Ind. Dec. (N. S.) 151, *Wallingford v. Mutual Society*, (1880) 5 A. C. 685; 50 L. J. Q. B. 49; 43 L. T. 258; 29 W. R. 81, relied on.

Sankunni v. Ikkora Kutti, 52 Ind. Cas. 989; (1919) M. W. N. 570; 10 L. W. 155; 37 M. L. J. 209 and *Nagappa Pillai v. Arunachalam Chetty*, 85 Ind. Cas. 1016; 47 M. L. J. 876; (1925) A. I. R. (M.) 281, not followed.

Per Ramesam, J.—A chit-fund the main object of which is the promotion of co-operation, prudence and thrift ought to be regarded as legitimate even though there is an element of chance. If by the time a society of this kind becomes known to the public, all its members are ascertained and there is no invitation to any member of the public to join it, it cannot be said that any person keeps a lottery office, at which the public are invited to join and pay, within the meaning of s. 294A of the Penal Code. [p. 421, cols. 1 & 2.]

In other words, it is not every lottery that constitutes an offence, but it is the keeping of a lottery

office which is a standing invitation to the public that constitutes the offence. [p. 421, col. 2.]

Per Venkatasubba Rao, J.—In a transaction like the one mentioned above, while chance determines the disposal of the interest earned, there is absolute certainty with reference to the distribution of the capital fund itself. The dominant feature of the transaction is that it enables a large number to gradually lay by money and receive their savings in a lump sum and the scheme is in their case an incentive to thrift. [p. 423, col. 2.]

A transaction is not necessarily a lottery simply because a matter of whatever kind is agreed to be decided by lot. [p. 424, col. 1.]

Second appeal against the decree of the District Court, Chingleput, in Appeal Suit No. 324 of 1921, preferred against that of the Court of the District Munsif, Conjeevaram, in Original Suit No. 159 of 1921.

Messrs. V. C. Seshachariar and K. V. Sesha Iyengar, for the Appellant.

Messrs. P. Somasundaram and K. S. Desikan, for the Respondent.

JUDGMENT.

Ramesam, J.—The facts of the case have been stated by my learned brother whose judgment I had the advantage of perusing and they need not be repeated. I will only observe that the suit is not between the subscribers *inter se* or by a subscriber against the stake-holder. The stake-holder of the suit chit-fund is a partnership consisting of the plaintiff and the defendant and the object of the suit is to recover the monies due to the plaintiff on the closing of the partnership. Unless the object of the main transaction is to commit an offence made punishable by the Indian Penal Code, there can be no objection to enforcing the terms of a contract of that kind which is collateral to another transaction even when the main transaction itself is merely void (as where it amounts to a wager) and cannot be enforced: see *Shibho Mal v. Lachman Das* (1), *Bhola Nath v. Mul Chand* (2), *Chekka Venkataswamy v. Gajjila Nagabhushanam* (3) which are cases of principal and agent. Cases of partnership are illustrated by *Sharp v. Taylor* (4) (case of fraud on the American Law and on the English Navigation Laws), *Johnson v. Lansley* (5), *Beeston v. Beeston* (6) and *Brookman v. Mather* (7) and several others ending with *Jeffery & Co.*

(1) 23 A. 165; A. W. N. (1901) 33.

(2) 25 A. 639; A. W. N. (1903) 161.

(3) 14 M. L. J. 326.

(4) (1849) 2 Ph. 801; 41 E. R. 1153; 78 R. R. 298.

(5) (1852) 12 C. B. 468; 92 R. R. 766; 138 E. R. 989.

(6) (1876) 1 Ex. D. 13; 45 L. J. Ex. 230; 33 L. T. 700; 24 W. R. 96.

(7) (1913) 29 T. L. R. 276.

v. Bamford (8). These are mostly cases of betting partnerships.

This leads to the question whether any offence has been committed in the formation and conduct of the main transaction, i. e., the chit-fund. If it is an offence, it must be one punishable under s. 294A of the Indian Penal Code. This section and Act V of 1844 are both founded on the terms of 12 Geo. 3 ch. 119 and 4 Geo. IV ch. 60. I agree with my learned brother in thinking that there is nothing to distinguish the present case in principle from *Iyyanar Kone v. Bidoomada Kone* (9), *Kamakshi Achari v. Appava Pillai* (10) and *Vasudevan Nambudri v. Mammud* (11). The cases in *Sankunni v. Ikkora Kutti* (12) and *Nagappa Pillai v. Arunachalam Chetty* (13) are not of much help as there is not much discussion on the question of what constitutes lottery.

The word 'lottery' is not defined either in the Indian Penal Code or Act V of 1844 nor in the English Statutes. A definition has been attempted in Volume XV of the Halsbury's Laws of England, s. 605, p. 299, apparently with reference to the decided cases but, when the cases are examined we are landed into difficulties. The only decision of the House of Lords available is *Wallingford v. Mutual Society* (14), the facts of which have been fully stated by my learned brother. The observations of the Lord Chancellor (Lord Selborne) and Lords Blackburn, Hatherley, and Watson (*vide* my learned brother's judgment) on the question whether the transaction was illegal under the Lottery Acts are very brief. In Halsbury's Laws of England, Volume XV, p. 300, the case is cited as authority for the proposition "when the scheme has for its object the carrying on of a legitimate business, the facts that it provides for the distribution of its profits in certain events by lots will not vitiate the scheme." If so all chit-funds, the main object of which is the promotion of co-operation, prudence

and thrift ought to be regarded as legitimate even though there is an element of chance and this is apparently the *ratio decidendi* of *Iyyanar Kone v. Bidoomada Kone* (9) and *Kamakshi Achari v. Appava Pillai* (10). In Chitty on Contracts, the opposite opinion of Jessel, M. R. in *Sykes v. Beadon* (15) was regarded as overruled by the decision of the House of Lords in *Wallingford v. Mutual Society* (14). It seems to me that Lord Selborne's reason for holding that the society was not affected by the Lottery Act is indicated in the sentence "The other Act relied on had reference to persons who kept lottery offices at which the public were invited to pay for lottery tickets; and that Act could have no application to this case." If by the time a society of this kind became known to the public, all its members were ascertained and there is no invitation to any member of the public to join it, it cannot be said that any person keeps a lottery office at which the public were invited to join and pay, within the meaning of the English Acts or s. 294-A of the Indian Penal Code. In other words, it is not that every lottery constitutes an offence, but the keeping of a lottery office which is a standing invitation to the public that constitutes the offence. In *Stoddart v. Sagar* (16) a case of "coupon competition" advertised in a newspaper, the coupons being filled up by purchasers of the newspapers with the names of the horses likely to come first, second, third and fourth in a race, Pollock, B. and Wright, J., held that the facts do not show anything amounting to a lottery. No reasons were given. But the cases cited in the arguments show that it was regarded as a case where the success depended not on mere chance but on some skill. If so, the case does not help us. So also the decisions in *Caminada v. Hulton* (17) and *Hall v. Cox* (18).

In the present case there is nothing to show when and how the 500 subscribers joined the fund, and whether there was any invitation to the public to join it and an

(8) (1921) 2 K. B. 351; 90 I. J. K. B. 664; 125 L. T. 348; 65 S. J. 589; 37 T. L. R. 601.

(9) 1 S. D. 1858, p. 51.

(10) 1 M. H. C. R. 418.

(11) 22 M. 212; 8 Ind. Dec. (N. S.) 151.

(12) 52 Ind. Cts. 939; (1919) M. W. N. 570; 10 L. W. 155; 37 M. L. J. 209.

(13) 85 Ind. Cts. 1016; 47 M. L. J. 876; (1925) A. I. R. (M.) 281.

(14) (1880) 5 A. C. 685; 59 L. J. Q. B. 49; 43 T. L. 258; 29 W. R. 81.

(15) (1879) 11 Ch. D. 170; 48 L. J. Ch. 522; 40 L. T. 243; 27 W. R. 461.

(16) (1895) 2 Q. B. 474; 64 L. J. M. C. 234; 15 R. 579; 73 L. T. 215; 44 W. R. 287; 18 Cox C. C. 165; 59 J. P. 598.

(17) (1891) 60 L. J. M. C. 116; 64 L. T. 572; 39 W. R. 570; 17 Cox C. C. 307; 55 J. P. 727.

(18) (1899) 1 Q. B. 198; 68 L. J. Q. B. 167; 47 W. R. 161; 79 L. T. 653; 15 T. L. R. 82.

office was kept for the purpose. If so, there is no offence under s. 294-A of the Indian Penal Code. In the case of *Reg. v. Pearson* (19) (the facts of which are stated by my learned brother), the Public Prosecutor conceded that, if the competition was confined to meteorological savants, there might have been no offence. Sir John Bridge thought that it was a pure lottery so far as those persons were concerned to whom the scheme was addressed. It is unnecessary for me now to discuss the soundness of the distinction.

In *Taylor v. Smetten* (20) (the facts of which are stated by my learned brother), Hawkins, J., says "although it was admitted by the respondent that the tea was good and worth all the money, it is impossible to suppose that the aggregate prices charged and obtained for the packages did not include the aggregate prices of the tea and the prizes." In other words, the price paid for each packet included something more than the proper price of the tea. If so, the aggregate of such amount was distributed unequally between the purchasers. There was an invitation to the public to purchase and any indefinite member may purchase. It is certainly a lottery. But, as it is also not clear that there was anything in the nature of prizes and as it is possible that every purchaser might have been cheated, it is worse than a lottery in which at least some get prizes. *Barclay v. Pearson* (21) is also a case where the parties were invited to join the competition and no limits were placed on the members that might join and the result did not depend on skill. So far it contained the elements of a lottery. But if each competitor paid no more than the proper price of the newspaper (as to the ascertaining of which there can be no difficulty), he paid nothing for the chance and the prizes were paid only out of the large profits realized by the proprietor of the newspaper by the increased circulation. I find some doubts as to why it should be held to be a lottery, as the case falls within the *dictum* of Darling, J., in the next case. In *Willis v. Young* (22), Lord Alverston, Chief Justice, held it was a lottery. Dar-

ling, J., argued that if the chances of a prize were obtained wholly gratuitously, the scheme could not be a lottery. But, on the facts of the case, it is not necessary, that the holders of the medals including the successful ones should be purchasers of the telegraph. It is possible that none of the medal-holders is a purchaser and the actual purchasers of the telegraph who have paid no more than the proper price might have purchased without any knowledge of the medals or the chance of a prize connected with them. The case presents to me some difficulties. The case of *R. v. Harris* (23) presents to me the same difficulty. Though Montagu Smith, J., begins the judgment by saying "Whether the full value of the shilling was or was not received by the subscribers," the inference is irresistible, as pointed out by Hawkins, J., in *Taylor v. Smetten* (20), that the shilling included more than the price of the goods sold. If so, it is a lottery. If not, the observation of Montagu Smith, J., would be in conflict with Darling, J.'s *dictum* in *Willis v. Young* (22). I am content to follow the decision of the House of Lords in *Wallingford v. Mutual Society* (14) and hold that the chit-fund before us is not a lottery and also even if it is, no offence under s. 294 A of the Indian Penal Code has been committed.

That being so, the suit is maintainable. The appeal is allowed, the decrees of the Courts below will be reversed and the suit remanded for disposal according to law. The appellant will be entitled to his costs here and in the lower Appellate Court; in the First Court the costs will abide the result.

The appellant will be entitled to a refund of Court-fee.

Venkatasubba Rao, J.—The plaintiff has filed this suit for the recovery of a sum of money due to him on the footing of a promissory note executed by the defendant. The suit is resisted on the ground that the plaintiff and the defendant were as partners engaged in a lottery, that the accounts of the partnership were settled, that the note was executed for the amount which was found due by the defendants to the plaintiff and that as lotteries are prohibited by law, the plaintiff should not be permitted to enforce his promissory note. The nature of the

(19) 37 S. J. 749.

(20) (1883) 11 Q. B. D. 207; 52 L. J. M. C. 101; 48 J. P. 36.

(21) (1893) 2 Ch. 154; 62 L. J. Ch. 636; 3 R. 388; 68 L. T. 709; 42 W. R. 74.

(22) (1907) 1 K. B. 448; 76 L. J. K. B. 390; 96 L. T. 155; 71 J. P. 6; 23 T. L. R. 23.

(23) (1866) 10 Cox C. C. 352.

transaction may be briefly set forth. The plaintiff and the defendant promoted what is described as a "chit-fund." A capital fund of Rs. 500 a month is raised by 500 subscribers subscribing each one rupee per mensem. At the end of the month there is a drawing by lot and the subscriber who draws the ticket is paid Rs. 50 and his connection with the transaction forthwith ceases. This process is repeated month after month till the end of the 49th month. It will be seen that by this time, 49 subscribers will have drawn the tickets and received each a sum of Rs. 50 and that they have consequently severed their connection with the fund. At the close of the 50th month, each of the remaining subscribers is paid Rs. 50 and the stake-holders divide the profit and the fund is dissolved.

Let me now examine what the essential features of this transaction are.

(1) There is no uncertainty in regard to the sum which each subscriber receives. It is clearly understood from the start that every member will be paid Rs. 50. He receives neither more nor less. The sum each subscriber gets is thus fixed.

(2) No subscriber takes the risk of losing any portion of the amount subscribed. The utmost that any subscriber may be required to contribute is Rs. 50. Each subscriber gets the same back.

(3) The element, therefore, that is generally present in a lottery or a wagering transaction, namely, that loss is occasioned to one or more, does not exist in this transaction.

But it may be asked, so far as the first 49 are concerned, they get more than what they pay, how is this made possible? The fund as it comes in is invested and earns interest. The aggregate amount of interest is utilised in paying the first 49 members the excess over what they contribute and there is still a surplus which leaves to the stake-holders a fair margin of profit. There is some element of chance in regard to the first 49 subscribers. The member who draws the first lot would in return for the one rupee that he pays in gets Rs. 50. The subscriber who draws the second lot pays Rs. 2 and gets Rs. 50. This goes on until the 49th member who subscribes as much as Rs. 49 and receive Rs. 50. Then chance ceases to play any part in regard to the remaining 451 members who receive at the end of the 50th month each a sum of Rs. 50. What the 449 members lose is

the interest upon their money and what the first 49 members gain is a portion of the interest thus lost by the other subscribers. The remaining portion of the interest earned is retained by the stake-holders as their profit.

The fact that emerges from this description is that while chance determines the disposal of the interest earned, there is absolute certainty with reference to the distribution of the capital fund itself. Though it may be said that it is the small element of chance that tempts some to join the fund, the dominant feature of the transaction is that it, enables a large number to gradually lay by money and receive their savings in a lump sum and the scheme is in their case an incentive to thrift.

There is another feature of the scheme to which I may advert. Under r. 8 of the chit-fund rules, any of the subscribers is entitled to obtain by way of loan, after being subscriber for 7 months, an amount not exceeding $\frac{3}{4}$ th of the total contribution made by him on executing a promissory note agreeing to re-pay the sum with interest at 12-annas per cent. per mensem. If a larger amount is required, there is a provision under which it may be advanced under proper safeguards. Rule 6 provides that when the member draws his amount, the sum due by him on account of loan is to be deducted and the balance alone is to be paid to him.

In my opinion there is nothing to distinguish this case in principle from *Iyyanar Kone v. Bidoomada Kone* (9), *Kamakshi Asari v. Appavu Pillai* (10) and *Vasudevan Nambudri v. Mammod* (11).

The transactions in all the three cases were similar and they may thus be described in the form of an illustration. A stake-holder promotes a chit-fund with 20 subscribers, each subscriber paying a monthly subscription of Rs. 10. The fund lasts for 20 months. The total subscription for one month is thus Rs. 200. Each subscriber in turn is paid the entire sum of Rs. 200, the order in which the members are to get the sum being determined by lot. The subscriber to whom the sum is paid executes a bond in favour of the stake-holder agreeing to pay regularly future subscriptions as they fall due. In the case decided by the *Sudder Udatat*,

three learned Judges expressed the opinion that the scheme is a provident and beneficial arrangement under which each member derives the advantage of having the use in his turn of a round sum, the only thing determined by lot, being the turn in which that advantage shall be enjoyed. The learned Judges observed that the latter circumstance did not, in their opinion, bring the case within the scope of Act V of 1844 an Act for the suppression of lotteries.

The material portion of the Act runs thus:—

“All lotteries not authorised by Government shall, from and after the 31st March 1844, be deemed and hereby declared common and public nuisances and against law.”

In *Kamakshi Achari v. Appavu Pillai* (10), Scotland, C. J., and Frere, J., based their decision on the ground:

“It is not the case of a few out of a number of subscribers obtaining prizes by lot.”

The learned Judges further say that the right of the subscribers to the return of their contributions is not made a matter of risk or speculation. They hold that a transaction is not necessarily a lottery within either the spirit or the letter of the Act, simply because a matter of whatever kind is agreed to be decided by lots. The Act that was in force was still the same Act V of 1844.

In *Vasudevan Nambudri v. Mammod* (11), Shepherd, O. C. J., and Moore, J., upheld the transaction on the ground that the law as laid down in *Kamakshi Achari v. Appavu Pillai* (10) was followed without question for 35 years and the introduction of s. 294-A into the Indian Penal Code made no difference.

Wallingford v. Mutual Society (14), a decision of the House of Lords, is a very useful authority. The object of the Mutual Society was to accumulate capital by means of monthly subscriptions from members, to advance such capital to the members in rotation and ultimately to divide among the members all the profits that had been made. An “appropriation certificate” was issued to every member on his entering the society and certified his title to receive an advance out of the funds of the society and to participate in its profits. “The appropriations” or advances were to be made in the following manner. By Art. 27 it was declared that “appropriations” shall

be allotted in two ways. The first and every fourth one thereafter by drawing, free of any premium or interest, while those intermediate shall be allotted to the member or members tendering the highest premium for the same respectively. The appellant took up appropriation certificates and obtained advances and did not make the required re-payments. In an action against him he pleaded among other things that the constitution of the society itself was illegal as its promised benefits were to be given to the members by drawings which made the society unlawful under the Lottery Acts. The Lord Chancellor (Lord Selbourne) observes that one of the acts relied upon had reference to gambling transactions only and the transaction before the House was not a gambling transaction; the other act relied on had reference to persons who kept lottery offices at which the public were invited to pay for lottery tickets and that act could have no application to the case. The learned Lord observed that no case was made worthy of a moment's consideration in support of the contention that the transactions were illegal under the Lottery Acts. Lord Blackburn, Lord Hatherley and Lord Watson were equally emphatic in their opinion that the plea was not in the slightest degree made out.

A contrary opinion was no doubt expressed by Jessel, M. R., in *Sykes v. Beadon* (15). There was a combination formed on the principle of investing the subscriptions of the members and dividing the capital fund and profits by means of certificates convertible by annual drawings by lot into preferable divided bonds bearing interest with bonus. The learned Master of the Rolls at page 190* observes:

“If that is not a lottery it is very difficult, at all events, to my mind, to understand what a lottery is. It is called a division by lot, which means lottery. It says that the selections of certificates shall be by lot, and that is to be done in the ordinary way, by chance, and the benefits, as I said before, are unequal.”

Chitty in his treatise on Contracts at page 805 (17th Edition 1921) seems to suggest that the opinion of Jessel, M. R., cannot now prevail in view of the latter decision of the House of Lords.

A chit-fund of the description with which we are called on to deal was held to be

*Page of (1879) 11 Ch. D.—[Ed.]

illegal by Phillips, J., in *Sankunni v. Ikkora Kutti* (12) and Coleridge, J., was of the opinion that this case required re-consideration and upon a reference by him, Krishnan and Odgers, JJ., held in *Nagappa Pillai v. Arunachalam Chetty* (13) that such a scheme was illegal although the learned Judges differed on another point.

The cases relied on by the defendant are easily distinguishable.

In *Taylor v. Smetten* (20), each packet of tea sold contained a coupon entitling the purchaser to a prize and although the tea was worth the money paid for it, it was held that the transaction was a lottery. The prizes were of an infinite variety and were not made known before the sale of the tea. The intending purchaser purchased the tea and the coupon together, whatever the value of the coupon might turn out to be. There was no doubt that in buying the tea, he also took the chance of getting something of value in the nature of a prize. It might turn out to be anything. The price paid was not merely for the tea but also for this chance. The seller only undertook that he would give away the prize; but the prize might be anything; it might not be worth half a penny. In this case, it is obvious that loss was hazarded by each purchaser of tea packet.

Barclay v. Pearson (21) related to a missing word competition and the scheme of it was that the competitors were to cut out coupons in a newspaper and fill in the word missing from a paragraph, the missing words being in the hands of a third party, enclosed in a sealed envelope. The whole of the money received in entrance was to be divided equally amongst those competitors who filled in the missing word correctly. Here the distribution takes place by chance, the fund itself being the contribution of all the competitors.

In *Reg v. Pearson* (19), a newspaper proprietor announced that he intended to carry on a Weather Forecast Competition and people were invited to predict the number of hours of bright sunshine and the number of rainy days. The competitors who most nearly forecasted the weather were to obtain the prizes. Sir John Bridge observed that the transaction was purely a lottery so far as those persons were concerned to whom the scheme was addressed. It was a competition of chance and not of skill. If the competition was confined to meteorological savants the case might be

different. The competition was held to be quite as mischievous as the missing word competition. It is clear that while many lose, a few win the prizes and that the fund out of which the prizes come is that contributed by the losing as well as the winning competitors.

In *Willis v. Young* (22), the Proprietors of the Weekly Telegraph devised a still more ingenious scheme. They caused medals to be distributed gratuitously among the members of the public. Each medal bore the words "Keep this, it may be worth hundred pounds. See the Weekly Telegraph to-day". The winning numbers which were arbitrarily selected were published in the newspaper. It was not necessary that the holder of the medal should purchase a copy of the paper as information as to the winning numbers could be obtained without charge at the office of the newspaper. The object of the proprietors was attained and the circulation of the paper increased considerably. The point I am trying to make is thus brought out very clearly by Lord Alverstone, C. J.: "The money for the prizes, however, comes out of the receipts of the respondents, and these in their turn come, to a considerable extent, from the people who buy the paper, although no doubt the advertisements may bring in a considerable sum. The persons who receive the medals, therefore, contribute collectively (though each individual may not contribute) sums of money which constitute the fund from which the profits of the newspaper, and also the money for the prize winners in this competition come" Darling, J., expresses the same idea very shortly thus:—"In the present instance all chances are paid for in the mass by the general body of purchasers of the paper, although an individual purchaser may not pay for his chance".

In *R. v. Harris* (23), the scheme judged by this test is clearly a lottery. The fund out of which the prizes came was contributed by the whole body of subscribers and it is obvious that the ticket-holders did not in all cases obtain full value for the shilling which each purchaser of the ticket was required to pay, even assuming that the entire £ 250 was distributed in "bonuses".

In the present case, however, as I have shown, the prizes paid to the first 49 members are not paid out of the contributions made by the subscribers; the money for the prizes comes out of the interest earned on the capital fund contributed. The cases

cited for the defendant are thus clearly distinguishable.

A view different from what I am disposed to take was no doubt taken as I have said in *Sankunni v. Ikkora Kutti* (12), but the respondent against whom the decision was given was unrepresented and the attention of the Court was not drawn to *Wallingford v. Mutual Society* (14). Nor does it appear that this case was cited before the Bench that decided *Nagappa Pillai v. Arunachalam Chetty* (13).

In my opinion, therefore, the transaction is not a lottery and the plaintiff is entitled to judgment.

In the view I have taken, it is unnecessary to deal with the contention based on the distinction between void and illegal transactions, or to discuss the group of cases of which *Johnson v. Lansley* (5), *Beeston v. Beeston* (6) and *Shibho Mal v. Lachman Das* (1) are examples.

I agree with my learned brother in the order proposed by him.

V. N. V.

Z. K.

Appeal allowed:

Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 180 OF 1924 AND
SECOND CIVIL APPEAL NO. 1016 OF 1924.

March 9, 1925.

Present:—Mr. Justice Suhrawardy and
Mr. Justice Duval.

AGENT, BENGAL NAGPUR RAILWAY
—DEFENDANT—APPELLANT

versus

BEHARI LAL DUTT—PLAINTIFF—
RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 23
—Second appeal, if lies when remand order not in
proper form—Inherent power of Court—High Court,
if can interfere when appeal is incompetent—Suit,
frame of—Railway Company—Suit against Manager
—Misdescription—Amendment of plaint, when to be
allowed.

An appeal lies from an order of the Appellate
Court purporting to be an order under O. XLI, r. 23,
of the C. P. C., even though the order may not be
in strict accord with the provisions of the said rule.
[p. 427, col. 2.]

An order of remand passed by the Appellate Court
in the exercise of its inherent jurisdiction is appealable
even though it does not come within the scope of O.
XLI, r. 23, C. P. C. [*ibid.*]

Abdulkarim Abu Ahmed Khan Ghuznavi v.
Allahabad Bank Ltd., 41 Ind. Cas. 598; 44 C. 929; 21

C. W. N. 877; 26 C. L. J. 49, *Bhairab Chandra Dutt v.*
Kali Kumar Dutt, 74 Ind. Cas. 1038; 37 C. L. J. 491;
(1923) A. I. R. (C.) 606 and *Radha Krishna Saha v.*
Kamal Kamini Debya, 70 Ind. Cas. 547; 35 C. L. J.
345; (1922) A. I. R. (C.) 456, relied upon.

The High Court can interfere under s. 115, C. P. C.,
with an order found to be not appealable, if it is
satisfied that the order is not in accordance with law.
[*ibid.*]

Where there are two known persons in existence and
the plaintiff brings the suit against one of them and
afterwards applies to have the other brought on the
record as defendant on the ground that he all along
intended to sue the other and in substance he sued
the other, the case is not one of misdescription but of
substitution, and s. 22 of the Limitation Act would
apply. [p. 429, col. 1.]

No amendment of plaint should be allowed where
it is applied for at a very late stage and will have the
effect of adding a new party to the suit and s. 22 of
the Limitation Act would apply. [p. 429, col. 2.]

Where instead of the Railway Company, its Agent
is sued, the suit is not framed properly and is not,
therefore, maintainable. [p. 429, col. 1.]

Indian General S. N. & R. Coy. Ltd., v. Lal Mohan
Saha, 31 Ind. Cas. 35; 43 C. 441; 22 C. L. J. 241, *Ram*
Dass Sein v. Mr. Cecil Stephenson, 10 W. R. 366; 2 B.
L. R. S. N. 6 (a); 1 Ind. Dec. (N. S.) 1011, *Nubeen*
Chanderpaul v. Mr. Cecil Stephenson, 15 W. R. 534 and
East Indian Railway Company v. Ram Lakhan Ram,
78 Ind. Cas. 312; 3 Pat. 230 (1924) Pat. 9; (1925) A. I.
R. (Pat.) 37; 6 P. L. T. 415, followed.

Saraspur Manufacturing Company Ltd. v. B. B. and
C. I. Railway Company, 73 Ind. Cas. 1027; 47 B. 785;
25 Bom. L. R. 513; (1923) A. I. R. (B.) 452, distin-
guished.

Appeal against an order of the District
Judge, Bankura, dated the 14th March
1924, reversing that of the Munsif, Third
Court, Bankura, dated the 19th June 1924.

Babus. Nagendra Nath Ghose, Ramesh
Chandra Sen and Jatendra Kumar Sen
Gupta, for the Appellant,

Mr. Mohendra Nath Roy (with him Babu
Panchanan Ghose), for the Respondent.

JUDGMENT.

Suhrawardy, J.—This Miscellaneous
Appeal (No. 180 of 1924) and the S. A. No.
1016 of 1924 are directed against the same
decision of the Court below. There is also
an application under s. 115, C. P. C., filed by
the appellant against the same order. The
explanation is that in the present unsettled
state of the law the appellant could not de-
cide on the proper procedure.

The miscellaneous appeal was first heard
and the learned Advocate for the respond-
ent took a preliminary objection on the
ground that no appeal lay. The facts of
the case are that the plaintiff-respondent
brought a suit for recovery of the value of
certain goods which he had despatched
from one Railway Station to another on the
Bengal Nagpur Railway but the goods
were not delivered to the consignee. He

accordingly raised the present suit and in the plaint filed the name of the defendant was given as "Agent of the Bengal Nagpur Railway Saheb Bahadur". The defendant Mr. Young, who was the agent of the Bengal Nagpur Railway Company at the time, appeared and one of the objections that he took was that the frame of the suit was bad. He also took other objections under ss. 75 and 77 of the Indian Railways Act on the grounds that the plaintiff had not declared the value of the goods as he was legally bound to do at the time of the consignment and that notice under s. 77 of the Indian Railways Act had not been properly served. The learned Munsif in the Trial Court without going into the merits of the case held that the suit as framed was not maintainable. He also found against the plaintiff on the objections under ss. 75 and 77 of the Indian Railways Act. In this view he dismissed the plaintiff's suit. There was an appeal by the plaintiff to the learned District Judge of Bankura who considered the first question only, namely, whether the frame of the suit was defective and being of opinion that the intention of the plaintiff was to sue the Railway Company he directed the plaint to be amended and the suit to proceed. The learned District Judge did not consider the decision of the Trial Court under ss. 75 and 77 of the Indian Railways Act. In the view which the learned Judge took he set aside the decree of the Trial Court and passed the following order: "The case will go back to the lower Court for amendment of the title of the defendant Company and for a fresh trial. The costs of the Court will abide the result of the suit. The Court-fee paid on the memorandum of appeal should be returned to the appellant". Against this judgment the appellant has preferred this appeal and S. A. No. 1016 of 1924. It is argued on behalf of the respondent that this order not being an order under O. XLI, r. 23 is not appealable and, therefore, this appeal is incompetent. It is further argued that the decision of the First Court dismissing the plaintiff's suit was not a decision upon a preliminary point. It is apparent that that Court did not enter into the merits of the case but held that the plaintiff's suit could not proceed because of the defect in the description of the defendant; and it also found that the suit was barred under ss. 75 and 77 of the Indian Railways Act. The decision of that Court must be taken to be a decision on a prelimi-

nary point and the remand order of the lower Appellate Court was one under O. XLI, r. 23, C. P. C. Moreover, it has been held that though an order of remand passed by the Court of Appeal below may not be in strict accord with the provision of O. XLI, r. 23 read with O. XLIII r. 1 (u), if the order of the Appellate Court purports to be an order under O. XLI, r. 23, an appeal will lie from such an order. Strictly speaking, the order passed by the learned Judge is not in conformity with O. XLI, r. 23, but it is manifest from the form of his order that he purported to pass it under O. XLI, r. 23. One of the orders that he passed is that the Court-fee paid on the memorandum of appeal should be returned to the appellant and such an order can only be passed under s. 13 of the Court Fees Act in a case where the remand is made under O. XLI, r. 23. It has further been held that an order passed by the Appellate Court in the exercise of its inherent jurisdiction, which it possesses, as held in the Full Bench case of *Abdul Karim Abu Ahmed Khan Ghuznavi v. Allahabad Bank Ltd.* (1) is an appealable order even though it may not come within the scope of O. XLI, r. 23, *Bhairab Chandra Dutt v. Kali Kumar Dutt* (2) and *Radha Krishna Saha v. Kumal Kamini Debya* (3). In this state of the authorities, I am of opinion that the appeal is competent. Even if there are any doubts as to the maintainability of the appeal in such cases the memorandum of appeal may be treated as an application under s. 115 C. P. C., where we are satisfied that the order passed by the lower Court is not in accordance with law.

Now, I come to the merits of the appeal. It has been observed that the Trial Court found against the plaintiff and held that the suit was not brought against the proper party and it is, therefore, not maintainable. It is not questioned before us that the description of the defendant as appears from the plaint is not strictly in accordance with law. It cannot be disputed that the frame of the suit is in contravention of the provisions of O. XXIX, r. 1 and Sch. A to the C. P. C., and that it should have been brought against the Railway Company. In

(1) 41 Ind. Cas. 598; 44 C. 929; 21 C. W. N. 877; 26 C. L. J. 49.

(2) 74 Ind. Cas. 1038; 37 C. L. J. 491; (1923) A. I. R. (C.) 606.

(3) 70 Ind. Cas. 547; 35 C. L. J. 345; (1922) A. I. R. (C.) 456.

the case of *Indian General S. N. & R. Co. Ltd.*, v. *Lal Mohan Saha* (4), the suit was brought against two Companies through a certain person who was named as the joint agent of two Companies. It was held that the frame of the suit was in contravention of O. XXIX, r. 1. But it is argued by the respondent that the plaintiff should be allowed to amend the plaint and to constitute the suit in accordance with the provisions of law. It appears that the plaint was filed on the 28th October 1922. The written statement on behalf of the defendant was filed on the 2nd January 1923. In paragraph 2 of the written statement the defendant pleaded that the suit as framed was not maintainable. On the 12th June 1923 the hearing of the evidence and the arguments of the Pleaders were finished and judgment was reserved. Thereafter on that day the plaintiff filed a petition for amendment of the plaint. The learned Munsif rejected it on the ground that the prayer could not be allowed at that stage. From these facts it cannot be said that the mistake that was committed was an accidental one. The plaintiff adhered to this case that the suit as framed was in proper form until after the arguments of the Pleader of the defendant when he was convinced of his mistake and put in an application for the amendment of the plaint.

Besides the objection that the plaintiff did not ask for any amendment of the plaint, in time, there is another objection on the ground of limitation. It is conceded that the effect of now bringing the Railway Company on the record will be the addition of a party to the suit and s. 22 of the Indian Limitation Act will apply. The respondent, however, argues that the amendment sought was not to add a fresh party to the suit but to remove the misdescription of the defendant in the plaint. The real question, therefore, is whether the present case is a case of misdescription of the defendant or whether the amendment would practically add a party to the suit. On the authorities there is no room for controversy that the suit as framed is not maintainable. In the case of *Ram Dass Sein v. Mr. Cecil Stephenson* (5), the East Indian Railway Company was sued in the name of its Deputy Agent. It was held that the suit was bad and could not proceed in that form

as the plaint did not disclose any cause of action against the defendant. This decision was followed in the case of *Nubeen Chunder Paul v. Mr. Cecil Stephenson* (6). There also the same mistake occurred. It was held that the suit could not proceed against the defendant. An attempt was made in that case to amend the plaint by bringing proper parties on the record. The learned Judges rejected the prayer on the ground that the Railway Company was no party to the suit and it could not be said that the Railway Company was likely to be affected by the result of the suit; and further under s. 73, Act VIII of 1859, it was not imperative on the Court to admit parties to the record; it was discretionary to allow amendment and it was justified in not allowing the amendment at the stage at which it was asked. These cases are tried to be distinguished from the present case on the ground that in those cases the defendant was sued by name as representing the Railway Company, whereas in the present case the defendant is not named but described only as Agent of the Railway Company. In the case of *Indian General S. N. & R. Co., Ltd. v. Lal Mohan Saha* (4) to which reference has been made, amendment was sought and allowed on the ground that as it was within time it would not affect the Statute of Limitation. Their Lordships observed thus: "In the circumstances of this case, as no question of limitation arises even if the suit be taken to have been instituted against the two Companies on the date when the plaint was allowed to be amended, we are of opinion that the amendment may stand." From this observation it is clear that if the amendment was not asked for within the period of limitation the prayer could not be granted. In the present case there is no question that the application for amendment was made after the statutory period. All the cases on this point were considered by the Patna High Court in the case of *East Indian Railway Company v. Ram Lakhan Ram* (7) which is on all fours with the present case and where all the points arising in this case were discussed and answered in the way in which we propose to answer them in this case. Das, J., in his lucid judgment after quoting the words of Mookerjee, J., in the case of *Indian General S. N. & R. Co., Ltd.*

(4) 31 Ind. Cas. 35; 43 C. 441; 22 C. L. J. 241.

(5) 10 W. R. 366; 2 B. L. R. S. N. 6 (a); 1 Ind. Dec. (N. S.) 111.

(6) 15 W. R. 531.

(7) 78 Ind. Cas. 312; 3 Pat. 230; (1924) Pat. 9; (1925) A. I. R. (Pat.) 37; 6 P. L. T. 415.

v. *Lal Mohan Shaha* (4) said as follows: "I read the decision of Mookerjee, J., as containing a strong intimation to the effect that amendment would not have been allowed if any question of limitation arose in the case." In that case the defendant was named 'Agent of the East Indian Railway Company'. Subsequently the plaintiff sought to substitute the Railway Company for the defendant originally sued. The learned Judge remarked: "When there were two known persons in existence and the plaintiff brings the suit against one of them and afterwards applies to have the other brought on the record as a defendant on the ground that he all along intended to sue the other and that in substance he sued the other, and no question of representation arises in the case, it is impossible to maintain the view that the case is one of misdescription". I fully agree with this observation. On behalf of the plaintiff-respondent much reliance has been placed on the decision in the case of the *Saraspur Manufacturing Company v. B. B. & C. I. Railway Company* (8). This case has been distinguished in the Patna case; and without accepting the correctness of that decision it may be distinguished from the present case on the following ground. In the suit brought in the Bombay case the defendant was stated as the Agent of the Railway Company. But the Railway Company appeared, filed a written statement, and raised several pleas in defence. They also objected that the plaintiff's suit should not lie as it was filed against the defendant's agent. Some of the observations on which the decision in that case is based are that "the defendant Company not only knew perfectly well that the various claims had been made against it, but also considered itself the party being sued. If the Company was not a party, no appearance should have been entered." Then again: "Though the description of the Company may not have been that which is in conformity with the Schedule A to the C. P. C., nevertheless the Company was substantially on the record the Company was in substance the defendant at the time the plaint was first filed, and it was not a case of adding a new party in which case, considerations of that kind might be relevant". I might hold the same opinion on the facts of that case. But here the defend-

ant at the very outset took objection to the frame of the suit and the Company has not appeared or defended the suit. I hold that it is not a case of misdescription but if the amendment is allowed it will have the effect of adding a new party to the suit, and s. 22 of the Limitation Act will apply.

Another case has been referred to by the respondent, viz., the case of *Nistarini Dasya v. Sarat Chandra Mojumdar* (9). I had occasion to refer to that case in a recent judgment with reluctance to follow it and tried to distinguish it, but that decision has no bearing on the present case. The view which the learned Judges took in that case was that the real plaintiff in the suit was the son and that the suit as originally framed was for the benefit of the real plaintiff; and, therefore, they thought that by the amendment of the plaint by bringing the real plaintiff on the record there was substantially no change in the frame of the suit.

On the above considerations I am of opinion that the plaintiff's suit as brought is incompetent and must be dismissed.

The order of the lower Appellate Court is also open to criticism on the ground that the Court was not justified in remitting the case to the Trial Court after setting aside its decision on one of the points decided by it. The learned Judge should have gone into the questions decided by the First Court under ss. 75 and 77 of the Indian Railways Act. But as, in my judgment, the suit is defective and must be dismissed I do not consider this point any further.

The result of the foregoing conclusion is that this appeal is allowed, the decree of the lower Appellate Court set aside and that of the Court of first instance restored with costs.

It is not necessary to pass any order in Second Appeal No. 1016 of 1924.

Duval, J.—I agree with the judgment of my learned brother just delivered. It appears to me that there are only two points in this case, the first is whether there is an appeal in this case and the second is whether, as a matter of fact, in the circumstances of this case the application to substitute the Company for the Agent filed at such a late stage can legally be allowed.

As to the first point, it appears to me to be perfectly clear that whatever else the

(8) 73 Ind. Cas. 1027; 47 B. 785; 25 Bom. L. R. 513; (1923) A. I. R. (B.) 452.

(9) 29 Ind. Cas. 680; 20 C. W. N. 49; 22 C. L. J. 270.

learned District Judge might have decided he really intended to decide only one point, namely, the preliminary point; and it is also clear that the learned Munsif in the First Court did only decide the preliminary point; that is to say, he took no evidence of the fact as to whether there was any loss occasioned to the plaintiff. I hold, therefore, that an appeal does lie to this Court against the order of the District Judge.

As to the second point, the weight of all the authorities is to the effect that substitution cannot be made at a late stage of the case. I had the plaint and written statement read to me and it appears quite clear that this objection was taken at the very first stage of the case. No attempt was made to rectify the mistake till at the very last stage of the case; and the First Court was right in dismissing the application. All the authorities except the decision in the case of *Saraspur Manufacturing Co. Ltd. v. B. B. & C. I. Railway Company* (8) are in favour of this view. In the Bombay case, however, permission for substitution was given owing to the special circumstances of the case which do not apply to the present case. I refer to this case because the learned Advocate for the respondent rested on it his whole case to justify the order of the District Judge. In this view I agree that the appeal must be allowed, the order of the District Judge vacated and that of the Munsif restored with costs of all Courts.

It is not necessary to pass any order in S. A. No. 1016 of 1924.

S. D.

Appeal allowed.

BOGDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 69 OF 1925.

July 22, 1925.

Present:—Simpson, A. J. C.

Musammatt HAIDRI KHANAM AND OTHERS
—APPLICANTS

versus

AHMAD ALI AND OTHERS—OPPOSITE
PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. VII, r. 10, O. XLIII, r. 1 (a)—Order returning plaint for presentation to proper Court—Appeal—

Appellate Court deciding that Trial Court had jurisdiction—Error of law—Revision, whether lies.

An error of law furnishes no ground for revision.

Where on an appeal from an order directing that a plaint should be returned for presentation to a proper Court, the Appellate Court decides that the Trial Court had jurisdiction to entertain the suit, its decision is not open to revision inasmuch as even if it is erroneous, it is a mere error of law committed by a Court which had jurisdiction to decide the matter.

Application against an order of the Officiating Subordinate Judge, Lucknow, dated the 9th March 1925, reversing that of the Munsif, South Lucknow, dated the 30th January 1925.

Messrs. A. P. Nigam and Rameshwari Dayal, for the Applicants.

Messrs. Nazir-ud-din and S. M. Ahmad, for the Opposite Party.

ORDER.—This is an application under s. 115 of the C. P. C. in revision. The question raised is one of some difficulty, if it had come before me in an appeal, but I am not prepared to decide it in revision.

There was an original mortgage for Rs. 2,700 and a sub-mortgage, that is to say, a mortgage by the mortgagee of his mortgagee rights for Rs. 690. The sub-mortgagee chose to pursue the remedy in connection with which form No. 9 of Appendix D of the C. P. C. has been provided, that is to say, he brought a suit for sale of the property itself. He made the mortgagee and the mortgagor defendants, and he asked that out of the sale money, he should get in the first place, the money he was entitled to on his sub-mortgage, and then out of the balance the original mortgagee ought to get his mortgage money, and that the surplus after that should be paid to the mortgagor.

He brought this suit in the Court of the Munsif whose jurisdiction is limited to Rs. 2,000. The Munsif decided that in a suit of this kind the sub-mortgagee is stepping into the shoes of the mortgagee, and that both Court-fee and jurisdiction must be calculated on the amount of the mortgage money of the original mortgagee. Accordingly, he returned the plaint for presentation to the proper Court. The plaintiff sub-mortgagee appealed, and the learned Subordinate Judge allowed the appeal. He held that any relief granted to the original mortgagee was merely incidental to the relief claimed by the plaintiff, and that the valuation of Rs. 690 was correct both for Court-fee and for jurisdiction. There

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seems to be no direct authority on the point but as I have said, I do not feel called upon to decide it. The learned Subordinate Judge may have been right in his decision or he may have been wrong, but there is no doubt that he had jurisdiction to hear the appeal, and that the most that can be urged against his judgment is that it contains an error of law. That furnishes no ground for revision. The case is similar to *Jawla Prasad v. E. I. Railway Company* (1).

I dismiss the application with costs.

Z. K. Application dismissed.

(1) 46 Ind. Cas. 99; 16 A. L. J. 535.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 29 OF 1924.

March 17, 1925.

Present :—Justice Sir Ewart Greaves,

Kt., and Mr. Justice Cuming.

DHIRENDRA NATH GHOSE AND OTHERS

—PLAINTIFFS—APPELLANTS

versus

CHARUSHASHI DEBYA—DEFENDANT

—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 52—
Claim for rent, whether right to immoveable property
—*Bengal Tenancy Act* (VIII of 1885), s. 150,
applicability of.

A mere "claim for rent" is not a right to immoveable property within the provision of s. 52 of the *Transfer of Property Act*. [p. 431, col. 2.]

The provisions of s. 150, *Bengal Tenancy Act*, do not apply to a case when the rate of rent is in issue. [p. 432, col. 1.]

Letters Patent Appeal against the judgment of Mr. Justice Duval, dated the 9th July 1924, in Appeal from Appellate Decree No. 972 of 1922.

Mr. Amarendra Nath Bose and Babu Arun Chandra Bose, for the Appellants.

Dr. Bijan Kumar Mukherjee, for the Respondent.

JUDGMENT.

Greaves, J.—This is an appeal by the plaintiffs under s. 15 of the Letters Patent from a judgment of Mr. Justice Duval. The suit was one for rent and the contention of the tenant was that he was only liable to pay rent at the rate of Rs. 30-10-8 *gandas* whereas the landlord claimed rent at the rate of Rs. 39. Before I state the questions that arise in this appeal it is necessary to state a few facts. On the 15th June 1914 proceedings were started by the landlord for enhancement of rent under s. 105 of the *Bengal Tenancy Act*. The judgment in that case was delivered on the 24th Decem-

ber 1915 fixing the rate of rent at Rs. 39 in accordance with an entry in the Record of Rights. In the meantime subsequent to the institution of the proceedings under s. 105 and whilst these were pending the landlord commenced a suit for rent against the predecessor-in-interest of the present respondent, Beni Kanta Banerjee. The decree was passed in that suit on the 25th August 1915 on the basis of a rental of Rs. 34-10-8 *gandas*. The holding was sold in execution of the decree sometime in August 1915 and the sale was confirmed on the 30th September 1915, the purchaser being Dinesh Chandra Chatterjee transferred his interest to the present respondent.

Three points were urged before us in this appeal against the judgment of the learned Judge who held that the respondent was not bound by the proceedings under s. 105. The first point is that the sale is merely a devolution and that the provisions of O. XXII, r. 10 of the C. P. C., apply to the case; and secondly, it was contended that in any case the proceedings under s. 105 were contentions and operated as *lis pendens* and that accordingly, the respondent was bound by the proceedings under the provisions of s. 52 of the *Transfer of Property Act*. Thirdly, it was contended that by virtue of the provisions of s. 150 of the *Bengal Tenancy Act* the plea taken by the respondent was not open to him as he did not deposit the rent which he had admitted to be due, namely, Rs. 34-10-8 *gandas*.

So far as the first point is concerned, I have endeavoured to understand the argument that was addressed to us based upon the provisions of O. XXII, r. 10. But I have been unable to see how that rule of O. XXII has any application whatsoever and the first point accordingly fails.

Secondly, so far as s. 52 of the *Transfer of Property Act* is concerned I am unable to agree with the argument of the learned Advocate that any right to immoveable property was directly and specifically in question. In my view the rights referred to by those words of s. 52 are rights such as arise with regard to sale, specific performance lease and so on; but I cannot see how a mere claim for rent is a right to immoveable property within the provisions of s. 52. No authority has been cited to us for the proposition and I am not prepared to hold that a claim for rent is a right to immoveable property within the meaning

of those words in s. 52. We were referred in support of the learned Advocate's argument, to an unreported case of this Court, namely, an appeal from an Appellate Decree No. 450 of 1916. But I cannot see how that judgment affects the matter at all as the only question there was whether the person there who occupies the same position as the respondent here knew of the proceedings under s. 105. The Court there found that he knew of those proceedings and that he knew of those proceedings at the time he purchased and that he was clearly bound by those proceedings. This is the only point that was decided in that case and I do not see how that case helps the appellants in this case.

With regard to the third point, namely, that s. 150 of the Bengal Tenancy Act debars the respondent from setting up the plea which he raised. This point seems to be decided by the case of *Banarasi Pershad v. Makhan Roy* (1). In that case the same argument was used with regard to the provisions of s. 150 as was urged before us in this appeal and Mr. Justice Banerji there decided that s. 150 did not apply where the rate of rent was in issue. We respectfully agree with that decision and under the circumstances, s. 150 has no application.

The appeal accordingly fails and is dismissed with costs.

Cuming, J.—I agree.

Z. K. *Appeal dismissed.*
(1) 30 C. 947; 7 C. W. N. 514.

CALCUTTA HIGH COURT.

CIVIL RULE No. 552 of 1925.

July 15, 1925.

Present:—Justice Sir Babington
Newbould, Kt.

KAMINI KUMAR ROY AND ANOTHER
—PETITIONERS

versus

RAJENDRA NATH ROY AND ANOTHER
—OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), O. XXIII,
r. 1—Withdrawal of suit, application for—Refusal to
grant permission to bring fresh suit—Procedure.*

Where a plaintiff applying for withdrawal of suit, does not desire to withdraw from the suit unless with liberty to bring a fresh suit, and the Court considers that such liberty should not be granted, the proper course is simply to dismiss the application. An order in such a case allowing withdrawal of suit without permission to bring a fresh suit is wrong, and must be set aside, with the restoration of the suit to the file.

Mahant Biharidasji v. Parshottamdas Ramdas, 32 B. 315; 10 Bom. L. R. 293, relied on.

A plaintiff who does not take any objection to the above course adopted by the Court cannot be deemed to have agreed to it, and to have withdrawn from the suit, it being not necessary for him to expressly take the objection before the refusal of his application.

Rule against an order of the Second Munsif, Chikandi, dated the 20th February 1925.

Babu Rupendra Kumar Mitter, for the Petitioners.

Mr. Gunada Charan Sen and Babu Someswar Prosad Mukherjee, for the Opposite Party.

JUDGMENT.—The plaintiffs-petitioners during the hearing of their Suit No. 69 of 1924 in the Court of the Second Munsif of Chikandi applied for permission to withdraw from the suit with liberty to bring a fresh suit. The Munsif allowed them to withdraw from the suit without permission to bring a fresh suit and directed the defendants to get their costs from the plaintiff. This order was passed in connection with two suits, but in this Rule we are only concerned with Suit No. 69 of 1924.

That the Munsif's order was wrong is clear from the decision of the Bombay High Court in *Mahant Biharidasji v. Parshottamdas Ramdas* (1). As there pointed out, where the plaintiff does not desire to withdraw from the suit unless with liberty to bring a fresh suit, and the Court considers that such liberty should not be granted the proper course is simply to dismiss the application. On behalf of the opposite party in this Rule the same argument was urged as had been urged at the hearing of the case cited.

It was contended that the permission having been refused without any objection on the part of the plaintiff he must be deemed to have withdrawn from the suit. It was not necessary for him to expressly take such objection before his application was refused. The Rule is accordingly made absolute with costs and the order passed by the Munsif will be varied by substituting therefor an order in these terms. The application for permission to withdraw from the suit with liberty to bring a fresh suit for the subject-matter of the suit is dismissed with costs. The result will be that the case must be restored to the file.

I assess the hearing-fee at two gold mohurs.

N. H.

Rule made absolute.

(1) 32 B. 345; 10 Bom. L. R. 293,

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 542 OF 1924.

January 28, 1925.

Present:—Justice Sir Babington Newbould,
Kt., and Mr. Justice B. B. Ghose.FAZARUDDIN AND OTHERS—ACCUSED—
APPELLANTS

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), ss. 6, 8, 9—Abduction case—Evidence of search prior to alleged abduction, whether admissible—Jury trial—Court, whether can express opinion on facts—Criminal Procedure Code (Act V of 1898), s. 288—Deposition of witness, admissibility of—"Subject to provisions of Evidence Act" meaning of.

The accused, who were alleged to have abducted a woman at midnight, produced a witness who gave evidence that he had seen certain other women of the abducted woman's household searching for something at dusk the same evening, the suggestion being that the woman was actually missing in the evening and could not have been abducted at midnight. The women were not examined as witnesses:

Held, that the evidence of the witness was inadmissible and neither s. 6, nor s. 8, nor s. 9 of the Evidence Act was applicable.

In a Jury trial, there is no harm in the Trial Judge expressing his opinion on facts, and in fact it is his duty to do so to assist the Jury, provided he is careful to express his opinion in such a way as not to interfere with the duties of the Jury to finally decide according to their own view of the facts.

The deposition of a witness before the Committing Magistrate when put in the Sessions Court under s. 288, Cr. P. C., becomes substantive evidence and is used as such. The meaning of the words "subject to the provisions of the Indian Evidence Act" in the section is not that the deposition must be admissible under some section of the Evidence Act. They simply mean that it cannot be used as substantive evidence, if for any reason it is irrelevant under the Evidence Act.

Criminal appeal against an order of the Assistant Sessions Judge, Rangpur, dated the 22nd July 1924.

Mr. D. N. Bagchi and Babu Mohini Mohan Bhattacharji, for the Appellants.

Mr. Khundkar, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—The appellants have been found guilty under s. 366, Indian Penal Code, by the unanimous verdict of the Jury and have been sentenced each to five years' rigorous imprisonment.

It is contended that the trial has been vitiated by the exclusion of relevant evidence and also misdirection by the Judge in summing up to the Jury. It is suggested for the defence that the woman who has been found to be abducted, Bibijan, was actually missing in the evening and, therefore, could not have been, as alleged, abducted at mid-

night. The witness Nur Muhamad Munshi gave evidence that he had seen three women, who were sleeping in the same *bari* as the complainant and his wife that night, searching something at dusk. These women were not examined as witnesses and when the witness was asked what reply one of these women, who were searching for something, gave, he was not allowed to answer the question. We hold that the learned Sessions Judge was right in excluding this evidence. This alleged search that evening cannot be treated as part of the same transaction as the abduction at night so s. 6 of the Evidence Act cannot make it admissible. Section 8 is of no help to the appellants since these women were neither parties to the case nor agents to any party. Section 9, the only other section of the Evidence Act on which reliance is placed, is equally inapplicable.

As regards misdirection, several points have been argued, but they really all amount to this—that the learned Sessions Judge in dealing with these points expressed his opinion too strongly in favour of the prosecution. But though the learned Judge expressed his opinion strongly it is evident from his charge that he was careful to impress on the Jury that on all questions of fact the decision rested with them and over and over again in the charge we find remarks like these. "I have the entire evidence to you to judge," "you are the Judges and you are to decide if you find the above question against the accused." There is no harm in the Trial Judge expressing his opinion on the fact and in fact it is his duty to do so to assist the Jury provided that he is careful to express his opinion in such a way as not in any way to interfere with the duties of the Jury to finally decide according to their own view of the facts. All the points to which reference is made, we find, have been adequately and properly dealt with in the charge to the Jury. The suggestions made on behalf of the defence have been considered. The points as to non-examination of various witnesses have been discussed. One other point of importance taken is that the deposition of witnesses before the Committing Magistrate was wrongly put in in accordance with the provisions of s. 288, Cr. P. C. It is contended that the concluding words of this section "Subject to the provisions of the Indian Evidence Act" mean that the depositions cannot be

put in under this section unless they are admissible under some sections of the Indian Evidence Act. This is not the meaning of these words. The evidence of the deposition when put in under this section becomes substantive evidence and is used as such. But obviously it cannot be put in evidence as substantive evidence if for any reason it is irrelevant under the Evidence Act. To adopt the interpretation which we are asked to put on these concluding words would be to render the provisions of s. 288 unnecessary and superfluous.

Having regard to the nature of the offence which the Jury have found to have been committed we are unable to hold that the sentence passed is too severe.

The appeal is dismissed.

The appellants must surrender to their bail and undergo the unexpired portion of the sentence.

N. H.

Appcal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT. FULL BENCH.

CRIMINAL REVISION No. 34 OF 1925.

May 1, 1925.

Present :—Mr. Kennedy, J. C., Mr. Aston, A. J. C., and Dr. DeSouza, A. J. C.

EMPEROR—PROSECUTION

versus

NABU AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 263, 342—Summons case—Summary trial—Examination of accused, whether necessary—Interpretation of Statutes.

The provisions of s. 342 of the Cr. P. C. as to examination of an accused person are mandatory and apply even to Summons Cases and the words "if any" in s. 263 of the Code do not limit the obligation imposed on Courts by s. 342, or render it inapplicable to summary trials, they merely have reference to those cases in which, owing to the admission and plea of the accused, or owing to the weakness of the evidence called in support of the prosecution, the accused can either be convicted on his own plea without the taking of evidence, or acquitted on the evidence without the examination referred to in s. 342. [p. 435, cols. 1 & 2.]

Fernandez v. Emperor, 59 Ind. Cas. 129; 45 B. 672; 22 Bom. L. R. 1040; 22 Cr. L. J. 17, *Emperor v. Gulabjap*, 64 Ind. Cas. 669; 46 B. 441; 23 Bom. L. R. 1203; 23 Cr. L. J. 45; (1922) A. I. R. (B.) 290, *Raghu Bhumji v. Emperor*, 58 Ind. Cas. 49; 5 P. L. J. 430; 1 P. L. T. 241; 21 Cr. L. J. 705, *Gulam Rasul v. Emperor*, 61 Ind. Cas. 715; 6 P. L. J. 174; 22 Cr. L. J. 427; 2 P. L. T. 390, *Muhammad Bakhsh v. Emperor*, 65 Ind. Cas. 618; 23 Cr. L. J. 154; 4 L. L. J. 230; (1922) A. I. R. (L.)

45 and *Parmeshwar Lall Mitter v. Emperor*, 67 Ind. Cas. 616; 3 P. L. T. 317; 23 Cr. L. J. 440; (1922) A. I. R. (Pat.) 296, followed.

Ponnusami Odayar v. Ramasami Thatham, 74 Ind. Cas. 915; 46 M. 758; 45 M. L. J. 224; (1923) M. W. N. 519; 18 L. W. 478; 24 Cr. L. J. 833; (1924) A. I. R. (M.) 15, dissented from.

The law does not favour legal and strained intentions, when over-minute precision may confound legal certainty. [p. 436, col. 1.]

Reference made by the Sessions Judge, Sukkur, dated the 11th February 1925.

Mr. C. M. Lobo, Acting Public Prosecutor, for the Crown.

Mr. Partabrai D. Punwani, *Amicus curiæ*.

JUDGMENT OF THE FULL BENCH.

Aston, A. J. C.—The accused Nabu and 14 others were convicted on summary trial by the City (First Class) Magistrate, Shikarpur, on 11th September 1924, Nabu under ss. 4 and 5 of the Bombay Prevention of Gambling Act, 1887, and the remaining accused under s. 5 of that Act.

The learned Sessions Judge, Sukkur, has referred the case to us under s. 438, Cr. P. C. for orders.

It appears that the case was registered by the learned Magistrate as a case tried summarily under Ch. XXII of the Cr. P. C. The particulars to be entered in cases of this nature are laid down in s. 263, Cr. P. C. under headings marked respectively (a) to (j).

All the requirements of s. 263 have been complied with by the learned Magistrate except that with regard to the heading marked (g) which requires that the plea of the accused and his examination (if any) should be entered, he has merely recorded the fact, that all the accused pleaded not guilty.

The record as the learned Sessions Judge points out does not mention any examination of the accused.

Section 342 of the Cr. P. C. empowers a Court at any stage of an inquiry or trial to question the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him and makes it obligatory on the Court to do so after the witnesses for the prosecution have been examined and before he is called on for his defence.

A similar obligation is imposed in Ch. XX which relates to the trial of Summons Cases for s. 244 provides *inter alia* that the Magistrate shall proceed to hear the accused and take all such evidence as he produces.

In Ch. XXII, however, which relates to summary trials there is no specific provision making it obligatory to examine the accused. All that s. 263 (g) requires is that the plea of the accused and his examination (if any) shall be recorded.

What is the effect of the words (if any), in s. 263? Are the mandatory provisions of s. 342 applicable to Summons Cases and to cases summarily or do the words "if any" give the Magistrate a discretion, whether to examine the accused or not?

It seems unthinkable that the Legislature could have intended by s. 263 to give Magistrates a direction in cases ending in conviction to dispense with the examination of the accused.

The principle embodied in the maxim *audi alteram partem*, viz., that no man should be condemned unheard is perhaps the first and most important principle relating to the mode of administering justice, and in any record of the essentials of a fair trial it is the last essential, which could be omitted.

The meaning of the word "if any" in ss. 263 and 370 is, I think, clear, if one considers ss. 243, 245, 253 and 289 of the Cr. P. C. It is not in every trial that an examination of the accused as required by s. 312 is necessary for if the accused in a Summons Case admits, that he has committed the offence of which he is accused, the Magistrate may convict him under s. 243, without proceeding to hear the complainant and take such evidence as may be produced in support of the prosecution. Again if the evidence produced in support of the prosecution does not point to the fact, that accused has committed any offence, section 245 shows that the Magistrate in a Summons Case can acquit the accused without examining him, and s. 253 shows that in a Warrant Case he can discharge him; and this is only reasonable and in harmony with s. 342, for in such a case there is nothing appearing in the evidence, which requires an explanation from the accused, before he can be acquitted. Similarly under s. 289 the Court can without an examination of the accused direct the Jury to find a verdict of "not guilty."

The words "if any," therefore, in s. 263 do not limit the obligation imposed on Courts by s. 342, or render it inapplicable to summary trials, they merely have reference to those cases in which owing

to the admission and plea of the accused, or owing to the weakness of the evidence called in support of the prosecution, the accused can either be convicted on his own plea without the taking of evidence, or acquitted on the evidence without the examination referred to in s. 312. The fact that the provisions of s. 342 are mandatory and apply to Summons Cases has been recognized by the Bombay High Court in *Fernandez v. Emperor* (1) and in *Emperor v. Gulabjap* (2), by the Patna High Court in *Raghu Bhumji v. Emperor* (3), *Ghulam Rasul v. Emperor* (4) and *Parmeshwar Lall Mitter v. Emperor* (5) and by the Lahore High Court in *Muhammad Bakhsh v. Emperor* (6).

These rulings, however, have been dissented from by a Full Bench of the Madras High Court in *Ponnusami Odayar v. Ramasami Thathan* (7), in which it was held that s. 342 has no application to Summons Cases. In his judgment Schwabe, C. J., drew attention to the inconvenience, which he maintained, would result, if s. 342 applied to Summons Cases, in view of s. 364, Cr. P. C., which imposes the obligation to record every question put to the accused and every answer given by him whenever the accused is examined by a Magistrate. He also expressed the opinion that the use of the expression "before the accused is called on for his defence" in s. 342 as well as in s. 256 relating to trials in Warrant Cases and in s. 289 relating to trials in Sessions cases and the absence of such an expression in trials in Summons Cases under Ch. XX of the Code showed that the provisions of s. 342 were not intended to apply to Summons Cases.

With great respect to the learned Judges who tried the case of *Ponnusami Odayar v. Ramasami Thathan* (7), I am of opinion

(1) 59 Ind. Cas. 129; 45 B. 672; 22 Bom. L. R. 1010; 22 Cr. L. J. 17.

(2) 64 Ind. Cas. 669; 46 B. 441; 23 Bom. L. R. 1203; 23 Cr. L. J. 45; (1922) A. I. R. (B.) 290.

(3) 58 Ind. Cas. 49; 5 P. L. J. 430; 1 P. L. T. 241; 21 Cr. L. J. 705.

(4) 61 Ind. Cas. 715; 6 P. L. J. 174; 22 Cr. L. J. 427; 2 P. L. T. 390.

(5) 67 Ind. Cas. 616; 3 P. L. T. 347; 23 Cr. L. J. 410; (1922) A. I. R. (Pat.) 296.

(6) 65 Ind. Cas. 618; 23 Cr. L. J. 154; 4 L. L. J. 230; (1922) A. I. R. (L.) 45.

(7) 74 Ind. Cas. 945; 46 M. 758; 45 M. L. J. 224; (1923) M. W. N. 519; 18 L. W. 478; 21 Cr. L. J. 833; (1924) A. I. R. (M.) 15.

that it was rightly decided that s. 342, Cr. P. C., applies to Summons Cases. No doubt the concluding sentence in s. 342 (1) "and before he is called on for his defence" contains the same language as is contained in s. 256 which relates to the trial of Warrant Cases and in s. 289, which relates to trials before High Courts and Courts of Sessions, and it would have been more precise to have concluded s. 342 (1) "and shall for the purpose aforesaid question him generally on the case after the witnesses for the prosecution have been examined in a Summons Case before the taking of such evidence as he produces in his defence under s. 244 and in a Warrant Case before he enters on his defence under s. 256" as in s. 451 of the Code where the very sections are referred to. But s. 342 (1) appears in a Chapter containing general provisions as to inquiries or trials. It was unnecessary to make it clear that the section was applicable to Summons Cases as well as to Warrant Cases and Sessions Cases. The words "after the witnesses for the prosecution have been examined" cover a definite stage in Summons Cases as well as in Warrant cases and the mere addition of a sentence which could well be applied to a stage in a Summons Case but from the nature of its wording was more appropriate to a Warrant or a Sessions Case would not, in my opinion, limit the application of the obligation referred to in s. 342 (1) to Warrant and Sessions Cases. The law does not favour legal and strained intentions, when over-minute precision may confound legal certainty. I am fortified in my opinion by the ruling of the Calcutta High Court in *Surendra Lal Saha v. Issamuddi* (8), for the Calcutta High Court there held that the examination of the accused in Summons Case after the prosecution had closed and "after they had entered on their defence" was not in accordance with s. 342. The words "after they had entered on their defence" are there used in the same sense and are perfectly intelligible though strictly speaking it is in Warrant Cases and in Sessions Cases that accused persons are called on to enter on their defence, in Summons Cases the evidence which they produce is taken. In the case of *Gulzari*

(8) 84 Ind. Cas. 325; 51 C. 933; 26 Cr. L. J. 261; (1925) A. I. R. (C.) 480.

Lal v. Emperor (9), the Calcutta High Court also held that s. 342 applies to Summons Cases.

With regard to the other objection referred to by Schwabe, C. J., it is the fact that s. 364 may be a serious obstacle to the expeditious disposal of Summons Cases but that does not appear to me a reasonable ground for holding that s. 342 does not apply to Summons Cases; the importance of guarding against accused persons being condemned without an adequate elucidation and consideration of what they have to say seems to me to outweigh any inconvenience which might arise in Summons Cases not tried summarily owing to the provisions of s. 364.

If the word "examine" in s. 263 only has reference to Warrant Cases tried summarily, there is no obligation on the Magistrate to record any statement of the accused or even the fact that the accused made a statement in Summons Case tried summarily and the record of such a trial would appear to lack any reference to the most essential ingredient of a fair trial.

Taking all the circumstances into consideration I am of opinion for the reasons above mentioned that the failure to comply with the provisions of s. 342 of the Cr. P. C., vitiated the trial of the accused and that the convictions and sentences must be set aside.

Kennedy, J. C.—I concur.

DeSouza, A. J. C.—I concur.

Z. K.

P. B. A.

Conviction set aside.
(9) 71 Ind. Cas. 51; 49 C. 1075; 24 Cr. L. J. 3; (1923) A. I. R. (C.) 164; 39 C. L. J. 31.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 515 OF 1924.
CRIMINAL REVISION PETITION No. 426 OF 1924.
December 12, 1924.

Present:—Mr. Justice Wallace and
Mr. Justice Madhavan Nair.

In re YERLAGADDA VENKANNA—
ACCUSED—PETITIONER.

Madras Abkari Act (I of 1886), ss. 31, 34, 55—Penal Code (Act XLV of 1860), s. 188—Criminal Procedure Code (Act V of 1898), s. 190 (1) (b)—Sale of arrack in contravention of Collector's order and terms of license—Offence—Abkari Inspector's report, absence of, effect

of—Jurisdiction of Magistrate to take cognisance—Conviction—Procedure.

A person selling arrack in his shop at an hour in contravention of an order promulgated by the District Collector does not commit an offence under s. 188 of the Penal Code. In such a case there is no question of causing or tending to cause obstruction, annoyance or injury to any one, and it does not follow, as a matter of course, that selling drinks will lead to riots or disturbance. [p. 437, cols. 1 & 2.]

The Madras Abkari Act is not self-contained in the matter of the procedure for the investigation of offences under s. 55 of the Act. In such a case the procedure to be followed is laid down in s. 5 (2) of the Cr. P. C. to be under that Code. There is nothing in the Act to indicate what is the procedure to be followed when an offender is sent under s. 31 of the Act direct to a Magistrate, nor is there a provision at all for a case where the offender is not placed under arrest. [p. 438, col. 2.]

Where in a prosecution under s. 31 of the Abkari Act the accused is neither arrested nor bailed out before the trial begins, the Police has authority to send him direct before a Magistrate. It is, therefore, a case to which s. 190 (1) (b) of the Cr. P. C. will apply. The absence of a report by an Abkari Inspector in such a case does not debar a Magistrate from taking cognisance of an offence under s. 55 of the Act and a conviction by him is not open to objection. [*ibid.*]

Where a case investigated by a Police Officer includes in addition to an offence under s. 55 of the Abkari Act a non-cognisable offence under the Penal Code, the Police Officer would be correct in taking up the more serious offence as the principal offence, that is, the one in which he could arrest without a warrant, namely, under s. 55 of the Abkari Act, and following the provisions of that Act, so far as it can be done, rather than of the Cr. P. C., and, if he can follow the provisions of both by ensuring that the accused should appear before a Magistrate, it is obviously his duty to do so. The same procedure will be the proper procedure for a Police Officer to adopt when he is confronted with an offender whose offences are both under s. 55 of the Abkari Act and a cognisable offence under the Penal Code. [p. 438, col. 2; p. 439, col. 1.]

Petition, under ss. 435 and 439 of the Cr. P. C., 1908, praying the High Court to revise the judgment of the Court of Session of the Guntur Division in Criminal Appeal No. 28 of 1924, preferred against the judgment of the Court of the Sub-Divisional Magistrate of Guntur, in C. C. No. 70 of 1924.

Mr. P. Viswanatha Iyer, for the Petitioner.
The Public Prosecutor, for the Crown.

ORDER.—The petitioner has been convicted of having committed offences under s. 188 (2) of the Indian Penal Code and s. 55 (b) of the Abkari Act.

The facts found were that he was discovered by a Police Officer on 20th March 1924 selling arrack in his shop during a festival day at Mangalagiri at 6-10 p. m., 7-10 p. m., and 10-30 p. m., the former sales being in contravention of an order promulgated by the District Collector, and the

latter sale being in contravention of the terms of his license. The conviction under s. 188, Indian Penal Code was for the former sales and that under s. 55 (b) of the Abkari Act for the latter.

It is contended for the petitioner, first, that s. 188, Indian Penal Code, will not apply to such a case, and we think this is so. There is here no question or proof of causing or tending to cause obstruction, annoyance or injury to any one, and it does not follow, as the lower Courts seem to think, as a matter of course, that selling drinks will lead to riots or disturbance. We are of opinion that the conviction under s. 188, Indian Penal Code, will not stand.

The next point raised is that the conviction under s. 55 of the Abkari Act cannot stand because there is no report by an Abkari Inspector on which the Magistrate could take cognisance of the offence. The Public Prosecutor contends that the Magistrate is empowered in law to take cognisance of such an offence on the report of a Police Officer and without any report by an Abkari Inspector. We have been taken through several sections of the Act in this connection and the more we examine these, the more difficult it is to extract what the Legislature intended to lay down as the proper procedure. The section which normally gives jurisdiction to a Magistrate to try an offence under s. 55 is s. 50, which certainly implies that where the offender is in custody or has given bail for his appearance, the Magistrate must wait for the report of an Abkari Inspector; and so far this is in the petitioner's favour. The Public Prosecutor contends, however, that there are sections which imply that a Police Officer has power to arrest an offender under s. 55 admit him to bail and send him direct to the Magistrate without the intervention of the Abkari Inspector at all and this must imply that the Magistrate must act under the Cr. P. C., and take cognisance of such an offence under s. 190 of that Act on a Police report. Section 31 of the Abkari Act empowers a Police Officer to arrest any one found by him on search in any place and believed to be guilty of an offence under the Act and to admit him to bail for his appearance before a Magistrate or an Abkari Inspector, "as the case may be." What this last phrase is intended to mean is obscure. Section 34 empowers a Police Officer to arrest any one

found committing an offence punishable under s. 55 and to admit him to bail to appear before an Abkari Officer having jurisdiction to enquire into the case. It is notable that the word "Magistrate" is not included in this section although it appears in s. 31. The Public Prosecutor contends that the omission is accidental but we cannot supply in any Statute words which are not there. The procedure begun under s. 34 seems to contemplate, in the case of a person arrested by the Police for committing an offence under s. 55, that the person be admitted to bail to appear before an Abkari Officer having jurisdiction to inquire into the case and presumably also that information of the offence be forwarded as s. 38 would imply. If bail is not forthcoming or is not accepted by the Police Officer, he is bound, under s. 40, to forward the offender to an Abkari Inspector if there be one within 10 miles, or to the Police Station, and if he is sent to the Police Station, the Police Station-House Officer shall admit him to bail for his appearance before the Abkari Officer as aforesaid meaning apparently an Abkari Inspector appointed under s. 4 (d) of the Act or send him in custody to him. Then the Abkari Officer has to hold an enquiry and forward the case to the Magistrate for trial.

So far is fairly plain. But under s. 41 the Police Station-House Officer apparently has an option of not bailing an arrested offender to appear before an Abkari Officer, but of bailing him to appear before a Magistrate and the same cryptic phrase as in the proviso to s. 31 "as the case may be," appears. This section, by force of the terms of s. 40, would seem to apply such a procedure, even to the case of persons referred to, in s. 34 that is, "found committing an offence, under s. 55 in any public thoroughfare, or open place other than a dwelling house", although under s. 34 itself the officer who arrests is not given the power to send the offender "before a Magistrate. However, it seems possible to apply the phrase "before a Magistrate, as the case may be" in s. 41, only to cases of arrest under s. 31, under which the offender may be sent before a Magistrate.

The net result seems to be this, that an offender arrested under s. 31 may be bailed to appear before either a Magistrate or an Abkari Inspector, while one arrested under s. 34 can be sent only before an Abkari Officer. If the offender is sent under

either section before an Abkari Officer there is an enquiry under s. 40 (3) and the offender is sent under s. 50 with a report to the Magistrate for trial. But there is nothing in the Act to indicate what is the procedure to be followed, where the offender is sent under s. 31 direct to a Magistrate.

A still more serious lacuna in the procedure prescribed is that there is no provision at all for a case where the offender is not placed under arrest. The only section providing for a preliminary enquiry before trial is s. 40, and that applies only to cases of offenders, brought in custody or bailed after arrest, to appear before the officer holding the enquiry. The Abkari Act is thus not self-contained in the matter of the procedure for the investigation of offences under s. 55. In such a case the procedure to be followed is laid down in s. 5 (2) of the Cr. P. C. to be under that Code. Now, in the case before us, so far as we have the records before us, it does not appear that the accused was ever arrested or bailed out, before the trial began. In any case, the offence having been committed in accused's shop would fall under s. 31 and not under s. 34, and the Police would have authority to send him direct before a Magistrate. It is, therefore, a case to which s. 190 (1) (b) of the Cr. P. C. will apply. We cannot, therefore, hold that in this case there has been any error in procedure, or lack of jurisdiction. We have been referred to a reported case of this Court in *In re Kuppuswamy Naidu* (1) but the report does not make it clear, whether that was a case initiated under s. 31 or s. 34 of the Abkari Act or whether the accused was arrested at the time of committing the offence. We have looked into the printed papers of that case but they throw no further light on the matter. We are unable, therefore, to regard this ruling as necessarily applicable to the present case. A close examination of the provision of the Abkari Act reveals, as we have shown, that the Act is not self-contained, in the matter of procedure and that we must fall back on the Cr. P. C. to fill up the blanks, in the procedure prescribed by the Abkari Act.

The present case is complicated by the fact that the original case investigated included, in addition to an offence under the Abkari Act, an offence under the Indian Penal Code, a non-cognizable

(1) 72 Ind. Cas. 175; 44 M. L. J. 231; 17 L. W. 308; (1923) A. I. R. (M.) 339; 24 Cr. L. J. 335.

[90 I. C. 1925]

BARHAMDEO RAI v. EMPEROR.

offence. In such a case the Police Officer would probably be correct in taking up the more serious offence as the principal offence that is the one in which he could arrest without a warrant, namely, s. 55 of the Abkari Act, and he will probably be correct in following the provisions of that Act, so far as it can be done, rather than of the Cr. P. C.; and, if he can follow the provisions of both, by ensuring that the accused should appear before the Magistrate, it is obviously his duty to do so. The same procedure would be the proper procedure for a Police Officer to adopt, when he is confronted with an offender, whose offences are both under s. 55 of the Abkari Act and a cognizable offence under the Indian Penal Code.

We are, therefore, not prepared to interfere with the conviction under s. 55 of the Abkari Act; but as the conviction under s. 188, Indian Penal Code, fails, the sentence will have to be reduced and we reduce it to a period of imprisonment already undergone, namely, 20 days, while maintaining the fine imposed. The bail-bond will be cancelled.

V. N. V.

*Petition dismissed.***PATNA HIGH COURT.**

CRIMINAL REVISION No. 136 OF 1925.

May 14, 1925.

Present:—Mr. Justice Macpherson.

BARHAMDEO RAI AND OTHERS

ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 379—Theft—Servant assisting master in removing goods, guilt of—Witness belonging to same caste as party producing him, whether must be disbelieved—Procedure—Conviction by Magistrate of lighter offence than warranted by facts—Interference by High Court.

Where a Magistrate convicts an accused person of an offence falling within his jurisdiction, though the facts found would also constitute a more serious offence not within the jurisdiction of the Magistrate, the proceedings of the Magistrate are not void *ab initio* and the High Court will not ordinarily interfere with the order of the Magistrate unless the sentence appears to be inadequate or unless the accused has been deprived of the right of appeal. [p. 440, col. 1.]

Queen-Empress v. Gundaya, 13 B. 502; 13 Ind. Jur. 469; 7 Ind. Dec. (N. S.) 333 and *Emperor v. Ayyan*, 21 M. 675; 2 Weir 699, relied on.

Where a servant knowing perfectly well that his master is removing the goods of another without even a pretence of right assists him in doing so, he acts dishonestly and is equally guilty along with his master of the offence of theft. [ibid.]

Hari Bhumali v. Emperor, 9 C. W. N. 971; 3 Cr. L. J. 836, distinguished.

It is not a sound ground for disbelieving a witness that he is of the same caste or community as the person in whose favour he deposes. [ibid.]

Criminal revision from an order of the Sessions Judge, Shahabad, dated the 5th March 1925, affirming that of the District Magistrate, Shahabad, dated the 19th January 1925.

Mr. N. N. Sinha, for the Petitioners.

JUDGMENT.—This is an application for revision of the conviction of the petitioners under s. 379 of the Indian Penal Code and their sentences of fine. They were tried by a Second Class Magistrate of Sasaram, an appeal against whose decision was dismissed by the District Magistrate of Shahabad. A motion against the appellate decision was rejected by the Sessions Judge. The petitioner Barhamdeo Rai is father of the other two petitioners and the fourth petitioner is his labourer.

The facts which have been found to be established are that the complainant was unwilling to continue the credit which he had formerly allowed to Barhamdeo Rai, who resented the refusal. On the day of occurrence the complainant had brought to the front of Barhamdeo's house a bullock cart on which to carry home five bags of rice which he had bought some time before from Deodhari Missir. The cart had to be left at the point because the road became too narrow for it to proceed. On the bags being brought Barhamdeo and the petitioners removed them from the cart to their house by force. Next day the Police found the cart in front of the house of Barhamdeo.

Mr. Nirsu Narain Sinha has advanced the following four contentions in support of the rule.

(1) The offence disclosed by the evidence which has been accepted by the Courts, amounts to robbery, and so a Second Class Magistrate cannot try it;

(2) The defence of the second petitioner Gaya Rai was that he was ill and he examined two witnesses in support of it, but neither the Trial Court nor the Appellate Court has discussed their evidence at all;

(3) The fourth petitioner being a servant of Barhamdeo cannot be convicted without a finding of guilty knowledge, and

(4) The defence witness No. 3 who states that the cart found near Barhamdeo's door was sold by him to Barhamdeo has been dis-

believed on the illegal ground that he is of the same caste as Barhamdeo.

As to the first point I am not prepared to say that a charge of robbery could not stand. The evidence that the first petitioner or perhaps the first three petitioners brought *lathis* seems to show that in order to the committing of the theft the offenders voluntarily caused fear of instant hurt to the complainant and his cartman, but it has been held in *Queen-Empress v. Gundaya* (1) and *King-Emperor v. Ayyan* (2) that where a Magistrate convicts an accused person of an offence falling within his jurisdiction though the facts found would also constitute a more serious offence not within his jurisdiction, his proceedings are not void *ab initio*, and the High Court will not ordinarily interfere unless the sentence appears inadequate or unless the accused have been deprived of the right of appeal. There are many unreported cases of the Calcutta High Court to the same effect. In my opinion the petitioners having been in no way prejudiced, the fact that they might have been charged with robbery is not a good ground for interference in revision with the conviction under s. 379.

As to the second point it would appear that this defence was not discussed because it was not relied upon. Indeed the point was not even taken specifically in the petition of appeal.

The third point is supported by a reference to the judgment of Woodroffe, J., in *Hari Bhaimali v. Emperor* (3). The circumstances are distinguishable. In that case the master of the petitioners had at least a colourable claim of right. In the present case the petitioner No. 4 knew perfectly well that his master was removing the bags of rice of complainant without even a pretence of right and yet he assisted him in doing so and, therefore, clearly acted dishonestly.

As to the 4th point it may at once be conceded that it is not a sound ground for disbelieving a witness that he is of the same caste or community as the person in whose favour he deposes. The defence adduced evidence in support of Barhamdeo's claim that the cart is his. The learned District Magistrate however, accepted the evidence as to the ownership of the

cart adduced on behalf of the complainant. He states. "The prosecution on the other hand have shown that the complainant's cartman, Ramdas Sundi, obtained the cart from one Rampati Koiri. There is no reason why the latter should have given false evidence and he has given his evidence in such a manner as to leave no doubt in my mind that he was once the owner of this cart." In effect, therefore, the learned District Magistrate considers the whole evidence of both sides as to the ownership of the cart and on a substantial ground prefers the evidence given by Rampati Koiri. It is urged that the Appellate Court has also not discussed specially the evidence of the first and fourth defence witnesses as to the first appellant having a cart, but on perusing their depositions I am not impressed with their testimony and apparently it was not thought worthwhile to place it before the District Magistrate, the question being whether the evidence of defence witness No. 3 or that of Ramdas and Rampati should be believed. It is not shown that the evidence on behalf of petitioners has not been adequately considered or that the decision of the Courts below is wrong on the merits.

In my opinion none of the grounds urged in support of the Rule are well-founded. The Rule is accordingly discharged.

Z. K.

Rule discharged.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 586 OF 1924.

February 13, 1925.

Present:—Justice Sir Babington Newbould, Kt., and Mr. Justice B. B. Ghose.

KASEM MOLLA AND OTHERS—

ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 208, 215—Commitment, irregularity in—Sessions trial, whether vitiated—"Complainant" in s. 208, meaning of.

It is too late to object to the commitment after the accused has pleaded to the charge before the Sessions Court. [p. 441, col. 2.]

In the matter of Empress and Sagambur, 12 C. L. R. 120, relied on.

The Sessions Judge has jurisdiction to try a case that has been committed to him for trial, and if the trial is legally held, an irregularity in the commitment would not vitiate the proceedings in the Sessions Court. [*ibid.*]

(1) 13 B. 502; 13 Ind. Jur. 469; 7 Ind. (N. S.) 333.

(2) 24 M. 675; 2 Weir 699.

(3) 9 C. W. N. 974; 2 Cr. L. J. 836.

Obiter.—The informant in a case which has been investigated by the Police is not necessarily the "complainant" referred to in s. 208, Cr. P. C. [p. 442, col. 1.]

Criminal appeal against an order of the Sessions Judge, Faridpur, dated the 21st August 1924.

Babu Probodh Chandra Chatterjee for Babus Pasupati Ghose and Dwijendra Nath Mukherji, for the Appellants.

Mr. Khundkar Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—The four appellants before us were tried before the Sessions Judge of Faridpur and a Jury on various charges of offences committed in the course of a riot in which they were accused of having taken part. The first two appellants were sentenced to seven years' rigorous imprisonment each under s. 304/149, Indian Penal Code and two years' rigorous imprisonment each under s. 324, Indian Penal Code, the sentences to run concurrently. The third appellant was sentenced to five years' rigorous imprisonment under s. 304/149, and no separate sentence was passed on his conviction under s. 147, Indian Penal Code. The fourth appellant was sentenced to two years' rigorous imprisonment under s. 147, Indian Penal Code.

As regards the appellant Basir Sardar a special point is taken, and that is that his conviction should be set aside on the ground of illegality in the proceedings before the Committing Magistrate. Five persons were committed to the Court of Sessions in this case one of whom has been acquitted. The commitment proceedings commenced against four of these accused other than Basir Sardar, and on the 25th June 1924 ten prosecution witnesses were examined. The Magistrate then directed that warrant should issue against Basir Sardar and he was produced before the Court on the 8th July. On that date three prosecution witnesses were examined in the presence of all the accused. On the 23rd July two more prosecution witnesses were examined in the presence of all the accused and the charge was framed. On the 28th July the investigating Police Officer and the Sub-Deputy Magistrate who recorded the dying declaration were examined apparently under s. 219, Cr. P. C. It is contended that this procedure was contrary to the provisions of s. 208, Cr. P. C. In our opinion even if the provisions of that section were not strictly followed that would not be a

sufficient ground for setting aside this conviction. No reported cases have been shown to us in which the conviction has been set aside on the ground of irregularity or illegality in the commitment. It is not shown that the appellant Basir has been in any way prejudiced. Even assuming that there has been such an irregularity or illegality in the proceeding as would justify us in quashing the commitment had such an application been made to us before the commencement of the trial we hold that we should not, therefore, be bound to hold that the conviction should be set aside. The Sessions Judge has jurisdiction to try a case which has been committed for trial to him, and if the trial is legally held we doubt if an irregularity in the commitment would vitiate the proceeding in the Sessions Court. In the case of *In the matter of Empress and Sagambur* (1) it was held that when a person had been put on his trial and pleaded to the charge the commitment cannot be quashed and we agree with that decision that it is too late to object to the commitment after the accused has pleaded to the charge before the Sessions Court. Taking this view it is not necessary to decide whether there was an illegality in the commitment but we may state that we have some doubts on this point. Section 208, Cr. P. C., provides that the Magistrate shall when the accused is brought before him proceed to hear the complainant if any and take all such evidence as may be produced in support of the prosecution. It does not appear that in this case the Magistrate omitted to take any evidence which was produced in support of the prosecution of the accused Basir. The same objection was taken before the Sessions Judge and he overruled it on the ground that one or two prosecution witnesses who were examined in the presence of Basir named him in the committing Court as "being present in the dock and taking part in the riot."

It is urged that the Magistrate was in any case under this section bound to hear the complainant in the presence of the accused. But it is not clear that the word complainant in this section applies to the person who laid the first information. Section 250 (3) of the Code draws a distinction between an informant and a com-

(1) 12 C. L. R. 120.

plainant. In s. 170 the words there used in the second clause "the complainant if any" indicate that the informant in a case which has been investigated by the Police is not necessarily the complainant. Section 444 of the Code gives the definition of a complainant which would include the informant under s. 154 but that definition is a special definition limited to the use of that word in the proceedings s. 443.

But though we hold that there was nothing in the method in which the commitment proceedings were held against this accused which would vitiate the trial we must not be held to approve of this procedure. We may point out that by following this procedure it might happen that the prosecution would be seriously embarrassed at the Sessions trial, since if they wished to take advantage of s. 288 and put in any deposition under that section for use at the Sessions trial, this could not be done as against the accused in whose presence the depositions were not recorded. Other difficulties also might arise.

The next point urged on behalf of all the appellants is that there was serious non-direction amounting to misdirection on account of failure of the learned Sessions Judge to draw the attention of the Jury to an important passage in the dying declaration made by the man Abdul Karim who has been found to have been killed in the riot. In this statement Karim after giving an account of the occurrence and the wounds inflicted on him stated, "no one else but any one else." It is said that this is totally contradictory to the case for the prosecution and, therefore, the special attention of the Jury should have been drawn to this point. It seems to us that the point is not one of real importance. There is a mass of evidence on the side of the prosecution contradicting the statement. It is obvious that Karim could not know what happened after he was struck and became unconscious. Further it was not even the case for the defence that Karim was the only man assaulted, for we find that Karim Molla, the first appellant, when examined in the Sessions Court said, "I too assaulted them," thereby admitting that others than Karim were also assaulted.

It is objected that the charge did not sufficiently deal with the evidence against each accused individually. But we find that there is a paragraph in the heads of

charge dealing with this point pointing out that the evidence against all the five accused as regards their presence at the time of the occurrence has not been exactly the same. That the Jury appreciated the necessity of weighing the evidence against the accused individually is clear from the fact that they acquitted one of the accused who was on trial before them with the appellants.

The last point urged is that the Jury were not told that the presence of the accused persons [at the occurrence was not sufficient for a conviction under s. 147, Indian Penal Code, the only charge on which the four appellants have been convicted. But the learned Sessions Judge told the Jury that one of the points they had to find to support a conviction on a charge of rioting was that the members of the unlawful assembly must have a common object. It does not appear either in the defence set out in the statements of the accused or as disclosed by the cross examination of the prosecution witnesses that it was ever suggested that any of the appellants were present at the riot without being members of the unlawful assembly or without having the common object of that assembly. We, therefore, hold that there was no misdirection on this point.

The appeal fails and is dismissed. The appellants must surrender to their bail and undergo the unexpired portion of their sentences.

N. H.

Appeal dismissed.

PATNA HIGH COURT.
CRIMINAL MISCELLANEOUS REVISION No. 41
OF 1925.

June 1, 1925.

Present :—Mr. Justice Sen.
SHAMA CHARAN AND OTHERS—
ACCUSED—PETITIONERS
versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 107, 145—Bona fide dispute about land.

In case of a *bona fide* dispute as to the possession of land the proper course to follow is to proceed under s. 145, Cr. P. C., and unless and until the Court is in a position to say that the party sought to be bound down is clearly in the wrong, s. 107, Cr. P. C., should not be resorted to. [p. 444, col. 1.]

Balajit Singh v. Bhoju Ghose, 35 C. 117; 6 C. L. J. 697; 12 C. W. N. 487; 6 Cr. L. J. 398, *Dolegobind Chowdhry v. Dhanu Khan*, 25 C. 559; 13 Ind. Dec. (n. s.) 369, *Shebalak Singh v. Kamaruddin Mandal*, 68 Ind. Cas. 149; (1922) Pat. 241; 3 P. L. T. 573; 4 U. P. L. R. (Pat.) 57; 23 Cr. L. J. 549; (1922) A. I. R. (Pat.) 435; 1 Pat. L. R. 2 Cr.; 2 Pat. 94 and *Sheoraj Roy v. Chatter Roy*, 32 C. 966; 10 C. W. N. 288; 2 Cr. L. J. 769, referred to.

Revision from an order of the District Magistrate, Gaya, dated the 27th March 1925.

Messrs. S. P. Varma and S. Prasad, for the Petitioners.

Mr. B. K. Singh, for the Opposite Party.

JUDGMENT.

Sen, J.—The petitioners four in numbers are *amlas* of Gidhaur Estate against whom proceedings under s. 107, Cr. P. C., have been drawn up by the Sub-Divisional Officer of Nawadh. They pray that the proceedings may be quashed or in the alternative, for a transfer of the case to the file of some other Magistrate.

The circumstances under which they apply are briefly as follows:—On the 30th July 1924 one Gursahay applied to the Maharaja of Gidhaur for a lease of village Suarkole Dumarkole in Rajauli Police Station. On the same date the Maharaja gave a *hukumnama* to Gursahay in the name of the *amlas* of the village. It is said that the *hukumnama* contained a condition to the effect that if a *patta* were not executed within a fortnight then the *hukumnama* would be deemed inoperative. A fortnight having elapsed notice was then given to Gursahay to the effect that the *mouza* would be settled with another person. Thereafter one Dasrath Ram applied for *thica* and a *hukumnama* was issued in his favour. Afterwards Dasrath took possession and Gursahay made a verbal complaint to the Sub-Divisional Officer of Nawadah and the Sub-Divisional Officer made an enquiry on the 22nd September 1924. On the 26th September final orders were passed in a proceeding under s. 144 drawn up by the Sub-Divisional Officer whereby he purported to come to a finding that Gursahay had been in possession for two months prior thereto, and he issued notice under s. 144 against Dasrath, Mahabir and some others. It is to be noted that the servants of the Maharaja were not parties to these proceedings. It is said that Dasrath then relinquished his *thica* and took back his money; and the petitioners on behalf of Gidhaur Estate took possession of the

manza. In January last Gursahay filed a further petition alleging that he was being wrongfully dispossessed by the Maharajas men and praying for proceedings under s. 107, Cr. P. C. On the 4th of February 1925 the Sub-Divisional Officer issued notice calling upon the petitioners and some others to show cause why proceedings under s. 107 of the Cr. P. C. should not be drawn up against them. On the 4th March 1925 the proceedings were amended finally by including two more names. It appears that an application was then made before the learned District Magistrate praying either for a transfer of the proceedings from the file of the Sub-Divisional Officer to that of some other Magistrate or in the alternative, that the proceedings might be quashed or proceedings drawn up under s. 145, Cr. P. C., instead. The learned District Magistrate thought that it was doubtful whether he had power to quash the proceedings or to order proceedings to be drawn up under s. 145 and he refused the application for transfer.

On the question of transfer the learned Counsel appearing for the petitioners has not laid much stress, nor is there much to be said in favour of it. He has addressed his arguments in the main on the subject of quashing of the proceedings. It is urged that unless and until the Court is in a position to say that the party sought to be bound down is clearly in the wrong, s. 107 of the Cr. P. C. should not be resorted to especially when there is a *bona fide* dispute on the question of possession. Reliance is placed on numerous reported cases out of which the following may be mentioned: *Balajit Singh v. Bhoju Ghose* (1), *Dolegobind Chowdhry v. Dhanu Khan* (2) and *Shebalak Singh v. Kamaruddin Mandal* (3). Upon the authorities the principle is clear that the provisions of s. 145 are mandatory and while it is discretionary with the Magistrate to draw up proceedings under s. 107 of the Cr. P. C., the proper course when there is a *bona fide* dispute as to lands is to proceed under s. 145. Otherwise, the effect would be to bind down one of the parties only to the dispute without any adjudication upon the question as to which of the two parties

(1) 35 C. 117; 6 C. L. J. 697; 12 C. W. N. 487; 6 Cr. L. J. 398.

(2) 25 C. 559; 13 Ind. Dec. (n. s.) 369.

(3) 68 Ind. Cas. 149; (1922) Pat. 241; 3 P. L. T. 573; 4 U. P. L. R. (Pat.) 57; 23 Cr. L. J. 549; (1922) A. I. R. (Pat.) 435; 1 Pat. L. R. 2 Cr.; 2 Pat. 94.

is in possession. The other side relies on the case of *Sheoraj Roy v. Chatter Roy* (4) and *Emperor v. Basiruddin Mollah* (5). The facts and circumstances of these two cases are clearly distinguishable from those of the present. The law on the subject was fully discussed in *Shebalak Singh v. Kamar-ud-din* (3) and it was laid down there that where one party is clearly in the wrong and threatens to disturb the rights of another who is in actual possession of the land s. 145 has no application. This is more than what can be said in the present case. The facts of the case, to my mind, do not show that one party is clearly in the wrong but, on the contrary, that there are circumstances which point to a *bona fide* dispute as to possession that should be adjudicated upon.

In the circumstances, I think, the proceedings under s. 107 should be quashed. I, therefore, order accordingly.

S. D. *Proceedings quashed.*
 (4) 32 C. 966; 10 C. W. N. 288; 2 Cr. L. J. 769.
 (5) 7 C. W. N. 746.

ODDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 768 OF 1924.

January 22, 1925.

Present:—Mr. Daniels, J. C.

CHHUTKAU AND OTHERS—ACCUSED—
 APPELLANTS

versus

EMPEROR—COMPLAINANT—
 RESPONDENT.

Evidence Act (I of 1872), s. 9—Identification of accused in Jail, evidence of—Person identified not specified—Magistrate conducting identification, evidence of, whether admissible.

In order to enable the Court to rely on the evidence of a person who identified the accused in Jail, but failed to do so in Court, the fact of the Jail identification must be stated in the witness' evidence. An identification in Jail is in essence a statement by the witness, "I saw this man who is now before me taking part in the offence." That statement can be used to corroborate his evidence given in Court. If the witness says in his evidence, "a number of persons were shown to me at the Jail and from among them I pointed out those persons whom I had seen committing the offence," it is permissible under s. 9 of the Evidence Act to call independent evidence, such as that of the Magistrate who conducted the identification, to prove the identity of the persons whom he picked out at the Jail, even though the witness himself may not correctly remember who they were. [p. 445, col. 1.]

Criminal appeal against an order of the Officiating Additional Sessions Judge, Kheri, dated the 6th December 1924.

Mr. H. N. Das, for the Appellants.

The Government Pleader, for the Respondent.

JUDGMENT.—The appellants Chhutkau, Data Ram, Sri Ram, Sheobaran Singh and Bansi Lal have been convicted with a large number of other persons who have not appealed of taking part in a dacoity at the house of Jagannath in the village of Kondri on the night of 2nd August last. The facts of the case are stated in detail in the judgment of the Court below. The case against the accused rests on their identification by witnesses who saw them at the dacoity, on the confession of a co-accused named Bhudar supported by a witness named Hulasi, who deposes to having been taken by Sheobaran Singh to a grove where the accused were assembled for the purpose of committing the dacoity, but having turned back on the way owing to illness. This last witness is of course not a man of high character, and he has some reason for ill-will towards the appellant Bansi.

The learned Sessions Judge has stated the evidence against each accused separately. The defect in his judgment is that he has gone solely on the number of identifications, and has not considered the various identifying witnesses. This is clearly stated in the identification note of the Magistrate who conducted the identification but was not brought out in his evidence in Court, and I have been obliged consequently to refer to the identification note in order to test the value of the evidence. Some of the accused pleaded that they had been shown to the witnesses before or that the complainant had seen them in the Bazar and, therefore, knew them. The Magistrate states in his cross-examination that at the time of the identification none of the accused complained of having been shown by the *thanadar* to the identifying witnesses. From the Magistrate's identifying note this appears to be inaccurate as regards the accused Bansi who did say that he was shown to many persons at Kondri after his arrest. The Magistrate thought however from his manner that he was lying. Of the witnesses on whose identification the case against the various accused rests the largest number of accused were identified by

Jagannath. The number of persons identified by him is so large as to suggest that he must have known some of them at least before, for he escaped from the house with his son while the dacoity was in progress. He named 13 of the accused and made six wrong identifications. Jagannath's wife Musammatt Mula is absolutely unreliable. She identified four of the accused and nine wrong persons. It is clear that she was identifying at random and her evidence may be eliminated altogether. Khagga at the identification of 24th August identified eight accused and seven wrong persons. Ram Sewak, son of the complainant, at the same identification identified ten of the accused and six wrong persons. Jagannath's daughter Musammatt Ananti identified nine of the accused and picked out five wrong persons. Khagga's son Ram Charan was the most reliable witness of the whole lot. He identified seven accused and only made two mistakes.

One other remark is also to be made in criticism of the learned Judge's judgment. In two cases he relies on the evidence of persons who identified in Jail but failed to do so in Court. In order that this may be permissible the fact of the Jail identification must be stated in the witness' evidence. An identification in Jail is in essence a statement by the witness, "I saw this man who is now before me taking part in the dacoity". That statement can be used to corroborate his evidence given in Court. If the witness says in his evidence a number of persons were shown to me at the Jail and from "among them I pointed out those persons whom I had seen in the dacoity," it is permissible under s. 9 of the Evidence Act to call independent evidence, such as that of the Magistrate who conducted the identification, to prove the identity of the persons whom he picked out at the Jail, even though the witness himself may not correctly remember who they were.

In the case of Sheobaran Singh and Bansilal there is no room for doubt. They are identified respectively by five and six witnesses including Ram Charan the most reliable of the witnesses. They are also named by Bhudar in his confession and Bansilal is named by Jagnu in a confession which he made. Data Ram apart from a witness who identified him in Jail but failed to identify him in Court

is identified by three witnesses including Ram Charan. He is also named by Bhudar and by Hulasi, none of whom have any motive for implicating him falsely. The other two accused Chhutkan and Sri Ram are not identified by any witness whose identification is at all reliable. I, therefore, allow their appeals and acquitting them direct that they be set at liberty. The appeals of Data Ram, Sheobaran Singh and Bansilal are dismissed.

N. H.

Appeal allowed in part.

PATNA HIGH COURT.

CIVIL-CRIMINAL REVISION No. 5 OF 1925.

May 14, 1925.

Present:—Justice Sir B. K. Mullick, KT.

FAUJDAR RAI—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 476, 476-B—Civil Procedure Code (Act V of 1908), s. 115—Government of India Act, 1915, (5 & 6 Geo. V, C. 61), s. 107—Penal Code (Act XLV of 1860), ss. 193, 471—Bengal Tenancy Act (VIII of 1885), s. 40—Proceeding for commutation of rent instituted in Revenue Court—Application to prosecute petitioner for forgery, refusal of—Appeal to Collector—Complaint by Collector—Appeal to Commissioner, whether competent—Revision—High Court, power of, to interfere—Question, whether must be finally determined in Revenue proceedings—Refusal of Revenue Court to determine question—Denial of right of fair trial—Superintendence, power of, exercise of.

Petitioner filed an application for the commutation of his rent under s. 40 of the Bengal Tenancy Act before the Sub-Deputy Collector and filed a patta alleged to have been given to him by the opposite party in support of his application. The opposite party contended that the patta was a forgery and asked the Court to direct the prosecution of the petitioner for an offence under ss. 471 and 193 of the Penal Code, but the Sub-Deputy Collector after enquiry refused the application. The opposite party moved the Collector on appeal and that officer set aside the order of the Sub-Deputy Collector and made a complaint against the petitioner under ss. 471 and 193 of the Penal Code. The petitioner thereupon appealed to the Divisional Commissioner who held that no appeal lay to him and rejected the appeal. On an application for revision being made to the High Court:

Held, (1) that the Collector was acting as a Revenue Court and was exercising judicial powers in setting aside the order of the Sub-Deputy Collector and was, therefore, subject to the superintendence of the High Court and his order was revisable under s. 115 of the C. P. C.; [p. 446, col. 2.]

(2) that the Court also had jurisdiction to interfere under s. 107 of the Government of India Act; [*ibid.*]

(3) that the Commissioner had jurisdiction to hear the appeal preferred by the petitioner against the order of the Collector and to set aside that order if necessary. [p. 447, col. 2.]

Section 476-B of the Cr. P. C. contemplates that if an Appellate Court sets aside the order of the Original Court, the party prejudicially affected by the order of the Appellate Court has a right of appeal to the Court to which appeals from such Appellate Court ordinarily lie. [*ibid.*]

When a criminal offence is alleged to have been committed in the course of a revenue or civil proceeding, the rule is that the facts upon which the criminal offence is founded should, as far as possible, be finally determined in the Civil or Revenue Court before a prosecution in respect of the criminal offence is commenced. The refusal of the Revenue or Civil Court to try out the proceedings in which the criminal offence is alleged to have been committed materially affects the criminal proceedings and amounts to a denial of the right of fair trial. In such a case the High Court is competent to interfere with the order directing the institution of criminal proceeding under s. 107 of the Government of India Act. [*ibid.*]

Revision from an order of the District Magistrate, Champaran, dated the 23rd February 1925.

Mr. S. P. Varma, for the Petitioner.

Mr. N. N. Sinha, for the Opposite Party.

JUDGMENT.—This is an application in revision against a complaint made by the Collector of Champaran on the 23rd February 1925, under s. 476 of the Cr. P. C., against the petitioner Faujdard Rai for his prosecution for offences under ss. 471 and 193, Indian Penal Code. It appears that on the 1st July 1924 the petitioner filed an application for the commutation of his rent under s. 40 of the Bengal Tenancy Act before the Sub-Deputy Collector of Champaran. On the same day he filed a *patta* alleged to have been given to him by the opposite party Reoti Raman Ojha. On the 5th August the petitioner was examined and the *patta* was tendered in evidence. On the 6th August the opposite party took a certified copy of the *patta*. On the 20th August the parties having come to an arrangement, the commutation case was withdrawn by the petitioner. On the 26th August the opposite party asked the Sub-Deputy Collector not to return the *patta* to the petitioner; but by that time it had already been taken back. On the 11th September the opposite party asked the Court to direct the prosecution of the petitioner for offences under s. 471 and 193, Indian Penal Code, but the Sub-Deputy Collector after inquiry refused the application.

On appeal the Collector set aside the order of the Sub-Deputy Collector and on

the 23rd February 1925, he made a formal complaint under s. 200 of the Cr. P. C. to the Sub-Divisional Magistrate of Motihari for the prosecution of the petitioner.

The petitioner thereupon appealed to the Divisional Commissioner; but he on the 30th March 1925 held that no appeal lay.

Now the first question is whether the High Court has any jurisdiction to interfere with the order of the Collector. The Collector was clearly acting as a Revenue Court and he was exercising judicial powers in setting aside the order of the Sub-Deputy Collector and in making a complaint under s. 200 of the Cr. P. C. He was, therefore, subject to the superintendence of the High Court and his order is revisable under s. 115 of the C. P. C. *Raktu Singh v. Emperor* (1) is authority for this view.

The Court also has jurisdiction to interfere under s. 107 of the Government of India Act. Undoubtedly the Collector had jurisdiction in appeal to set aside the Sub-Deputy Collector's order declining to make a complaint against the petitioner. But in arriving at this result the Collector did not apply his mind to the evidence in favour of the petitioner and, therefore, he has failed to exercise jurisdiction. Finding that the opposite party had withdrawn from the compromise and instituted criminal proceedings against him, the petitioner renewed his application for commutation and re-filed the *patta* in the Sub-Deputy Collector's Court on the 14th November 1924. It is suggested that this is not the *patta* which was filed on the 1st July, but the Sub-Deputy Collector states definitely that it is the same *patta* and that it contains the endorsements made by him on the former occasion; the learned Collector has not considered how a prosecution for forgery can be maintained when there is no trace of any alteration in the document. It is true that a certified copy was issued from the Collector's office on the 6th August in which the plot alleged to have been leased by the *patta* is described as within *Khata* No. 226, *Khasra* No. 1227, while in the original document it is said to be within *Khata* No. 191 and *Khasra* No. 279. It is also true that in the certified copy the word "*nij*" appears and in the original *patta* contains the word "*khas.*" The landlord denies that he ever gave any *patta* to

(1) 61 Ind. Cas. 643; 6 P. L. J. 178; (1921) Pat. 240; 22 Cr. L. J. 403; 2 P. L. T. 609.

the petitioner and his case is that the *patta* which is alleged to have been given in 1901, must be a forgery because the land is described by the number given to it at the revisional survey which took place long after 1901. It is suggested that after taking back the document on or about the 20th August, the petitioner altered the revisional survey numbers which are originally in the document into the numbers allotted to the land in the Cadastral Survey which took place before 1901.

Now there is no evidence to show that the Nos. 226 and 1237 which appear in the certified copy have any relation to the Nos. 191 and 279 which now appear in the *patta* and the object of altering the *patta* is, therefore, not clear. Moreover, if, as appears from the evidence, the opposite party was aware on the 21st July 1924, that the *patta* contained the revisional survey plots and was, therefore, a forgery, it is not understood why he did not bring that fact to the notice of the Sub-Deputy Collector on the 5th August, but allowed the case to be withdrawn on the 20th August without demur; nor is there any explanation why only six days later he asked that the documents by the petitioner should be attached. In my opinion the suspicious conduct of the opposite party has not been considered.

The learned Collector relies upon the statements of his copying staff, but they do not really touch the case. It has not been shown that the document, which was given to the copying staff, was the document now under consideration. On the contrary as there are no marks of alteration on the document, the presumption is that it is not the document which was made over to the copying department for the issue of a certified copy. The petitioner suggests that the copying department were in conspiracy with the opposite party and intentionally inserted the revisional survey plot numbers instead of the numbers on the document, but without going so far it is possible to hold that the copying department were deceived and that they copied out a document which was neither filed nor exhibited by the petitioner.

There is another point which requires notice. The learned Collector was asked to proceed with the commutation case which is now pending in order that the question of the genuineness of the *patta* might be determined before the criminal law was put

in motion against the petitioner; but his order is that the question whether in fact the petitioner is a tenant or not should first be determined by the Criminal Court. This is a reversal of the ordinary procedure and cannot be permitted. When a criminal offence is alleged to have been committed in the course of revenue or civil proceedings, the rule is that the facts upon which the criminal offence is founded should, as far as possible, be finally determined in the Civil or Revenue Court. Here the refusal to try out the commutation case materially affects the criminal proceedings and amounts to a denial of the right of fair trial. This Court is, therefore, competent to interfere under s. 107 of the Government of India Act.

There is a third point raised, namely, that the learned Commissioner was wrong in declining to hear the appeal preferred by the petitioner. I think the contention must be accepted. Section 476-B of the Cr. P. C. appears to contemplate that if an Appellate Court sets aside the order of the Original Court, the party prejudicially affected has a right of appeal to the Court to which appeals from that Appellate Court ordinarily lie. In this case, therefore, the Commissioner had jurisdiction to hear the appeal from the order of the Collector and to set it aside, if necessary, and I am asked to direct that the criminal prosecution should not proceed till the Commissioner has disposed of the appeal. In my opinion it is not necessary to make any such order as I think I have jurisdiction to interfere under s. 115, C. P. C., and 107 of the Government of India Act. I direct that the order of the Collector be set aside.

The application is allowed but without costs.

Z. K.

Application allowed.

ODDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 31 OF 1925.
July 21, 1925.

Present:—Mr. Simpson, A. J. C.
EMPEROR—APPLICANT

versus

GAJADHAR PRASAD AND OTHERS—
RESPONDENTS.

Penal Code (Act XLV of 1860), ss. 109, 114, 467,
471—Forgery—Using forged document as genuine—
Witness deposing that he saw execution of document—Offence.

Where a party to a judicial proceeding relies on a forged document in support of his case, a witness who states that he saw the execution of the document by the person by whom it purports to have been executed, intentionally aids by his deposition the using of the document as genuine and is liable to prosecution for an offence under s. 471 read with s. 109 of the Penal Code, although he could not be charged with abetment of the forgery itself.

Case reported by the Sessions Judge, Gonda, by his letter No. 63, dated the 1st July 1925.

The Government Pleader, for the Opposite Party.

ORDER.—This is a Reference by the learned Sessions Judge of Gonda, I am asked to quash a commitment. The facts set forth are that one Sital Prasad lodged a complaint against one Baba Gayan Das under s. 406 for embazzlement of a sum of Rs. 35,400 which Sital Prasad had deposited with him. The case was tried in the Court of the Magistrate, and Sital Prasad produced a receipt to prove the deposit purporting to be signed by Baba Gayan Das. The Magistrate found that this document was forged and he took proceedings under s. 476 against six persons. One of these was Sital Prasad. He was charged under s. 465 with forgery and under ss. 467/114 with abetment of forgery of the valuable security amounting to the offence itself, also under s. 471 with using a forged document as genuine, and under s. 474 with having in his possession a document which he intended to use as forged document. This charge appears to be somewhat redundant, but it is not this that I am asked to quash. The Magistrate also committed Chhedi described as attesting witness, but with this commitment I am not now concerned.

There were three witnesses, Ram Kishor, Baba Gayan Das and Ram Dhani, who gave evidence that a sum of Rs. 35,400 had been deposited by Sital Prasad with Baba Gyan Das and that Baba Gayan Das had executed a receipt. These three persons have been committed on charges under s. 465 of forgery, ss. 467/114 of abetment of forgery, and ss. 471/109 of abetment of the fraudulent use of a forged document. It is this commitment which I am asked to quash.

The learned Judge says that even if the entire prosecution evidence is to be believed, it cannot be said that they committed forgery or abetted that offence. He goes on to say that if the entire prosecution is to be believed, then the offence which they

have committed is that under s. 196 of the Indian Penal Code for giving false evidence and he has learnt that separate cases under s. 193, Indian Penal Code, are already pending against them. It is certainly difficult to see how they can be said to have abetted the forgery itself, if the only evidence is that they made a deposition in Court with regard to it. But it is not equally clear that they were not abetting the use of a forged document as genuine. If these three witnesses gave evidence, as they appear to have done, that they had seen Baba Gayan Das writing the receipt, it would appear that they intentionally aided by their deposition, the doing of the act. The deposition itself would be an act towards the use of the document in the case that would bring them under the third clause of s. 103. It is also possible that it might be a fair legal inference that they had engaged in conspiracy, for they could hardly have come into Court unless it had been previously arranged between themselves that Sital Prasad should use a forged document, and that they would give false evidence in support of it.

It is not desirable that there should be two trials in respect of the same act, namely, the giving of false evidence, one under s. 193 and another under ss. 471/109. But I do not think I have power to quash a commitment on such grounds as that. I think the best course will be to let the commitment stand, and to stay proceedings in the Magistrate's Court in respect of the offence under s. 193, Indian Penal Code. If the learned Sessions Judge, on trying the case, does not record a conviction under any section, the matter will come before this Court for decision whether the present suit in the Magistrate's Court should be allowed to go on.

The learned Sessions Judge when he has finished trying the case, will forward the record to this Court in order that the Court may decide whether the proceedings ought to go on in the Magistrate's Court or not.

The learned Sessions Judge will convey the orders of this Court to the Magistrate who is trying the cases under s. 193.

Z. K.

Commitment not quashed.

CALCUTTA HIGH COURT.

CIVIL CASE NO. 57 OF 1922.

July 21, 1925.

Present:—Mr. Justice Buckland.

In the matter of KANHYA LAL
SEWBUX—PETITIONER.Ex parte RAM GOPAL PODDAR—
OPPOSITE PARTY.*Presidency Towns Insolvency Act (III of 1909),
Sch. II, r. 11—High Court Insolvency Rules, r. 128—
Creditor under composition—Proof of debt.*

The mere fact that a sum is payable under composition and is stated therein to be payable does not of itself forego the need for proof, required by the concluding part of r. 128 of the Insolvency Rules.

Mr. K. P. Khaitan, for the Petitioner.

Mr. S. N. Banerjee (Sr.), for the Opposite Party.

JUDGMENT.—This is an application made on behalf of Ram Gopal Poddar, one of the creditors of the insolvent, Kanhya Lal Sewbux, for an order that the trustee under the composition may be directed to pay him Rs. 19,159-6-0. On the 17th December 1923 an order was made approving the terms of composition annexed to the order, under which Babu Shedmull Dalmia of 69, Cotton Street, a creditor to the extent of Rs. 47,216 was appointed to be the trustee. The terms of composition recite two mortgages, one in favour of Shedmull Dalmia amounting to Rs. 35,000, and the other in favour of the applicant for Rs. 15,000 and it says that these sums shall be paid first of all as soon as sufficient funds come into the hands of the trustee.

It is alleged that the trustee has paid away considerable sums to unsecured creditors out of the assets, of which at present Rs. 20,000 are still in his hands. The trustee admits a certain amount of assets and that he has paid sums to unsecured creditors, but says that he has paid them out of his own pocket.

It is objected that the applicant's mortgage which is dated 7th March 1922 has not been proved, and that until that has been done he is not entitled to be paid. This is based upon r. 128 of the Insolvency Rules of this Court, which provides that "every person claiming to be a creditor under any composition or scheme, who has not proved his debt before the approval of such composition or scheme, shall lodge his proof with the trustee thereunder, if any, or, if there is no such trustee, with the Official Assignee who shall admit or reject the same." The rule con-

cludes that no creditor shall be entitled to enforce payment under a composition unless he has proved his debt and proof has been admitted. I have also been referred to the 2nd Schedule, r. 11, of the Insolvency Act, which says:—"If a secured creditor does not either realize or surrender his security, he shall, before ranking for dividend, state in his proof the particulars of his security, the date when it was given and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed."

The point is not altogether easy of determination, because the order approving the composition is made under the Act after it has been submitted by the Official Assignee to the creditors, and in the presence of the insolvent. In such circumstances, it may reasonably be argued that proof is not necessary, and that the order is admitted.

On the other hand, there is no provision either in the Act or in the rule contemplating any such position. The mere fact that the sum is payable under the composition and is stated therein to be payable does not of itself forego the need for proof. This appears from the latter part of r. 128.

Having regard to the terms of the Act and the terms of the rule, although possibly it may be superfluous, it seems to me that it is the duty of the secured creditor to lodge his proof which should be done with the trustee, now that the composition has been approved and there is a trustee.

It is not necessary at this stage to anticipate what may follow hereafter. It has been said that the object of insisting on proof is to obtain the benefit of the security for the unsecured creditors. That may be so. All I have to determine at present is whether or not before the money can be paid out the debt has to be proved, and, in my opinion, it should. I decide no more than that and as matters stand the applicant cannot obtain the order and I dismiss the application with costs.

S. D.

Application dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 354-B OF 1922.

June 19, 1924.

Present:—Mr. Kinkhede, A. J. C.

**KRISHNAJI AND ANOTHER—PLAINTIFFS—
APPELLANTS**
versus

**KASHIRAO AND OTHERS—DEFENDANTS
—RESPONDENTS.**

Evidence Act (I of 1872), s. 92—Mortgage-debt, discharge of—Oral evidence, whether admissible.

Evidence is admissible to prove an oral agreement of satisfaction or discharge of a mortgage-debt. [p. 451, col. 1.]

Rama Bakhsh v. Durjan, 9 A. 392; A. W. N. (1887) 65; 5 Ind. Dec. (N. S.) 696, *Ramlal Chandra Karmokar v. Gobinda Karmokar*, 4 C. W. N. 304, *Ram Awatar v. Tulsi Prasad Singh*, 11 Ind. Cas. 713; 16 C. W. N. 137; 14 C. L. J. 507 and *Kamla Sahai v. Babu Nandan Mian*, 2 Ind. Cas. 13; 11 C. L. J. 39, relied on.

Appeal against a decree of the Additional District Judge, Amraoti, in Civil Appeal No. 231 of 1921, dated the 1st April 1922.

Mr. W. R. Puranik, for the Appellants.

Mr. G. R. Deo, for the Respondents.

JUDGMENT.—This second appeal raises one question of law, namely whether oral evidence was legally admissible to prove a lease given for a period of six years in full satisfaction of the mortgage dated the 29th March 1909 involved in this suit. Both the Courts below have admitted such evidence and held that the mortgagee was in possession of the mortgaged property for a term of six years under an agreement that the debt was to be treated as fully satisfied as the result of the enjoyment of such possession. The plaintiffs' claim was accordingly dismissed. They have, therefore, come up in second appeal.

Before dealing with the question of law I would dispose of the contention raised regarding the incorrectness of the finding of fact arrived at by the lower Appellate Court. My attention is drawn to the Perepatraks (Exs. 4 D-1, 4 D-2, 4 D-3, 4 D-4 and 4D-5) and it is urged that the Perepatraks do not support the finding that the plaintiffs' father was in possession of the land inasmuch as Exs. 4 D-1 and 4 D-2 do not mention his name but show somebody else's name as the actual cultivator. It is true that if the said Perepatraks had stood by themselves they would not have supported the defence but the entries in them read along with the oral evidence of plaintiffs' own witnesses P.

W. Nos. 3 and 4 make it sufficiently clear that the actual cultivators whose names are shown in the Perepatraks, Exs. 4 D-1, and 4 D-2 were lessees from the plaintiffs' father. I, therefore, see no reason to hold that the finding arrived at to the effect that the plaintiffs' father was in possession of the mortgaged property in full satisfaction of the mortgage debt for a period of six years, is not warranted by any evidence proper for consideration. I, therefore, overrule the contention, and hold that the finding is good finding for the purposes of this second appeal, provided the evidence on which it is based is legally admissible.

At this stage I propose to deal with the question of the admissibility of the oral evidence. It is argued that the effect of admitting the oral evidence for proving satisfaction by an oral lease for six years, is to modify the written contract embodied in the mortgage-deed regarding the manner of satisfying the mortgage-debt. Reliance is placed on s. 92, proviso (4) of the Indian Evidence Act. There are a number of cases wherein this question has been decided in favour of admitting oral evidence to prove the fact of satisfaction or discharge of an obligation created by a written and registered instrument.

In a similar case of *Rama Bakhsh v. Durjan* (1), it was held that such an oral agreement was not one which detracted from, added to or varied the original contract, but only provided for the means by which the instalments were to be paid, and that it was, therefore, admissible. In *Ram Lal Chandra Karmokar v. Govinda Karmokar* (2), it was similarly held that oral evidence was admissible to prove a discharge and satisfaction of the mortgage bond and that the provisions of s. 92, proviso 4 of the Evidence Act did not exclude such evidence. To the same effect was the decision in *Ram Awatar v. Tulsi Prasad Singh* (3), where it was held that oral evidence was admissible to prove a subsequent arrangement under which the usufructuary mortgagee allowed the mortgagor to possess and enjoy a portion of the mortgaged property in lieu of the payment stipulated by the terms of the mortgage-deed.

(1) 9 A. 392; A. W. N. (1887) 65; 5 Ind. Dec. (N. S.) 696.

(2) 4 C. W. N. 304.

(3) 11 Ind. Cas. 713; 16 C. W. N. 137; 14 C. L. J. 507.

to be made by him to the latter inasmuch as it did not supersede and vary any stipulation regarding the payment but merely concerned the mode of payment.

In *Kamla Sahai v. Babu Nandan Mian* (4), the mortgagee was under a subsequent arrangement placed in possession and authorised to receive the profits in satisfaction of his dues under the mortgage. It was held by Mukerji and Richardson, JJ., that this was not an agreement contradicting, varying, adding to, or subtracting from the terms of the original contract but merely providing means for the satisfaction of the bond, and could be proved by oral evidence, and that s. 92 of the Evidence Act did not apply. Mitra, A. J. C., in Second Appeal No. 15-B of 1913 which arose out of a mortgage suit held that oral evidence of discharge or satisfaction of a debt was always admissible. In this view of the law it is idle to contend that an oral agreement of satisfaction or discharge of a mortgage-debt is not capable of being proved by oral evidence and that the evidence offered in the present case in support of it was inadmissible under law.

The result is that this appeal fails and is dismissed with costs. Those in the lower Courts which will be paid as already ordered.

N. H. *Appeal dismissed.*
(4) 2 Ind. Cas. 13; 11 C. L. J. 39.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE

No. 61 OF 1923.

July 6, 1925.

Present:—Justice Sir Hugh Walmsley,
Kt., and Mr. Justice Mukerji.

KANAILAL GHOSH AND OTHERS

—DEFENDANTS—APPELLANTS

versus

BASANTA BEHARI SEN—PLAINTIFF

—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 11, 12—Darpatni tenure—Security of charge for payment of rent, whether ceases on transfer of tenure—Rent, liability to pay, after transfer of tenure—Rule against perpetuities, charge or security if offends.

As soon as the lessee of a *darpatni* tenure transfers it in accordance with the provisions of ss. 11 and 12

of the Bengal Tenancy Act, and ceases to have any estate, his liability for the payment of the rent ceases if that liability is based on the privity of estate. But if by the terms of the lease some further rights and liabilities, (e. g., security or charge for the payment of the *darpatni* rent) are created between the parties, they do not cease automatically on the transfer of the tenure and the termination of the relationship of landlord and tenant. [p. 454, col. 1.]

(Case-law discussed.)

The rule against perpetuities affects only the creation of a future interest in property and the restricting of transfer of property by tying it up. The rule has no application to the case of a charge where a present interest is created and there is no transfer of an interest in property, but the property is merely made security for the payment of money. Therefore, where a charge or security is created as a part of the consideration for a *darpatni* lease, that charge or security is not extinguished on lessee's transfer of his interest under the lease. [*ibid.*]

Appeal against a decree of the Subordinate Judge, Hughly, dated the 10th August 1922, reversing that of the Munsif, Chinsura, dated the 26th May 1921.

Babu Nagendra Nath Ghose, for the Appellants.

Babu Panchanon Ghose, for the Respondent.

JUDGMENT.

Mukerji, J.—The facts necessary to be stated for the purposes of this appeal are these: In 1309, the plaintiff and his co-sharer obtained a *darpatni* settlement of 4-annas share of three villages from the predecessors of defendant No. 1 and executed a *kabuliyat* in their favour hypothecating the said 4-annas share of the three villages as well as seven other *mouzahs* as security for the payment of the *darpatni* rent and for the performance of obligations and discharge of liabilities incidental to the *darpatni*. In 1312 they sold the said *darpatni* to the defendant No. 2; and the defendant No. 1 recognized the transfer and accepted rent from the defendant No. 2. In the *kobala* by which the *darpatni* was sold there was a stipulation that the defendant No. 2 would furnish security to the defendant No. 1 or to the plaintiff and his co-sharer in order to re-place the security given by the plaintiff and his co-sharer. On the defendant No. 2 failing to furnish the said security the plaintiff, to whom the seven *mouzahs* in suit were subsequently allotted on partition between him and his co-sharer, instituted a suit against the defendant No. 2 making the defendant No. 1 *pro forma* defendant, for specific performance, and obtained a deposit of security in cash; but the defendant No. 1 did not accept the said security,

The plaintiff then instituted the present suit praying for a declaration that the said seven *mouzahs* were no longer subject to any charge.

The Munsif dismissed the suit, but the Subordinate Judge on appeal reversed that decision and granted the plaintiff a decree declaring that the charge no longer subsisted. From that decree the present appeal has been preferred by the heirs of the defendant No. 1.

The appellants' contention, which was the defence to the action, is that the liability of the lessee to the lessor continued notwithstanding the transfer, as based on the privity of contract between the parties; that the lessor had also a remedy against the transferee for rent and on the covenants running with the land, the transferee was under a liability based on privity of estate; that although the lessor has his remedy as against the transferee who is to be treated as primarily liable, the original lessee remains in the position of a surety and he cannot get rid of his liability merely by transfer. It is contended further that even if the liability to pay the rent be held to cease in consequence of the transfer the security remains in force and the charge is not extinguished.

The respondent urges that the lessee ceases to be liable for the rent as soon as the transfer is complete, and in any event if the lessor has accepted the transferee, whether expressly or impliedly, e. g., by acceptance of rent; that there having been acceptance of rent in the present case the original lessee's liability for rent has altogether ceased; and that to hold under such circumstances that the security still remains in force would be to offend against the rule against perpetuities.

Now, there is no dispute that the *darpatni* is a permanent tenure governed by the provisions of the Bengal Tenancy Act, *Mahomed Abbas Mondul v Brojo Sundari Debia* (1). Under s. 11 of the Bengal Tenancy Act, it is capable of being transferred in the same manner and to the same extent as other immoveable property. Section 12 provides a limit as to the mode in which the transfer is to be made. As soon as the document by which the transfer is made is registered—and the registration is not to take place until a condition precedent mentioned in s. 12 is fulfilled—the transfer

is complete. When the estate is transferred and the vendor ceases to have any estate, then if the vendor's liability is a liability consequent on privity of estate, that liability ceases: *Kristo Bulluv Ghose v. Kristo Lal Singh* (2) and *Girish Chandra Guho v. Khagendra Nath Chattopadhyaya* (3). The same principle has been held to apply in the case of transfer by the original lessee, *Hamendra Nath Mukerji v. Kumar Nath Ray* (4). It is clear therefore that after the transfer the plaintiff was no longer liable for the rent, and the defendant No. 1 was thenceforward to look to the defendant No. 2 for the same.

The next question is as to whether, when the liability for payment of the rent ceased, the security continued and the charge remained in force. The appellants' contention is that it did, and that though as a consequence of the transfer the transferee became by operation of law the tenant of the tenure and the transferror ceased to be a tenant, the transferror was not necessarily absolved from the liability which was created by the contract. In support of this contention reliance has been placed upon a passage in the judgment of the Court in the case of *Rupchand Ghose v. Narendra Krishna Ghose* (5). The passage indicates that the fact that by transfer the transferror ceases to be a tenant does not imply that he is absolved from liability under the terms of the contract between him and the lessor, and that it is conceivable that a person may cease to be a tenant and yet continue liable to the landlord under his personal covenant.

The respondent urges that if it is held that the security remains in force in spite of the transfer, it would mean that the lessor would be competent to impose a restriction on transfer of a permanent tenure which is transferable by law and that in that case the security might continue for ever and thus offend against the rule against perpetuities.

As regards the first of these objections, in my opinion, it is not well-founded on principle. In the case of *Dinobundhu Roy v. W. C. Banerjee* (6), it was held by this Court that a transfer of a tenure made in terms of the provisions of the Bengal

(2) 16 C. 642; 8 Ind. Dec. (N. S.) 424.

(3) 9 Ind. Cas. 1001; 16 C. W. N. 64; 13 C. L. J. 613.

(4) 12 C. W. N. 478.

(5) 28 Ind. Cas. 683; 19 C. W. N. 112 at p. 114.

(6) 19 C. 774; 9 Ind. Dec. (N. S.) 958.

(1) 18 C. 360; 9 Ind. Dec. (N. S.) 240.

Tenancy Act is not binding on the landlord, if there is a contract between the landlord and the tenant that the transfer shall not be valid and binding until security to the satisfaction of the landlord has been furnished, and if such security has not been given; and that in such a case the original tenant is still liable for the rent. Permanent leases no doubt are transferable under s. 11 of the Bengal Tenancy Act; but a provision in a lease of a permanent tenure for forfeiture or re entry in case of assignment in violation of its terms would not be invalid. In *Keshab Lal Nag Majumdar v. Madhu Sudan Pal Knndu* (7), it was held by this Court that the provisions of s. 10 of the Transfer of Property Act saving conditions restraining alienation in leases where the conditions are for the benefit of the lessor, are not inconsistent with the provisions of s. 11 of the Bengal Tenancy Act, and that the two provisions of the two Acts are not inconsistent or repugnant to each other but are capable of standing together. It follows, therefore, that the lessor is competent to insist on a stipulation that he would not be bound by the transfer unless the transferee keeps the security in force. The whole question then resolves itself into one as to whether such an intention or its contrary may be gathered from the *kabuliyat*. The learned Subordinate Judge has proceeded upon the decision in the case of *Bijoy Chand Mohatab Bahadur v. Sarat Chandra Adhiya* (8) which he treats as an authority for the proposition that the liability to pay the rent having ceased, the charge created for payment of rent is automatically extinguished. The decision in that case, however, rested upon the terms of the *kabuliyat* on which the case was based and not upon any such general principle. The *kabuliyat* in that case provided that so long as the lessees were not released from the liability to pay the rent, the lessees shall not be able to transfer in any manner the property mortgaged as security for the rent. It was held in the case that on the transfer being completed the lessees' liability to pay the rent ceased and, therefore, the security was at an end.

The relevant passages in the *kabuliyat* in the present case are the following—“

“We shall without objection provide the rent instalment by instalment. If we fail therein you will be entitled to recover

the arrears, according to the law which is in force, or which will be in force, from the said *darpatni mehal* and from the properties hypothecated as specified in Schedule (*kha*) or from our other moveable and immoveable properties which stand in our names or *benami*. To that neither we nor our heirs or representatives shall have any objection at any time whatsoever If you suffer any damage by our acts then you will be entitled to recover the same from whatever moveable or immoveable properties we or our heirs or representatives shall have in our own name or *benami* and from the properties hypothecated and specified in Schedule (*kha*) and to that neither we nor they shall be entitled to raise any objection If this *darpatni mehal* be sold for arrears of rent due by us or in execution or is transferred in any other way, our representatives shall be bound by all the terms of this *kabuliyat* Being in possession as *darpatni talukdar* and maintaining intact the boundaries and regularly paying the rent, with our sons, grandsons, heirs and representatives shall in great felicity enjoy and possess the *darpatni* interest with powers of gift and sale In case we do anything injurious to you we and our heirs and representatives shall be bound to compensate you therefore, and in order to secure the said damages and for the performance of all the stipulations of this *kabuliyat* we give as security the properties in Schedule (*kha*) below owned and possessed by us”

These conditions created a charge on the seven *mouzahs* for all times to come for the due payment of the *darpatni* rent and the performance of the other obligations arising under the *kabuliyat*, and there is nothing in the *kabuliyat* which may go to indicate that the security would be extinguished on the lessees' liability to pay the rent ceasing with the transfer. That this was the intention of the parties is also suggested by the term in the *kobala* by which the plaintiff and his co-sharer transferred the *darpatni* to the defendant No. 2 by which the latter was required to furnish security to the plaintiff and his co-sharer or to the defendant No. 1 in order to re-place the original security. This intention is also evidenced by the fact of the institution of the suit for specific performance, the result of which, however, is not binding on the defendant No. 1.

As regards the contention that a

(7) 6 Ind. Cas. 635; 12 C. L. J. 126.

(8) 51 Ind. Cas. 909; 29 C. L. J. 476.

security of this description which is to last for all times to come is repugnant to the rule against perpetuities, I am not prepared to regard the contention as well-founded. This rule affects only the creation of a future interest in property and the restricting of transfer of property by tying it up. The rule has no application to the case of a charge where a present interest is created and there is no transfer of an interest in property, but the property is merely made security for the payment of money. The creation of this charge was a part of the consideration for the *darpatni* lease, and I am unable to see how it could be extinguished merely because the lessee chose to transfer his interest under the lease. The position, therefore, is this: The liability to pay the rent subsists so long as the relationship of landlord and tenant exists. This relationship as between a landlord and his lessee, the permanent tenure-holder, ceases on the latter transferring the whole of his tenure. The lease may create further rights and liabilities as between the parties thereto and where it does, they do not cease automatically on the termination of the relationship.

For these reasons I am of opinion that plaintiff by merely transferring the *darpatni* to the defendant No. 2 could not get rid of the charge created by him under the *kabuliyat*, and that the mere acceptance of rent by the defendant No. 1 from the defendant No. 2 has not extinguished the same. The plaintiff, in my opinion, is not entitled to the declaration sought for by him.

The decree of the learned Subordinate Judge should be set aside and that of the learned Munsif restored and the plaintiff's suit dismissed with costs in all the Courts.

Walmsley, J.—I agree.

S. D.

Decree set aside.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 825 OF 1922.

May 29, 1925.

Present :—Mr. Justice Das and Mr. Justice Ross.

THE HON'BLE Maharajadhiraj SIR
RAMESHWAR SINGH BAHADUR—
PLAINTIFF—APPELLANT

versus

DURGA MANDAR AND OTHERS—
DEFENDANTS—RESPONDENTS.

Hindu Law—Debt incurred by father—Pious obligation of son to pay off father's debt, extent of—Misappropriation by father, effect of.

Where a Hindu father appropriates money belonging to another person under circumstances which do not render the taking of the money itself a criminal offence, a subsequent misappropriation by the father cannot discharge his sons from their liability arising out of their pious obligation to satisfy the debt. But the position is different if the money is taken by the father and misappropriated under circumstances which render the taking itself a criminal offence. [p. 455, col. 2.]

Chakouri Mahton v. Ganga Proshad, 12 Ind. Cas. 609; 39 C. 862; 15 C. L. J. 228; 16 C. W. N. 519 and *Medai Dalavay Terumalaipappa Mudaliar v. Veerabudra*, 4 Ind. Cas. 1090; 19 M. L. J. 759, relied on.

One J was plaintiff's *patwari* and owed the plaintiff a sum of money in respect of the collections made by him on behalf of the plaintiff and being unable to pay the amount he arranged with A that the latter should execute a mortgage-bond in favour of the plaintiff to discharge the debt. After A's death plaintiff brought a suit to enforce the mortgage-bond against A's son:

Held, (1) that it was J's duty to account for the money which had come into his hands to the plaintiff and his failure to do so involved on his part a breach of civil duty and that even if he had misappropriated the money it was a subsequent act which did not render the original taking of the money by J a criminal offence and that, therefore, J's debt in discharge of which A had executed the mortgage-bond in suit was not tainted with illegality or immorality, and A's son was under a pious obligation to discharge the debt secured by the mortgage-bond; [p. 456, col. 1.]

(2) that the plaintiff was not, however, entitled to a mortgage-decree inasmuch as the debt was not incurred by A for the benefit of the family; [*ibid.*]

(3) that the plaintiff was entitled to a simple money-decree for the amount of the mortgage-bond with interest and could recover the amount of the decree out of the entire ancestral property in the hands of A's son. [*ibid.*]

Appeal from a decision of the Subordinate Judge, Bhagalpur, dated the 26th May 1922, affirming that of the Munsif, Bhagalpur, dated the 31st December 1920.

Messrs. Murari Prasad and Sambhu Saran, for the Appellant.

Mr. Siveshwar Dayal, for the Respondents.

JUDGMENT.

Das, J.—This appeal is directed against

[90 I. C. 1925]

the judgment of the Subordinate Judge of Bhagalpur, dated the 26th of May 1922, and arises out of a suit instituted by the appellant, the Maharaja of Darbhanga, to enforce a mortgage-bond executed by one Adhik Lal Mandar in his favour on the 4th of April 1916.

The plaintiff's case as made out in the plaint is as follows: One Jag Narayan Lal Das was his *patwari* and he owed the plaintiff Rs. 1,231-15-9 in respect of the collection made by him on behalf of the plaintiff. The *patwari* being unable to pay the amount arranged with Adhik Lal Mandar to execute the mortgage-bond in question in favour of the plaintiff. The plaintiff states that there were money-lending transactions between Adhik Lal Mandar and Jag Narain and that Adhik Lal paid Rs 200 in cash to the plaintiff and executed a mortgage bond for Rs. 1,031-15-9 in favour of the plaintiff. Adhik Lal Mandar is dead and the suit is now brought against defendant No. 1, the minor son of Adhik Lal, and Billo Mandar his brother. The allegation in the plaint is that the defendants were members of a joint family of which Adhik Lal Mandar was the *karta* and that, as such the plaintiff is entitled to enforce the mortgage-bond as against the members of the joint family.

The learned Munsif found that the mortgage-bond was in fact executed by Adhik Lal Mandar for valuable consideration. According to him Jag Narain Lal misappropriated the sum of Rs. 1,231-15-9 and Adhik Lal executed the mortgage-bond in question in consideration of the plaintiff abstaining from taking criminal proceedings as against Jag Narain. On this finding he thought that the mortgage-bond could not be enforced as against the defendants, and he dismissed the plaintiff's suit with costs. On the question whether defendant No. 2, the brother of Adhik Lal Mandar, was in any event liable, he came to the conclusion that Billo Mandar was separate from Adhik Lal and could not in any case be liable on a bond executed by Adhik Lal. The plaintiff appealed to the learned Subordinate Judge. That learned Judge agreed with the finding of the Court of first instance on the question whether Billo was joint with Adhik Lal. He thought that there was no consideration for the mortgage-bond and that, were Adhik Lal Mandar alive, the plaintiff could not enforce the mortgage-bond against him. He also agreed with the

finding of the learned Munsif that the defendants could not be made liable on the bond in question, and dismissed the appeal. The plaintiff now comes to this Court.

The finding of the Courts below that Billo Mandar was separate from Adhik Lal Mandar is a finding of fact which is binding on us in second appeal. The plaintiff's suit as against Billo Mandar must accordingly fail.

The next question is whether the plaintiff is entitled to recover the money covered by the mortgage-bond from the defendant No. 1. The solution of this question depends on whether what Adhik Lal undertook to pay was tainted with illegality or immorality. The argument on behalf of the respondents in this Court was to the effect that Jag Narain Lal was guilty of a criminal offence and that, if he had executed the mortgage-bond in question, it could not be enforced as against his sons; and that, that being so, and Adhik Lal having undertaken to pay the money tainted with illegality or immorality, his son defendant No. 1 cannot be called upon to pay the debt of his father. There are many decisions in the books on the question how far a Hindu son is under a pious obligation to discharge a debt of his father when such debt consists of money misappropriated by the latter. Here the mortgage-bond was not executed by the *patwari*, but by Adhik Lal Mandar, who certainly was not guilty of any criminal misappropriation. But the problem is exactly the same, namely, is there any illegality or immorality involved in a transaction of this nature. There is a divergence of judicial opinion on this question but, as was pointed out by Mookerjee, J., in *Chakouri Mahton v. Ganga Proshad* (1), "the case might possibly be reconciled if we recognize the distinction between a criminal offence and a breach of civil duty". That learned and distinguished Judge discussed the various cases on the point and came to the conclusion that "Where the taking of the money itself is not a criminal offence, a subsequent misappropriation by the father cannot discharge the son from his liability to satisfy the debt; but the position is different if the money has been taken by the father and misappropriated under circumstances which render the taking itself a criminal offence". I entirely agree with the view taken by Mookerjee, J.

(1) 12 Ind. Cas. 600-30 C. 862; 15 C. L. J. 228; 16 C. W. N. 519.

in the case to which I have referred which is founded on the decision of the Madras High Court in *Medai Dalavoy Tirumalaiappa Mudaliar v. Veerabudra* (2).

What then is the position? Jag Narain was the plaintiff's *patwari*. It was his duty to make collections on behalf of the plaintiff and the taking of the money was in the ordinary course of his employment as *patwari* and was in no sense a criminal offence. Now what was the position when the money originally came into the hands of Jag Narain? It was his duty to account for it to the plaintiff and the failure to do so involved on his part a breach of civil duty. It is said that he misappropriated the money; but if he did so, it was a subsequent act, for as I have said it was part of his duty to make collections on behalf of the plaintiff. That being so, the son is clearly under a pious obligation to discharge the debt incurred by Adhik Lal Mandar. The plaintiff is, however, not entitled to a mortgage-decree, for he has not shown that the debt was incurred for the benefit of the family. He is entitled to a decree for the sum of Rs. 1,031-15-9 with interest thereon at 12 per cent. per annum up to the date of this decree. The plaintiff is also entitled to interest at 6 per cent. per annum on his decree up to the date of realization. He is entitled to recover the money out of the entire ancestral property now in the hands of defendant No. 1. The plaintiff will also get his costs throughout from the defendant No. 1.

Ross, J.—I agree.

Z. K.

Order accordingly.

(2) 4 Ind. Cas. 1090; 19 M. L. J. 759.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 569
OF 1921.

May 22, 1923.

Present:—Justice Sir Hugh Walmsley, Kt.,
and Mr. Justice Suhrawardy.

O. S. MEAH—DEFENDANT—APPELLANT
versus

DURGA CHURN DUTTA AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Revenue, arrears of, sale for—Suit to set aside sale—Onus of proof—Civil Procedure Code (Act V of 1908), O. XLVII, r. 7—Decree given on one out of two grounds alleged in plaint—On review decree main-

tained on other ground—Appeal, whole case, whether can be opened in.

In a suit to set aside the sale of an estate, held by a Collector under the Bengal Land Revenue Sales Act, 1859, on the ground that no arrears were due from the estate, the plaintiff must make out a *prima facie* case by showing that no arrears were actually unpaid on the date of the sale. [p. 457, col. 1.]

Where a plaintiff bases his claim on two grounds and the Court decrees it on one of them only without discussing the other, but on a review application by the defendant, rejects the ground on which it had based its decision formerly and maintains the decree on the second ground, in an appeal by the defendant, although his application for review was limited only to the first ground, it is open to the plaintiff to re-open in the Court of Appeal the question concerning the second ground as well. [p. 457, col. 2.]

Appeal against a decree of the District Judge, Chittagong, dated the 20th September 1920, affirming that of the Subordinate Judge of that District, dated the 24th July 1919.

Babus Ram Chandra Majumdar and Chandra Sekhar Sen, for the Appellant.

Babus Jogesh Chandra Ray and Narendara Coomar Das, for the Respondents.

JUDGMENT.

Walmsley, J.—This appeal is preferred by the first defendant, the purchaser at an auction-sale held under the provisions of Act XI of 1859.

The estate sold was a residuary share bearing *Touzi* No. 2017 of the Chittagong Collectorate. The plaintiffs alleged that there were no arrears due from the estate and, granted that there were arrears, that the processes required by the Act were not duly served.

The First Court decreed the suit in February 1918 on the ground that there was no arrear of revenue on account of which the sale could be held. The purchaser then preferred an application for review of judgment, and this was allowed on April 1918. Both sides adduced additional evidence, and then the learned Subordinate Judge held that there were arrears for which the estate could be sold, but that there was collusion between the appellant and one of plaintiffs' co-sharers, and consequently he directed the appellant to re-convey the property to the plaintiffs.

Then the defendant purchaser preferred an appeal and on his behalf it was urged before the Appellate Court that the order allowing a review of judgment was limited to the question whether as a fact there were arrears of revenue on account of which the estate could be sold. The learned Judge accepted this argument and confined

his attention to that question. He then dealt with the evidence about the *kists*, and about the entries in the Touzi Department's ledgers and he agreed with the view taken in the second judgment of the First Court that the Pous *kist* if unpaid, became "arrears" within the meaning of s. 2 of the Act and that if such arrears remained unpaid on February 1925, the latest date for payment, as fixed under s. 3, there could be a valid sale; but he held that it was for the auction-purchaser to prove that there were arrears, and that he had produced no evidence to that effect. Consequently he dismissed the appeal.

It will be convenient to deal first with the main ground on which the purchaser attacks the Judge's decision. It is this, that the learned Judge was wrong in laying upon the purchaser the burden of proving that there were arrears of revenue, instead of requiring the plaintiffs to prove that there were no arrears. It is conceded for the respondents that the authorities quoted by the Judge do not bear out his view, but the learned Pleader for the respondents says that the view is correct. Among other things he said it was a matter within the special knowledge of the purchaser. That argument appears unsound: if anybody has special knowledge it must be the late owners. The question, however, does not turn upon special knowledge, but on the ordinary rule that a plaintiff must make out a case. If the plaintiffs want the Court to hold that the Collector had no authority to put the machinery of Act XI into force after 25th February they must make out a *prima facie* case to that effect, and they must do so by showing that actually there were no arrears unpaid on 25th February. If that were the only question it might be possible for us to treat the statements made in the plaint as admissions that arrears were left outstanding. Another aspect of the case, however, has been put before us. The result of the review has been that the other arguments advanced by the plaintiff have never been considered by the Appellate Court. Their case was that there had been fraud in the matter of service of processes, and fraud in the failure of their co-sharers, acting in connivance with the purchaser to deposit money given to them by the plaintiffs for deposit in the Collector's office. The learned Judge held that he could not deal with these questions, because the order

granting review of judgment was confined to the question whether there were arrears and he took this view although the Judge of the First Court had again dealt with all questions.

This is very unsatisfactory. The plaintiffs appealed to the District Judge against the order granting review of judgment, but it was held that no appeal lay. It is said that they appealed to this Court but whether it was an appeal or an application under s. 115, C. P. C., they were unsuccessful. Does it follow that the plaintiffs are unable to put before the Appellate Court the argument that the First Court was wrong in holding that notices were duly served and that the defendant was not a party to any fraud? It appears to me that the plaintiffs are protected by r. 7 of O. XLVII, and that whether the order granting review of judgment was limited in its scope or not, it remained open to the plaintiffs after the second judgment of the First Court to re-open in the Court of Appeal the questions of fraud and suppression of processes.

It is very desirable, now that the litigation has lasted so long, that all the matters in controversy should be threshed out.

The order that I think we should make is this: The judgment and decree of the lower Appellate Court are set aside, and the appeal will be re-heard: the purchaser will be the appellant as he has been throughout: the question whether there were arrears outstanding on 25th February will be dealt with on the footing that the burden of proof lies on the plaintiffs to prove that there were no arrears: the respondents will be entitled to support the decree passed in their favour by the First Court by showing that the processes were not properly served, or that on account of fraud or irregularity the sale cannot be allowed to stand.

The costs of this hearing will abide the result.

Suhrawardy, J.—I agree.

A. D.

Appeal allowed:
Case remanded.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITIONS NOS. 2561
AND 3092 OF 1923.

December 18, 1924.

Present :—Mr. Justice Odgers and Mr.
Justice Wallace.

KRUTHIVENTI PERRAJU GARU—
PLAINTIFF—PETITIONER

versus

Sri NALLAPURAJU MUJA SITARAMA-
CHANDRA RAJU GARU AND OTHERS
—DEFENDANTS—RESPONDENTS.

*Hindu Law—Joint family—Mortgage by manager—
Interest, high rate of—Necessity—Burden of proof—
Finding by Trial Court—Appellate Court, interference
by.*

The manager of a Hindu joint family, whether the father or not, is not entitled in law to borrow money at an exorbitant rate of interest unless there is necessity for such a rate, and, if the rate of interest is excessive, the onus will be on the lender to show that there was necessity for such an onerous rate; that is, where the rate is shown to be onerous, it must be shown that there was pressing necessity at the time of the loan for such an onerous rate. The actual result brought about by the mounting of interest, if not paid, to a crushing figure cannot affect the principle. A Court is not entitled to presume that any particular rate of interest is onerous. A rate *prima facie* harsh may, considering the nature of the security offered, its dubious title or its exiguous nature, be perfectly reasonable when the facts are known. Those attacking the transaction must first show *prima facie* that the rate of interest is unnecessarily high for the circumstances of the case, although in certain cases the rate may be *prima facie* so excessive that proof is practically unnecessary. [p. 461, cols. 1 & 2.]

Where the Trying Court has not considered it necessary to call on the lender to explain the rate of interest, and no issue has been framed, therefore, a Court of Appeal should not interfere without giving an opportunity to the party affected to explain it, unless the rate is so monstrous as to be unconscionable in any conceivable set of circumstances. [p. 462, col. 1.]

Where a mortgage of family property was executed by a Hindu father at 12 per cent. compound interest consolidating a series of prior simple money loans at 12 and 18 per cent. simple interest:

Held, that the fact that the money due on the mortgage had aggregated to a very large sum on account of non-payment of interest was insufficient to render the rate of interest excessive or not binding on the sons. [p. 461, col. 1.]

Case-law referred to.

Petition, under r. 13 of the Agency Rules (Civil Justice), praying that on the grounds set forth therein the High Court will be pleased to issue an order directing the Additional District Judge, Agency Division, Waltair, to review his judgment, dated the 30th April 1923, in A. S. No. 2 of 1923, preferred against a decree of the Court of the Judicial Assistant Commissioner, Agency Division, Vizagapatam, dated the 23rd May 1922, in O. S. No. 7 of 1921.

Messrs. C. V. Anantakrishna Iyer and C. Sambasiva Rao, for the Appellant.

Messrs. S. Varadachariar Rao and K. Venkatarama Raju, for the Respondents.

JUDGMENT.

Odgers, J.—This is a petition by the plaintiff for an order directing the Additional District Judge of the Agency Division, Waltair, to review his judgment and decree in A. S. No. 2 of 1923, dated 30th April 1923. The suit came to the Additional District Judge on appeal from the Judicial Assistant Commissioner of the Agency Division, Vizagapatam, in a mortgage suit on a bond dated 9th May 1901 executed by the first defendant in favour of one K. Perrazu, said to be the adoptive father of the plaintiff. The first defendant is the undivided father of the defendants Nos. 2 to 6 and the manager of the joint family. No less than 14 issues were originally framed in the case and there is in fact a petition by the defendants Nos. 2 to 6 against the findings of the learned Additional District Judge on points of adoption, limitation and the binding nature of the mortgage. These points were all given up before us, and the petition is confined to the conclusions arrived at by the learned Judge in para. 8 (a) to (f) of his judgment.

The dealings between the parties began on the 12th December 1892 by a promissory note of that date for Rs. 600 at 18 per cent. Ex. D. This was followed by a promissory note of 4th February 1893, Ex. D-2 for Rs. 600 at 12 per cent. and also on the 7th May 1895 Ex. D-1 for Rs. 1,000 at 12 per cent. Nothing having been paid on any of these promissory notes, they were consolidated into a mortgage on the 11th November 1895, Ex. L for Rs. 6,000 at 10½ per cent. payable on the 11th November, every year, in default interest to be compounded, the whole principal and interest being re-payable on the 11th November, 1897; and if it is not paid within that time interest shall be at 12 per cent. compound. Nothing having been paid under this, the further suit mortgage, Ex. S, dated 9th May 1901 for Rs. 11,000 was executed at Rs. 1-0-6 or 12-3-8 per cent. compound interest. Nothing having been paid for this mortgage the plaintiff instituted the suit for no less than Rs. 1, 07,000 odd. The learned Additional District Judge evidently impressed, I think, with the way in which this debt has accumulated, has reduced the interest payable so as to make the whole amount due from the defendants Rs. 45,000

odd. The learned Additional District Judge in para. 8 (a) to (f) considers whether the bargain was harsh and unconscionable based on undue influence by the mortgagee or the inherent harshness of the bargain. It may be said at once that no case of undue influence was proved and in fact I think it is fair to say that the contention of the parties and their Counsel was not really focussed on this point of excessive interest until the last moment. Their attention was concentrated on that date on the more important points of adoption, limitation, etc., and Mr. C. Sambasiva Rao, Barrister-at-Law, who was present at the hearing in the Additional District Court, has stated to us that it was only in the later stages in the hearing of the appeal that this point was raised and was pressed on the attention of the learned Judge owing to Counsel and the Vakils in the case having received a copy of the Privy Council decision in *Ram Bhujhawan Prosad Singh v. Nathu Ram* (1) which will be presently noticed. The suit had a curious history. It began as O. S. No. 41 of 1913 before the Subordinate Judge of Cocanada some of the properties being situated in the Godavari District and some in the Agency. The plaintiff got a decree and costs. Execution was taken of the properties within the ordinary jurisdiction and a small sum was recovered. As for the balance due the decree was transferred to the Agency Judge for execution. It was held, however, that a fresh suit must be brought in the Agency Court. So O. S. No. 7 of 1921 was filed in consequence. The learned Judges held in *Ram Bhujhawan Prosad Singh v. Nathu Ram* (1), that where, as here, the manager of a Hindu family borrows money on the mortgage of a family property, it must be proved that there was necessity to borrow at the rate contracted for and, secondly, that it was not unreasonable to borrow at some such high rate and upon such terms. The learned Judge took these propositions from the judgment in *Ram Bhujhawan Singh v. Nathu Ram* (1), where they are quoted from *Nawab Nazir Begam v. Rao Raghunath Singh* (2), and this is the

(1) 71 Ind. Cas. 933; 44 M. L. J. 615; 4 P. L. T. 29; (1923) A. I. R. (P. C.) 37; 32 M. L. T. 129; 25 Bom. L. R. 568; (1923) M. W. N. 382; 4 Pat. 285; 38 C. L. J. 25; 18 L. W. 767; 1 Pat. L. R. 445; 28 C. W. N. 446; 50 I. A. 14 (P. C.).

(2) 50 Ind. Cas. 434; 36 M. L. J. 521; 46 I. A. 145; 17 A. L. J. 591; 23 C. W. N. 700; 21 Bom. L. R. 484; 26 M. L. T. 40; 30 C. L. J. 86; (1919) M. W. N. 498; 1 U. P. L. R. (P. C.) 49; 41 A. 571 (P. C.).

law report referred to by Mr. C. Sambasiva Rao in his statement to us from the bar. The learned Judge proceeds:—"The main thing is to see if results show that the terms taken as a whole were harsh and unconscionable". On the other hand the Privy Council in a case reported as *Balla Mal v. Ahad Shah* (3) say that it is misleading to have regard to the result alone. Their Lordships say: "It is not enough—indeed, it is misleading—to look at the result alone.....A borrower who obtains a loan secured by a promissory-note on a quite reasonable term, by neglecting to pay the note at maturity, further neglecting to pay the accruing interest for the several years following, and then giving a renewal note for the original debt plus the capitalised interest, could produce a result which might at first sight appear oppressive, and yet there would be nothing harsh or unconscionable in the creditor's demand, since the added interest only accumulated while he forbore to enforce the payment of the sums from time to time due to him". As to this the learned Judge himself says: "There is no suggestion that the mortgagee wilfully allowed default, so as to take advantage of an improvident man and to pile up debt swiftly; on the other hand, it is clear that the mortgagee warned the mortgagor of the rapidity with which the debt was swelling". The learned Judge is obviously swayed by the hardship on the younger sons losing practically the whole of their estate owing to the improvidence of their father, not in borrowing the money for interest as it was in fact admitted or found to exist, but in failing to pay interest as it fell due and thereby causing payment of compound interest to become necessary.

Ordinarily speaking it is extremely doubtful whether the sons would have been allowed to raise this plea at all. The issues taken as regards this point are issues Nos. 3 and 11. The third issue is: "Is the suit mortgage debt binding on the defendants Nos. 2 to 6? It is contended for the sons that this issue opens the whole point of liability of the sons for the father's debts created by the mortgage. This point is considered at length by the learned Judge in para. 8 (a) to (f) and he agrees with the

(3) 48 Ind. Cas. 1; 23 C. W. N. 233; 35 M. L. J. 614; 16 A. L. J. 905; 124 P. R. 1918; 25 M. L. T. 55; 180 P. W. R. 1918; 29 C. L. J. 165; 1 U. P. L. R. (P. C.) 25; 21 Bom. L. R. 558 (P. C.).

lower Court that the mortgage is a valid charge on the joint family property. The question that it lay on the plaintiff to show that the father could not raise money at a lower rate is not considered in that part of the judgment and it is perfectly clear to me that neither side at the hearing of the appeal contemplated that issue No. 3, would admit that discussion at all. The only other issue properly referable to the point is issue No. 11, whether the interest claimed is usurious and penal. On an examination of the respondent's grounds of appeal to the lower Appellate Court, the only grounds urged are that the enhanced rate of interest provided for in Ex. L, and carried into Ex. S, is penal and unconscionable and that the lower Court erred in thinking that it had no power to give relief for the usurious and preposterous claim. Cases have been cited to us by the learned Vakil for the respondent to show that the pleadings in this country are to be leniently considered. He contends that practically any objection to the transaction can be made to raise this point as to the binding nature of the interest claimed. He points for example to *Gangapershad Sahu v. Maharani Bibi* (4). There the issue was whether the defendant is bound to pay off the debt. It was held that that enabled the question of the amount to be raised. I cannot, speaking personally, see why in this case the issue could not have been clearly and distinctly taken. One view of it was certainly advanced in issue No. 11 but Mr. S. Varadachari for the respondents quite frankly says that their case here is not for relief under s. 74 of the Contract Act. He based his case entirely on the Hindu Law. I have carefully considered all the cases that we have been referred to. The principle laid down in *Nawab Nazir Begam v. Rao Raghunath Singh* (2) is that where there is no evidence on either side, i. e., as to the necessity for borrowing at the particular rate, their Lordships of the Privy Council would relieve, where "the thing speaks for itself". This is the case previously quoted by the later decision of their Lordships in *Ram Bhujawan Singh v. Nathu Ram* (1). Their Lordships holding that, although there may be necessity to borrow, it is open to the defendants to show that there was no necessity to borrow on the onerous

terms of the mortgage. In that case the rate was Rs. 2-8-0, 30 per cent. simple and in default Rs. 3-2-0 or 37½ per cent. compound. So it seems to me that before any question of reduction of the amount in question can be raised, there being no evidence on either side, we must see if "the matter speaks for itself," that is to say, if it is obvious from the terms of the document that an unfair bargain as against the sons has been concluded by the father. The Privy Council cases to which we have been referred, nearly all concern a rate which is obviously very high. In the case just referred to in *Nawab Nazir Begam v. Rao Raghunath Singh* (2) the sum originally borrowed Rs. 398 became 3 lakhs. In *Rai Radha Kishun v. Jag Sahu* (5), another Privy Council case, the rate was 24 per cent. compound with half yearly rests. Their Lordships observe there that it was evident on the face of the document that the interest charged was far in excess of the commercial rates. In *Ram Bhujawan v. Nathu Ram* (1), the interest was 35 per cent. compound with quarterly rests. *Nand Ram v. Bhupal Singh* (6) refers to a very high rate of interest, the original sum borrowed being Rs. 80 at 27 per cent. compound. In *Manna Lal v. Karu Singh* (7), the Privy Council concurred in altering 18 per cent. compound to 18 per cent. simple. In *Ramchandra Prasad v. Mahabir Prasad Singh* (8), the Patna High Court held that an agreement to pay compound interest on failure to pay simple is not invalid and does not fall within s. 74 of the Indian Contract Act. It, will, I suppose, be agreed that each case must be judged by its own circumstances. In the present case, we have a series of prior transactions between the parties at 12 per cent. and 18 per cent. simple. We have Ex. L with 10½ per cent. simple and in default 12 per cent. compound. Nothing having been paid for over a period of nine years to the lender, the final transaction, Ex. S, which consolidates all the others, reserves a rate of interest at 12 per cent. compound there being no increase on that rate in case of default.

(5) 80 Ind. Cas. 791; 47 M. L. J. 329; (1924) A. I. R. (P. C.) 184; 5 P. L. T. 434; 26 Bom. L. R. 732; 20 L. W. 285; 2 Pat. L. R. 259; 35 M. L. T. 177; 11 O. L. J. 652; 22 A. L. J. 959; 51 I. A. 278; L. R. 5 A. (P. C.) 129; 29 C. W. N. 293; 10 O. & A. L. R. 1384; 1 O. W. N. 481; 4 Pat. 19 (P. C.).

(6) 13 Ind. Cas. 5; 34 A. 126; 8 A. L. J. 1294.

(7) 56 Ind. Cas. 766; 13 L. W. 652; 1 P. L. T. 6; 39 C. L. J. 255 (P. C.).

(8) 64 Ind. Cas. 247.

(4) 11 C. 379; 12 I. A. 47; 4 Sar. P. C. J. 621; 9 Ind. Jur. 158; 5 Ind. Dec. (N. S.) 1012 (P. C.).

It is all very well to consider the case of hardship of the family, but they presumably had the benefit of the amount borrowed. They have also what benefit there might be in delaying the payment of interest and principal. That this has now aggregated to a very large sum there is no doubt. But, on the other hand, the interests of the lender who has been kept out of his money for a long series of years have also to be considered and as stated there is no evidence that he took any undue advantage of his borrower. On the other hand, he warned him that the sum due was very rapidly growing. I cannot agree that on the face of the document or that the thing of itself speaks of an unjust or unfair transaction as far as the sons are concerned. What the commercial rate of borrowing referred to by their Lordships of the Privy Council in *Ram Bhujawan Singh v. Nathu Ram* (1) may be in Cocanada we have no means of knowing. But it is not an unfair inference from the facts as we know them that the lender was not willing to wait for his money any longer unless the borrower consented to pay 12 per cent. compound interest which he had already bound himself to pay by his default in the repayment of the sum borrowed under the previous mortgage; Ex. L. On the best consideration I can give to both the facts and law of this case, I am bound to say, I think, that the learned District Judge was wrong in the view he took of this transaction as far as it affects the sons. In my view the petition must be allowed with costs and the decree of the Additional District Judge set aside and the First Court's decree restored.

IN C. M. P. No. 3092 OF 1923.

This is a petition by the defendants Nos. 2 to 6 with regard to the question of necessity of borrowing and its binding character on the sons and also raises the question of limitation and adoption which were not raised before us. It must be dismissed with costs.

The defendants will have six months from this date to redeem.

IN C. M. P. No. 2561 OF 1923.

Wallace, J.—I agree. I do not quarrel with the principle that the manager of a joint family, whether the father or not, is not entitled in law to borrow money at an exorbitant rate of interest unless there

was necessity for such a rate, and that, if the rate of interest is excessive, the onus will be on the lender to show that there was necessity for such an onerous rate. This involves two principles, firstly, that the rate must be shown to be onerous, and, secondly, that there was pressing necessity at the time of the loan for such an onerous rate. I fail to see how the actual result brought about by the mounting of interest, if not paid, to a crushing figure can affect the second principle. If the manager, *bona fide* was in urgent necessity for money and could not get it at a lower figure, then he was in law justified in borrowing at that figure, and the after *math* of that transaction is irrelevant to the consideration of whether he was justified or not. The onerous nature of the interest would only be justified reasonably if the necessity for the money at the time of the loan was really urgent. The more urgent the need the less unjustifiable a high rate of interest. Both questions are, therefore, questions of fact to be decided by the circumstances of the case. This is the principle approved by the Privy Council in the case quoted by my learned brother reported as *Balla Mal v. Ahad Shah* (3).

Hence it appears to me that a Court has no right to presume without evidence that any particular rate of interest is onerous, at least without affording the plaintiff an opportunity of rebutting that view. A rate *prima facie* harsh may, considering the nature of the security offered, its dubious title or its exigious nature, be perfectly reasonable when the facts are known. Therefore it seems to me that normally the Courts are not entitled to presume anything either way without evidence and these questions are entirely matters of proof in the circumstances of each case. Those attacking the transaction must first show *prima facie* that the rate of interest is unnecessarily high for the circumstances of the case. It may be that in certain cases the original rate of interest is *prima facie* so excessive that proof is practically unnecessary and that the plaintiff must know that it is his duty to show necessity for it. But in other cases, it may be that the rate, although high is not so high that the plaintiff should reasonably take it for granted that he has to explain it, even though the Court does not call upon him to do so. In such a case he cannot reasonably be mulct-ed if he does not explain it. It seems to

me not proper that, when the Trying Court has not considered it necessary to call on the plaintiff to explain the rate of interest, and no issue has appraised him that it is necessary for him to explain it, Courts of Appeal should not interfere without giving him an opportunity to explain it, unless the rate is so monstrous as to be unconscionable in any conceivable set of circumstances, that is, so harsh that no explanation whatever would have any chance of acceptance by the Courts. Under some such principle I would group the Privy Council cases which have been quoted before us. They resolve themselves into three classes:—first, where there is a finding of fact that the rate of interest was excessive and the Privy Council saw no good reason to disturb it, such as *Gangapershad Sahu v. Maharani Bibi* (4), *Hurro Nath Rai Chowdhri v. Randhir Singh* (9), *Nand Ram v. Bhupal Singh* (6), *Nawab Nazi Begam v. Rao Raghunath Singh* (2), *Aziz Khan v. Duni Chand* (10) and *Manna Lal v. Karn Singh* (7), secondly, the cases in which the Privy Council has reduced the rate of interest awarded by the High Court such as *Ram Bhujawan v. Nathu Ram* (1) and *Rai Radha Kishen v. Jag Sahu* (5) in which they restore the Subordinate Judge's finding, that is, the Trying Court's finding on the rate of interest. In the former case the initial rate was 26 per cent. compound interest and in the latter it was 24 per cent. compound interest, rates which the Trying Court had already found excessive. In the former case the Subordinate Judge had, on the question of fact, held that the fair commercial rate was 12 per cent. simple interest. The third class of cases is those in which the Privy Council has increased the rate of interest awarded by the High Court and restored the rate of interest awarded by the Trying Court, such as *Balla Mal v. Ahad Shah* (3). In no case, therefore, has the Privy Council decided "in the air", if I may use that expression, without a finding of fact by one or the other of the lower Courts, that finding of fact being based also not "in the air" or on an appeal *ad miseri cordiam* but on the circumstances surrounding the transaction.

In the present case, the Judicial Assistant

Commissioner, the Trying Court, has considered whether the interest could be called usurious or penal and he had found that it could not. The Additional District Judge has given a very halting judgment on this point, based merely on an *ad miseri cordiam* appeal by the sons, and, without considering whether the rate was at the time of the bond excessive in the circumstances of the case, has based his decision on what has resulted purely from the father's failure to pay anything whatever towards either interest or principal which has caused the interest to mount up to a very large sum.

I should have preferred to send the case back for a finding of fact on this matter of the alleged excessive rate of interest, but I am not prepared to dissent from the order proposed to by my learned brother, considering the long delay that has already occurred in the trial of this case, which is chiefly due to the obstructive tactics of the defendants, to which again is due very much of the swelling of the interest. A further remand would have the further result of prolonging the litigation and swelling the interest still more. As has already been pointed out by my learned brother in neither of the lower Courts was any issue taken on this matter, nor was any plea put forward of any undue influence, while the bond in question was taken in renewal of loans which had run for several years, without payment of a pie either for interest or for principal. I am not prepared to hold that in the present case the rate of interest is on the face of it excessive or unconscionable.

Under these circumstances I agree with my learned brother that the Additional District Judge was not justified in relieving the sons of their obligation to pay the debts since they have not shown that the interest was unduly high in the circumstances of the case, and it was, therefore, not necessary for the plaintiff to prove necessity for such a rate of interest.

V. N. V. C. M. P. No. 2561 allowed;
Z. K. C. M. P. No. 302 dismissed.

(9) 18 C. 511; 18 I. A. 1; 15 Ind. Jur. 34; 5 Sar. P. C. J. 642; 9 Ind. Dec. (N. S.) 207 (P. C.).
(10) 48 Ind. Cas. 933; 23 C. W. N. 130; 101 P. R. 1917; 165 P. W. R. 1918 (P. C.).

CALCUTTA HIGH COURT.APPEAL FROM ORIGINAL DECREE No. 172
OF 1923.

April 30, 1925.

Present:—Justice Sir Ewart Greaves, Kt.,
and Mr. Justice Mukerji.**RAMESHWAR MARWARI—**
PLAINTIFF—APPELLANT

versus

UPENDRANATH DAS SARKAR—
DEFENDANT—RESPONDENT.*Contract Act (IX of 1872), ss. 15, 16, 23—Unlawful agreement—Agreement to stifle prosecution—Coercion—Threat not to withdraw prosecution—Undue influence—Relation between creditor and debtor.*

In order to avoid a contract on the ground that its object was to stifle prosecution, two things must be established,

(1) that there was really a criminal case in respect of a non-compoundable offence pending at the time when the agreement was entered into, and

(2) that one of the objects for which the agreement was entered into was to stifle prosecution of the case. [p. 464, col. 1.]

Collins v. Blantyre, (1765) 1 Sm. L. C. (11th Ed.) 369; 2 Wils. K. B. 342; 95 E. R. 847, *Keir v. Leeman*, (1846) 9 Q. B. 371; 15 L. J. Q. B. 360; 10 Jur. 742; 115 E. R. 1315; 72 R. R. 298 and *Williams v. Bayley*, (1866) 1 H. L. 200; 35 L. J. Ch. 717; 12 Jur. (N. S.) 875; 14 L. T. 802, referred to.

A threat not to withdraw criminal proceedings, already instituted, unless a bond was executed, is not "coercion" as defined in s. 15 of the Contract Act. [p. 464, col. 2.]

The relation between a debtor and a creditor is not necessarily one in which the former is to be taken as being situated in such a position that his will is bound to be dominated by the latter. [p. 464, col. 2.]

So long as there is no agreement not to prosecute, there is nothing to prevent a creditor from taking a security for the payment of his debt, even if the debtor is induced to give the security by a threat of criminal proceedings. [p. 465, col. 1.]

Jai Kumar v. Gauri Nath, 28 A. 718; 3 A. L. J. 506; A. W. N. (1906) 212, relied upon.

Appeal against a decree of the Subordinate Judge, Second Court, Hughly, dated the 12th May 1923.

Babus Baranashibashi Mukerjee and Gopendra Krishna Banerjee, for the Appellant.*Mr. Amarendra Nath Bose and Babu Hiralal Chakravarty* (for *Babu Suresh Chandra Mukherjee*), for the Respondent.**JUDGMENT.****Mukerji, J.**—This appeal arises out of a suit instituted by the plaintiff for recovery of a sum of Rs. 7,662-8-0 due on an instalment bond executed by the defendant on the 13th May 1899, in favour of the plaintiff and his deceased brother, Ram Kumar Marwari. The suit has been dismissed by the learned Subordinate Judge and the plaintiff has, thereupon, preferred

this appeal. The execution of the bond was not denied by the defendant in his written statement but several objections were taken by him as to why the plaintiff should not be granted a decree on the bond. Apart from the objections of a formal nature, the first objection was that the bond was not executed by the defendant out of his free will; the second objection was that the sum of Rs. 18,051 that was mentioned in the bond as being the amount for which the defendant had been found liable on adjustment of accounts was not really due to the plaintiff as the accounts has not been properly adjusted; and the third objection was that the bond had been executed by the defendant at a time when there was a case of a criminal breach of trust pending against him at the instance of the plaintiff and the bond was executed, because it was stipulated that if it was executed the criminal case would be withdrawn. These objections were substantially dealt with by three of the issues that were framed in the suit, namely, Issues Nos. 6, 7 and 8. The learned Judge in his judgment has taken up all these issues together. He has found that there was no proper adjustment of accounts. He has also found that the plaintiff and his brother took the law into their own hands and force the defendant to execute the bond and that the defendant executed the bond under pressure of a criminal prosecution. In dealing with the case as he has done it seems to me that the learned Judge has not kept in view the distinction between the different lines of defence upon which the defendant relied for the purpose of avoiding the liability under the bond. I propose to deal with these defences separately.

Taking the last one first, namely, as to whether the bond was executed for a consideration or object which was unlawful, that is to say, as having been entered into with a view to stifle a criminal prosecution and so, as being opposed to public policy, it appears to me that the facts that are necessary to be established in order to bring the case under s. 23 of the Indian Contract Act have not been established in the present case. The defendant has not produced any of the papers relating to the said criminal case. An application was filed on his behalf asking for time in order to enable him to file copies of the proceeding in that case, and time was granted to him for that purpose. Thereafter, nothing

further was done and all that appears upon the record with regard to this matter is the oral evidence of the defendant himself which is to the effect that Ram Kumar, the plaintiff's brother, and one Srilal instituted a case against him for criminal breach of trust and warrant of arrest was issued against him and that he, therefore, executed the bond in order to get rid of the criminal case. He says further that as he executed the bond the criminal case was withdrawn. He admits in cross-examination that he received no summons in connection with the criminal case and also that no warrant of arrest was served upon him but that there was a search for his *khatas* in the house in which he lived. This is all the evidence on the side of the defendant. On the other hand, the witness examined on behalf of the plaintiff proved that Ram Kumar did not institute the criminal case. This witness, however, was not in a position to say whether any of the other partners instituted the case. Now in order to show that the object of the agreement was to stifle the criminal prosecution it is necessary to prove that there was an agreement between the parties, express or implied, the consideration for which was to take the administration of the law out of the hands of the Judges and to put it into the hands of a private individual to determine what is to be done in the particular case, and that the contracting parties should enter into a bargain to that effect. This is what was laid down in the leading case of *Collins v. Blantern* (1) and other cases, amongst which reference may be made to those of *Keir v. Leeman* (2) and *Williams v. Bayley* (3). On the particular facts of the case before us it will have to be shown that there was really a criminal case in respect of a non-compoundable offence pending at the time when this agreement was entered into and it will also have to be shown that one of the objects for which this agreement was entered into was to stifle the prosecution in that case. It cannot be said that these facts have been established in the present case. As is well-known the same transactions may give rise to a civil as well as a criminal liability

and an agreement to settle a dispute amicably will not be invalid unless the object of the agreement is to stifle a criminal prosecution. This rule enunciated in the cases to which I have referred has been adopted in our Courts as well. See *Rai Charan Purkait v. Amrita Lal Gain* (4).

Then as to the question whether the document was executed by the defendant out of his own free will. In this connection reference must be made to the provision of s. 14 and also, upon the facts of the present case, to ss. 15 and 16 of the Indian Contract Act, because the consent in the present case is said to have been vitiated by coercion and undue influence. The learned Judge has found that the defendant had been forced and coerced to execute the bond. He has come to this conclusion upon the evidence that was before him to the effect that the defendant was threatened by the plaintiff's brother that the criminal case which had already been instituted against him would not be withdrawn. Now these facts, even if established, would not bring the case within s. 15 of the Contract Act, which defines coercion. As regards undue influence the contract would be vitiated if it has been induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other. The relation between a debtor and a creditor is not necessarily one in which the former is to be taken as being situated in such a position that his will is bound to be dominated by the latter. It is, however, urged that there are facts from which this domination of the will may be justly presumed. We have been referred to certain circumstances for the purpose of coming to the conclusion that the case comes within sub-s. (3) to s. 16 of the Contract Act. These circumstances are that although the defendant was only a partner to the extent of $\frac{1}{3}$ rd share in the business, yet by the bond he acknowledged a liability to the extent of R. 18,000 or Rs. 19,000, which, it is stated is much in excess of the amount for which he was really liable. It has also been stated, that the stipulation in the bond for payment of interest on default of payment of any of the instalments as well as other stipulation with regard to stock-in-trade

(1) (1765) 1 Sm. L. C. (11th Ed.) 269; 3 Wils. K. B. 342; 95 E. R. 847.

(2) (1846) 9 Q. B. 371; 15 L. J. Q. B. 360; 10 Jur. 742; 13 E. R. 1315; 72 R. R. 298.

(3) (1866) 1 H. L. 200; 35 L. J. Ch. 717; 12 Jur (N. S.) 675; 14 L. T. 802.

(4) 5 Ind. Cas. 98; 11 C. L. J. 131.

show that the transaction was an unconscionable one. As I have already stated the defendant himself was examined in the case; but in his examination-in-chief I do not find that he made the least attempt to make out a case of undue influence at all. In cross-examination he states that at the time when the bond was executed the matter was settled by one Devendra Nath Ghose, who is apparently an independent man and coal merchant and also by his own eldest brother one Prem Chand Sarkar. The terms of the bond may be considered to be stringent but there is no reason to suppose that the bargain was an unconscionable one. I am, therefore, of opinion that it has not been proved that there was any undue influence in consequence of which the defendant was made to execute this bond. So long as there is no agreement not to prosecute, and as I have said, there are no materials in this case upon which it may be held that there was such an agreement, there is nothing to prevent a creditor from taking a security for the payment of his debt, even if the debtor is induced to give the security by a threat of criminal proceedings: *Flower v. Sadler* (5) and *Jai Kumar v. Gauri Nath* (6).

The argument advanced before us to the effect that there was no proper adjustment of liabilities does not commend itself to me inasmuch as I am unable to find that there was either coercion or undue influence or want of free consent for any other reason which may be taken to have vitiated the transaction. Unless the bond can be impugned on that ground the admission made by the defendant himself as to his liabilities must be taken to be binding on him.

For these reasons, I am of opinion that the judgment of the learned Subordinate Judge cannot be supported and that it should be set aside and that a decree should be entered in favour of the plaintiff for a sum of Rs. 7,662-8-0 with interest pending the suit at the rate of six per cent. per annum.

The plaintiff-appellant will be entitled to his costs in this Court and in the Court below.

Greaves, J.—I agree.

S. D.

Order set aside.

(5) (1883) 10 Q. B. D. 572.

(6) 28 A. 718; 3 A. L. J. 506; A. W. N. (1906) 212.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 223 OF 1922.

December 11, 1924.

Present :—Mr. Justice Venkatasubba Rao.
SUTRAME GOVINDA RAO—PLAINTIFF
—APPELLANT

versus

ANUGODA MATADA RUDRAYYA

AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, O. VIII, r. 6—Set-off, legal or equitable, plea of, whether obligatory—Counter-claim, cause of action on, whether can be split up—Partial satisfaction by reduction of plaintiff's claim—Suit on balance of claim—Res judicata.

A defendant is not under an obligation to plead a set-off, legal or equitable, and his omission to do so does not debar him from bringing a separate suit in respect of it. [p. 466, col. 2.]

Mahabir Pershad Singh v. Macnaghten, 16 C. 682; 16 I. A. 107; 13 Ind. Jur. 133; 5 Sar. P. C. J. 345; 8 Ind. Dec. (N. S.) 451 (P. C.), distinguished.

Ameenammal v. Meenakshi, 60 Ind. Cas. 226; 12 L. W. 173, not followed.

Jenner v. Morris, (1861) 3 DeG. F. & J. 45; 45 E. R. 795 at p. 798; 1 Dr. & Sm. 218; 30 L. J. Ch. 361; 3 L. T. 871; 7 Jur. (N. S.) 375; 9 W. R. 391; 130 R. R. 22, *Pichaiyar v. Subbrayar*, 29 Ind. Cas. 34; 28 M. L. J. 513, relied upon.

In a suit by an agent against a principal for recovery of advances in respect of purchases of certain goods on behalf of the principal, the defendant is not bound to plead by way of set-off a claim for damages for an unauthorised sale of other goods. If the plaintiff gives the defendant credit for a lesser price than that actually realized by him in respect of the unauthorised sale of goods, a separate suit by the principal for the balance due on his claim is not barred by *res judicata*. [p. 468, col. 1.]

Davis v. Hedges, (1871) 6 Q. B. 687; 40 L. J. Q. B. 276; 25 T. L. 155; 20 W. R. 60, *Mondel v. Steel*, (1841) 8 M. & W. 858; 151 E. R. 1288; 6 Dowl. (N. S.) 1; 10 L. J. Ex. 426; 58 R. R. 890, followed.

Second appeal against a decree of the Court of the District Judge, Anantapur, in Appeal Suit No. 81 of 1924, preferred against the decree of the Court of the Subordinate Judge, Anantapur, in Original Suit No. 15 of 1920.

Mr. B. Somayya, for the Appellant.

Mr. A. Krishnaswamy Iyer, for the Respondents.

JUDGMENT.—The question to be decided is, whether s. 11, C. P. C., bars the trial of the present suit.

The facts may be shortly stated. The plaintiff is a trader in the Madras Presidency and the defendant is his agent residing in the Presidency of Bombay. I shall, in my judgment, refer to the plaintiff as principal and to the defendant as agent. The duties of the agent were to purchase goods for the principal, to advance, if necessary, monies for that purpose,

to sell the goods so purchased or to despatch them to other constituents named by the principal. The agent filed O. S. No. 356 of 1919 on the file of the Havari Sub-Court claiming the balance of the amount alleged to be due to him on account of the advances made by him for purchase of goods. In the plaint he gave credit for various sums including an item which represents the sale proceeds of 82 bags of chillies belonging to the principal. It is this item which has been the subject of controversy in this appeal. The suit was thus for the recovery of the advances made, less certain credits which *inter alia* included the sale proceeds referred to above. After the agent filed the suit in the Havari Court, the principal instituted a suit in the District Court, Anantapur, claiming damages from the agent on the ground that sale of the 82 bags in question was unauthorized and contrary to instructions. The agent applied to the District Court under s. 10, C. P. C., for a stay of the later suit and it was accordingly stayed. The agent's suit in the Havari Court was then taken up and tried. The principal raised the contention that a large sum was due to him in respect of damages for the unauthorized sale of 82 bags and if that amount was taken into consideration, the agent would be found indebted to him, far from his being liable to pay the agent any sum. At the trial, the Sub-Judge of the Havari Sub-Court directed the principal to pay a Court-fee on Rs. 3,053-10-0, the amount which the principal claimed as due to him. He, however, failed to pay the Court-fee on the ground that he had already paid the requisite Court-fee on the plaint which he filed in the District Court, Anantapur. He requested the Judge not to raise an issue in regard to damages stating that he intended to have the claim to damages decided in the suit at Anantapur. The Sub-Judge of Havari accordingly gave no decision of the question relating to the unauthorized sale of the 82 bags and passed a decree in favour of the agent for a certain sum. The principal has now asked the Anantapur Court to proceed with the trial of his own suit. The Sub-Judge of Anantapur dismissed the suit on the ground that the trial of it is barred under s. 11, C. P. C. The District Judge of Anantapur in appeal has confirmed the decision of the Sub-Judge. The principal has filed the present appeal.

The point to be decided is whether the question of the principal's right to claim damages from the agent has become *res judicata*. In the previous suit, the agent claimed the balance due in respect of the advances made by him in the course of the agency. There is no dispute that that amount was substantially due. The principal's main defence was that he was entitled to set off a certain sum of money as damages on account of the sale of the 82 bags in question contrary to his instructions. In effect, the principal admitted the amount due and claimed that on account of damages a different sum would be payable to him. This amounts to a pleading of a set-off. But as the sum claimed is not an ascertained sum of money, it is no doubt true that O. IV, r. 6, C. P. C., is inapplicable. But if cross-demands arise out of one and the same transaction or are so connected in their nature and circumstances that they can be looked upon as part of one transaction, Courts of Equity in England have held that the defendant may be allowed to plead a set-off although the amount may be unascertained. The doctrine of equitable set-off has been recognized by Indian Courts and it was open to the principal to plead in the former suit that an amount was due to him for damages. Under s. 11, Explanation 4, any matter which might and ought to have been made a ground of defence in the former suit should be deemed to have been a matter directly and substantially in issue in that suit. There is no doubt that the claim to damages *might* have been a ground of defence in the former suit. The question then is, *ought* the claim to have been made a ground of defence or, in other words, was it incumbent upon the principal to claim in the previous suit the equitable set-off? I put the question in this way because although the principal raised the contention relating to damages in the first instance, his failure to have the issue tried leads to the same legal consequence as an entire omission to raise the plea.

It is conceded at the Bar that a defendant is not under an obligation to plead a *legal set-off* and that his omission does not preclude him from bringing a separate suit in respect of it. But it is urged that so far as an equitable set off is concerned, if the defendant fails to plead it, he does so at the risk of the question becoming *res judicata*. I cannot agree to this conten-

tion. If there is no obligation on the part of a defendant to plead a legal set-off, which is a matter of right, I fail to see why he should be in a worse position in regard to an equitable set-off which originally was merely permissive in character. The learned Vakil for the agent has relied upon *Mahabir Pershad Singh v. Macnaghten* (1) but a close examination of the facts of the case will show that this case does not support his argument. It will be seen that the mortgagor in that suit was given a decree for the rents which according to the present contention ought to have been claimed by way of set-off in the previous suit by the mortgagee. The claim disallowed by the Judicial Committee was the claim to have the two decrees, the decree in the mortgage suit and the decree in the rent suit, set-off against each other and to treat, as a consequence, the mortgage decree as of no avail. This is not an authority bearing on the question.

The next case relied upon is *Ameenammal v. Meenakshi* (2). The facts are entirely different and such observations as there are in the judgment of Sadasiva Iyer, J., to the effect that it is imperative upon a defendant to plead an equitable set-off are obiter and are opposed to the practice and the decisions of the English Courts: see *Jenner v. Morris* (3), and 25 Halsbury's Laws of England, page 485. *Pichaiyar v. Subbarayar* (4) also supports my view.

It is not obligatory, therefore, upon a defendant to plead an equitable set-off. But there is a feature in the present case which presents some little difficulty. In the agent's suit he gave credit for a certain item which according to him represented the sale proceeds of the 82 bags in question. A decree was passed on the footing that the principal was entitled to that credit. The effect of this is, that the principal has already obtained by virtue of this decree a portion of the damages which he claims he is entitled to. If in the present action, the Court comes to the conclusion that the principal is entitled to damages, it will become necessary to reduce the amount which otherwise may be awarded to him, by the sum for which he has obtained

credit in the previous suit. In other words if it is held that the question of damages has not become *res judicata* the principal will, in effect, be allowed to split up his claim to damages, and as he has obtained a portion in the first action the balance will be awarded in the second. It is the propriety of this proceeding that has to be decided in this appeal. There is no Indian case on the point, but the law is clearly laid down in English decision that this procedure is authorized.

In *Mondel v. Steel* (5) it was held: "In all actions for goods sold and delivered with a warranty, or for work and labour, as well as in actions for goods agreed to be supplied according to a contract, it is competent for the defendant to show how much less the subject-matter of the action was worth by reason of the breach of the contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract; and he is precluded from recovering in another action to that extent, but no more." To take a concrete instance, suppose A entrusts his watch to B for repairs to be effected. B effects the repairs but breaks the lid and delivers the watch to A. B sues A for Rs. 50 charges for repairing the watch. A may plead that he is not liable to pay B Rs. 50, because he estimates the damage to his watch by the lid having been broken at Rs. 125. If A's case is made out the suit of B is dismissed. This suit will not bar A from claiming in a separate action the balance of the damages payable to him, Rs. 75. The principle on which this decision is based is that in truth there was no dividing of the cause of action, but the employer is merely allowed to defend himself by showing how much less the subject-matter of the action was worth by reason of the breach of the contract. To the extent that he obtains an abatement of price or wages, he must be considered as having received satisfaction for the breach of the contract and he is precluded from recovering in another action only to that extent. The previous suit does not operate as a bar to any further extent. This principle applies in action for goods sold and delivered with a warranty as also for work and labour. The judgment of the Court

(1) 16 C. 682; 16 I. A. 107; 13 Ind. Jur. 133; 5 Sar. P. O. J. 345; 8 Ind. Dec. (N. S.) 451 (P. O.).

(2) 60 Ind. Cas. 226; 12 L. W. 173.

(3) (1861) 3 D. G. F. & J. 45; 45 E. R. 795 at p. 798; 1 Dr. & Sm. 218; 30 L. J. Ch. 361; 3 L. T. 871; 7 Jur. (N. S.) 375; 9 W. R. 391; 130 R. R. 22.

(4) 29 Ind. Cas. 34; 28 M. L. J. 513.

(5) (1841) 8 M. & W. 858; 151 E. R. 1288; 6 Dowd. (N. S.) 1; 10 L. J. Ex. 426; 58 R. R. 890.

which was delivered by Parke, B., traces the course of the decisions on this point and deals exhaustively with this subject.

Davis v. Hedges (6) takes the matter a little further. The defendant has the option to obtain an abatement in the first action, but he is not bound to do so. Hannen, J. who delivered his own as well as Blackburn, J.'s judgment says at page 692*.

"We have, though not without some doubt, come to the conclusion that the better rule is, that the defendant has the option, if he pleases, to divide the cause of action, and use it in diminution of damages, in which case, as Parke, B., says, he is concluded to the extent to which he obtained, or was capable of obtaining, a reduction; or he may, as in the present case, claim no reduction at all, and afterwards sue for his entire cause of action."

Going back to the illustration which I have given, A, the owner of the watch is not bound to plead in B's action that he is entitled to an abatement. He may allow a decree to be passed for the sum claimed, namely, Rs. 50 and bring a second suit for the damages sustained by him, namely, Rs. 125. The first action is not a bar to the second suit. In the case of *Davis v. Hedges* (6) the process is described as dividing the cause of action, but nevertheless the second suit is not held to be barred. The point again is very fully considered in the judgment.

Following these two decisions I hold that the question of the principal's right to claim damages from the agent has not become *res judicata*. The second appeal is, therefore, allowed, the decision of the District Judge is reversed and the suit is remanded for trial on the merits. I make no order as to costs. The appellant will have a refund of the Court-fee paid on the memorandum of appeal in this and in the lower Appellate Court.

As the Subordinate Judge's Court at Anantapur is not in existence at present, the suit will be tried by the District Judge of Anantapur.

*Appeal allowed;
Suit remanded.*

V. N. V.

(6) (1871) 6 Q. B. 687; 40 L. J. Q. B. 276; 25 L. T. 155; 20 W. R. 60.

*Page of (1871) 6 Q. B.—[Ed.]

CALCUTTA HIGH COURT. SPECIAL BENCH.

ORDINARY ORIGINAL CIVIL JURISDICTION.

June 19, 1925.

Present:—Sir Lancelot Sanderson, Kt.,
Chief Justice, Mr. Justice C. C. Ghose and
Mr. Justice Buckland.

In the matter of two ATTORNEYS.

Attorney, duties of—Duty to Court—Breach of duty—High Court, disciplinary jurisdiction of—"Incorporated Law Society, Calcutta," whether can move High Court.

An attorney, being an officer of the Court, owes a duty to the Court, as well as to his client. [p. 470, col. 1.]

The "Incorporated Law Society, Calcutta" is competent to bring a breach of his duties by an attorney to the attention of the High Court, when the matter is brought to its notice. [p. 470, col. 2.]

The plaintiff in a suit, who had obtained an attachment of certain furniture before judgment, stored it at premises belonging to a charitable trust, under arrangement with the trustees. The furniture was sold after some months by the Sheriff, who realized the sale-proceeds. A claim was then made by the trustees upon the plaintiff for rent amounting to Rs. 3,250. The attorney who was acting for the plaintiff, thereupon, wrote to the Sheriff, asking for the amount to pay the rent, and enclosing the bill. The Sheriff sent the amount. The plaintiff, however, did not wish to pay the amount to the landlords, and, on his instructions, the attorney wrote a letter to the trustees repudiating all liability in respect of the rent of the premises, but "as a matter of grace" enclosing a cheque for Rs. 474 as a donation to the trust. The trustees brought the matter to the notice of the "Incorporated Law Society, Calcutta", and the latter moved the High Court in the matter:

Held, (1) that the attorney made a serious mistake in making himself a party to the course adopted by his client, and that although it was not suggested that there was any moral turpitude on his part, yet he was guilty of a breach of the duty which he owed to the Court; [p. 470, col. 1.]

(2) that having regard to the way in which the money was obtained from the Sheriff, and the purpose for which it was obtained, the attorney should have insisted on his client paying the money to the landlords in full, or returning it to the Sheriff. [*ibid.*]

Rule obtained by the Incorporated Law Society, Calcutta.

Mr. N. N. Sircar (with him Mr. B. K. Ghosh), for the Society.

Messrs. L. P. E. Pugh and T. Ameer Ali, for the first Attorney.

Mr. H. D. Bose (with him Mr. R. Westmacott), for the second Attorneys.

JUDGMENT.

Sanderson, C. J.—This is a Rule which was issued against two attorneys of the Court and which was based upon allegations contained in a petition, presented by the President of the Incorporated Law Society, Calcutta.

In view of the course, which has been

adopted by the learned Counsel, who appear for the attorney, whose name stands first on the record, it is possible for me to deal with this matter shortly.

It appears that one Gora, the plaintiff in a suit of *Gora v. Templeton*, instituted in the High Court, obtained an attachment of certain furniture before judgment.

The furniture was in some premises in Calcutta which were rented at about Rs. 600 per month. Apparently it was thought desirable on the part of the plaintiff that the furniture should be removed to premises which could be obtained at a less rental. The result was, that by an arrangement made by or on behalf of the plaintiff and the person representing a certain trust, the furniture was removed to and stored at premises belonging to the trust, namely, 84, Dhurumtolla Street.

The Sheriff, who had attached the furniture, had nothing to do with this arrangement.

The furniture was lying in the premises 84, Dhurumtolla Street for about 10 months and was then sold. The proceeds of the sale were in the hands of the Sheriff. A claim was then made by the owners of the premises upon the plaintiff for rent at the rate of Rs. 325 per month.

The attorneys, against whom this Rule was issued and who were acting for the plaintiff, wrote to the Sheriff on the 9th of May 1924 as follows:—"Perhaps you may remember that our client rented the premises No. 84, Dhurumtolla Street for storing the furniture attached herein and the landlord has submitted his bill at Rs. 325 per month. We shall be much obliged if you will kindly send us your cheque for Rs. 3,250 out of sale proceeds to enable our client to discharge the liability. We enclose herewith a copy of the said bill."

Accordingly a cheque for Rs. 3,250 was sent to the attorneys by the Sheriff and a receipt was given dated the 13th of May. The terms of the receipt were as follows:—"Received from the Sheriff of Calcutta by cheque No. 61 on the Imperial Bank of India the sum of Rs. (3,250 0 0) three thousand two hundred and fifty only being the rent of the premises No. 84, Dhurumtolla Street from November 1922 to August 1923 in the above cause."

The cheque or its equivalent was handed by the attorneys to their client and they obtained a receipt from him in these terms: "Received from (the attorneys) the sum

of Rs. 3,250 being amount realized by them from the Sheriff of Calcutta for payment of rent of premises No. 84, Dhurumtolla Street which I undertake to settle with the landlord."

It seems clear that the sum of Rs. 3,250 was obtained by the attorneys from the Sheriff upon the representation that the money was due to the landlords of 84, Dhurumtolla Street, for the rent of the premises and that if it were received from the Sheriff it would be paid in full to the landlords.

When the attorneys handed the money to their client I have no doubt that it was expected that the client would pay the amount in full to the landlords. I think that is obviously the meaning of the receipt which the plaintiff gave to the attorneys.

It turned out, however, that the attorneys' client did not propose to pay the Rs. 3,250 to the landlords.

In my opinion, it was then the duty of the member of the firm of attorneys, who had this matter in hand, to have told his client in effect: "You must either pay this money (3,250) to the landlord in full or the money must be returned to the Sheriff."

Instead of that being done the attorney, upon the instructions of his client, wrote to the trustees of the society a letter, the material part of which is as follows:—"Our client is informed by the Sheriff that you have sent in a bill to him in respect of the rent of the premises and he tells us that the Sheriff repudiates all liability in the matter on the ground that he did not engage the premises. Our client also denies liability on the ground that he did not engage them but as a matter of grace he instructs us to send you as we do herewith a cheque for Rs. 474, the balance remaining in his hands out of the monies realized by the sale after deducting the expenses he has been put to. Our client considers this sum a very handsome donation to charity in the circumstances."

In my judgment, that is a letter which ought not to have been written and the attorney ought not to have made himself a party to the course adopted by his client. The money had been obtained from the Sheriff on the express understanding that the money was due to the owners of the premises and that the whole amount would be paid to them in respect of the rent of

the premises. But for that representation the money would not have been paid to the attorney by the Sheriff. Having regard to the way in which the money was obtained from the Sheriff and the purpose for which it was obtained apart from other considerations, it is clear that the plaintiff in this suit was not entitled to retain the balance in his hands. The attorney, being an Officer of the Court, owed a duty to the Court, as well as to his client, and in my judgment the attorney made a serious mistake in the course which was adopted. If the money was not to be used for the payment of the rent, it should have been returned to the Sheriff. The learned Counsel, who appeared for the attorney, has stated that the attorney now recognises that a serious mistake was made.

It is not suggested that there was any moral turpitude on the part of the attorney: I am of opinion, however, that there was a breach of the duty which the attorney owed to the Court.

I understand that at some date, subsequent to the above-mentioned letter, the plaintiff sent a cheque for Rs. 800 to the owner of the premises but that sum was not accepted and the cheque was not cashed. The result is that at present no part of the Rs. 3,250 has been used for the payment of the rent. The attorney, through his learned Counsel, has undertaken to return the sum of Rs. 3,250 to the Sheriff to-day, and, through his learned Counsel he has expressed his regret for the mistake, which was made.

In these circumstances and in view of the above-mentioned undertaking, my learned brothers and I are of opinion that with regard to the first attorney, on the record, it is not necessary for this Court to take any further steps or to make any order in respect of Rule, which accordingly is discharged.

With regard to the second attorney on the record, it is clear that at the time when the material incidents of this case occurred, he was not in India and he was in no way responsible for the matters, upon which the Rule was based. If that fact had been known to the Court at the time the application for the Rule was made, I feel sure that the Rule would not have been issued in his case. In the case of the second attorney on the record, therefore, the Rule is discharged.

The learned Counsel who appeared for

the Incorporated Law Society stated that if the first attorney would withdraw certain passages in the correspondence to which objection was taken, the Law Society would not ask for costs. The passages have now been withdrawn. Consequently we make no order as to costs.

There remains one more matter to which I must refer having regard to certain remark which were made by the learned Counsel who appeared for the first attorney on the record, with regard to the action which was taken by the Incorporated Law Society.

My learned brothers and I are of opinion that when the matter, which we have been considering, was brought to the notice of the Incorporated Law Society, it was competent to and proper for the Society to bring the matter to the attention of the Court.

Ghose, J.—I agree

Buckland, J.—I agree.

N. H.

Rule discharged.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 38 AND 46 OF 1923.

July 24, 1925.

Present:—Mr. Daniels, J. C., Mr. Dalal, A. J. C., Mr. Wazir Hasan, A. J. C., and Mr. Simpson, A. J. C.

Babu ACHAL SINGH AND ANOTHER—
PLAINTIFFS—APPELLANTS

versus

Babuain SHAGHUNATH KUER—
DEFENDANT—RESPONDENT.

Oudh Estates Act (I of 1869), as amended by U. P. Act) III of 1910), ss. 13A (2), (3), 22—List II Estate—Will by taluqdar in favour of agnate—Legatee not nearest agnate at time of testator's death—Will, whether governed by sub-s. (2) or sub-s. (3) of s. 13A—Registration, form of—Registration Act (XVI of 1908), ss. 35, 42, 43. Per Daniels, J. C., and Simpson, A. J. C. (Dalal, A. J. C., dissenting).—A Will made by a taluqdar of an estate entered in List II of the Lists prepared under s. 8 of the Oudh Estates Act, where the succession is governed by s. 22 of the Act, in favour of an agnate who is not the nearest agnate of the testator at the time of the testator's death, is governed by sub-s. (2) of s. 13A of the Oudh Estates Act, as amended by the Oudh Estates Amendment Act of 1910 and, therefore, a Will in favour of such a person duly executed and attested more than three months before the testator's death and registered under ss. 42 and 43 of the Registration Act is, in all respects, a good and valid one. [p. 478, col. 1; p. 480, col. 1.]

Per Dalal, A. J. C.—The plain meaning of cl. (2) of s. 13A of the Oudh Estates Act is that it includes every kind of heir mentioned in the amended s. 22 of

the Act and no one else. Clause (10) of s. 22 provides only for the nearest male agnate and where a person is not such male agnate at the time of the testator's death when the bequest takes effect he does not come under that clause. [p. 473, col. 1.]

In interpreting cl. (2) of s. 13A of the Oudh Estates Act, the Court has to look for possible heirs at the time of the *taluqdar's* death and in cl. (10) of s. 22 the only possible heir can be the nearest male agnate. [ibid.]

Per *Daniels, J. C.*—The words "in the absence of other heirs" in cl. (2) of s. 13A of the Oudh Estates Act apply just as much to the absence of heirs who might take in priority under cl. (10) as to the absence of other heirs falling under cls. (1) to (9) of s. 22 of the Act. [p. 476, col. 2.]

The classification introduced by s. 13A of the Oudh Estates Act is a perfectly natural and intelligible one, namely, first the immediate heir and one or two persons who are grouped with him, then the remote heir, and lastly the person who is not a possible heir at all, and there is nothing either absurd or improbable in the Legislature enacting that when the estate is bequeathed to a kinsman of the testator it should continue to be governed by the Act, whereas if it passes to a stranger it should not be so governed. [p. 477, col. 2.]

The difference between cls. (2) and (3) of s. 13A of the Oudh Estates Act is that in the case of cl. (2) the Will may be registered by deposit with the Registrar in a sealed cover with the name of the testator and a statement of the nature of the document, whereas in the case of a person falling under the third clause there must be what may be called open registration, that is to say, the document must be registered with the same formalities as any ordinary deed. There is this further difference that by ss. 14 and 15 of the Act a Will in favour of any of the persons mentioned in cls. (1) and (2) of the section leaves the estate still subject to the provisions of the Act, whereas a Will in favour of a person under cl. (3), except where it is in favour of another *taluqdar*, takes the estate out of the Act and brings it under the operation of the ordinary law of succession. p. 476, col. 2.]

First appeal from a decree of the Subordinate Judge, Rae Bareilly, dated 26th of May 1923, in Regular Suit No. 172 of 1921.

Sir Dr. Tej Bahadur Sapru and Messrs. Bisheshwar Nath Sirivastava and Grija Shanker, for the Appellants.

Messrs. P. L. Banerji, Ali Zaheer and Hasan Imam, for the Respondent.

JUDGMENT.

Dalal, A. J. C.—(February 19, 1925).—A *Taluqdar* B. Sahdeo Bakhsh Singh made a Will in favour of the plaintiff Achal Singh. This Bench has held that the Will was duly executed, attested and deposited with the Registrar. So far the decision of the Trial Court was affirmed and the appeal of the defendant Babuain Sagonath Kuar the widow of the deceased *taluqdar* has been dismissed.

In that suit the Trial Court further held that the Will was inoperative as regards the *taluqdari* property because the Will was

not registered openly but deposited with the Registrar in accordance with s. 43 of the Registration Act. Under s. 13-A of the Oudh Estates Act, as amended by local Act No. III of 1910, a Will of a *taluqdar* property has to observe certain formalities which are more or less rigorous according to the class to which the beneficiary belongs. If the beneficiary is a person falling under cl. (1) of that section a Will to be operative need only be executed and attested; if he belongs to cl. (2) in addition to execution and attestation, it must be registered either openly or by deposit within a certain time of the testator's death and of the date of the execution; if he belongs to cl. (3) the Will besides being executed and attested must be openly registered with the same conditions as to time fixed for a Will in favour of a person of cl. 2 (2). There is no difficulty here as to the period of time allowed by the Act. The Will was deposited 10 years prior to the death of the *taluqdar* and two days after its execution.

The point which arises for decision is whether Achal Singh is one of the persons included in cl. (2) of this section. At the time of his death the *taluqdar* had no son or any lineal descendant alive and he was the only son himself of his father. His mother pre-deceased him, but his widow was alive and is now defendant to the present suit. Achal Singh plaintiff belonged to a distant branch of the *taluqdar's* family and counting according to degrees he would have been the next reversioner if fourteen intermediate relations had not existed. On these facts the learned Judge of the lower Court held that he was not a person included in cl. (2).

I am in agreement with that finding. Section 13A is one of two sections which replaces and considerably alters s. 13 of Act I of 1869. The former section treated jointly transfers and bequests and in the amended Act the two are distinguished. In this case we are concerned only with a bequest which is dealt with in s. 13A. Confining ourselves to a bequest the former section reads as below:—

"No *taluqdar* shall have power to bequeath his estate to any person not being either

(1) a person who under the provisions of this Act or under the ordinary law to which persons of the donor or testator's tribe and religion are subject would have suc-

ceeded to such estate . . . if such *talukdar* . . . had died intestate, or

(2) a younger son of the *talukdar* . . . in case the name of such *talukdar* appears in the third or the fifth of the lists mentioned in s. 8 ;

Except by . . a Will executed and attested not less than three months before the death of the . . . testator in manner here in provided . . . and registered within one month from the date of its execution."

"Registered" here includes deposit under s. 45 of the Registration Act as enacted in the amending Act X of 1885.

This Court interpreted the words "would have succeeded" widely and did not confine them to the immediate heir under s. 14 of the Act. It was held here that the word included every heir mentioned under s. 22 of Act I of 1869 which laid down the special devolution of a *taluka* by way of succession: *Rae Jagatpal Singh v. Thakurain Balraj Kuar* (1). On appeal their Lordships held that a person who would have succeeded according to the provisions of the Act meant the person or one of the persons to whom the estate would have descended according to the provisions of the special clause of s. 22 applicable to the particular case. In that case the younger son of a *talukdar* had acquired a *taluka* from his father by bequest and their Lordships held that the property went out of the entail as laid down in s. 15.

It appears that the *talukdars* did not desire their estate to go out of the entail under such circumstances and their desire to continue the entail where a bequest was made to some one other than the immediate heir led to the amendment of the Act in 1910.

We are not concerned with, nor have we any evidence as to exactly what the *talukdars* desired. In my opinion codification in India is to a certain extent a gamble. First of all Indians have to express themselves in a language which is after all foreign to them. Local Governments do not command the help of men trained in drafting laws and, even at the time of legislation, I do not think that it is settled accurately and in detail what a particular Act is required to provide for. There are vague notions to remedy an evil or to satisfy certain sentiments but the full details are not worked out. When this is my view of

present day codification in India, arguments as to what the Legislature desired or did not desire leave me unimpressed.

It will be safer for a Judge to give effect to the language of the Act apart from all other considerations. It is obvious that in cl. (1) the interpretation of their Lordships of the Privy Council given to the words "would have succeeded" is adopted and a daughter and daughter's son are added to that clause. Persons of the clause are defined as below:—

"To a person who might, in the absence of other heirs, have succeeded to such estate, portion or interest under the provisions of this Act applicable to such estate, had the person so bequeathing died intestate as to his estate, at the time when the bequest took effect."

To my mind the plain meaning of these words is that the clause includes every kind of heir mentioned in the amended s. 22 and no one else. In s. 22 the persons stated to be heirs under intestate succession are:—

"(1) The eldest son and his male lineal descendants ;

(2) if such eldest son shall have died in the lifetime of the *talukdar*, leaving male lineal descendants, then to the eldest and every other son of such eldest son successively, according to their respective seniorities and their respective male lineal descendants ;

(3) if such eldest son shall have died in his father's life-time, without leaving male lineal descendants, then to the second and every other son of the said *talukdar* successively according to their respective seniorities and their respective male lineal descendants ;

(4) in default of such son or his male lineal descendant, then to such person as the *talukdar* shall have adopted and his male lineal descendants ;

(5) in default of such adopted son and his male lineal descendants, then to the eldest and every other brother of such *talukdar* according to their respective seniorities and their respective male lineal descendants ;

(6) in default of such brother and his male lineal descendants, then to the widow of the deceased *talukdar* (provision being made in case of more than one surviving widow) ;

(7) on the death of such widow, then to such son as the said widow shall, with the consent in writing of her deceased husband,

have adopted and his male lineal descendants;

(8) similarly every other widow;

(9) in default of any such widow or any such adopted son, or his male lineal descendants, then to the mother of the *talukdar* (widows and mothers have only a life estate);

(10) in default of or on the death of such mother, then to the nearest male agnate according to the rule of lineal primogeniture."

We need not go on to cl. (11) because the plaintiff claims to belong to cl. (10). Clause (10) provides only for the nearest male agnate and as the plaintiff was not such male agnate at the time of the *talukdar's* death when the bequest took effect he does not come under that clause. This is the plain answer to the plaintiff's claim.

It was argued on his behalf that the nearest male agnate meant the entire class of agnates and included every possible agnate. In my opinion such an interpretation would be a contradiction of terms. In interpreting cl. (2) of s. 13A we have to look for possible heirs at the time of the *talukdar's* death and in cl. (10) the only possible heir can be the nearest agnate. Some ridicule was cast by the learned Counsel for the plaintiff-appellant on the expression used by the lower Court of a possibility upon a possibility. What the lower Court meant by that expression is obvious. It meant that the Court has to look to possible heirs and not to heirs who would be possible on the disappearance of these possible heirs. We have already noticed the expression "in default" used at the commencement of every clause of intestate successors beginning with cl. (4) of s. 22 and in cls. (2) and (3) the right of members of cl. (2) is stated to accrue on the death of members of cl. (1) and that of cl. (3) on the death of the members of clauses (1) and (2). The words "in the absence of other heirs" in clause (2) of s. 13A must be given the same meaning. What is meant is that all the persons who could come under cls. (1) to (10) of s. 22 are included in this cl. (2) of s. 13A.

The argument of the appellant's learned Counsel that on this interpretation all except the immediate heir would be excluded has no substance. The eldest son and his descendants are mentioned in cl. (1) of s. 22. They will all come under cl. (2) of s. 13A except the eldest son who being

the next heir would go to cl. (1). Every son of the *talukdar* and the descendants of every such son are described in cl. (3) of s. 22 so they also will fall under cl. (2) of s. 13A, similarly the adopted son and his lineal descendants—(cl. 4 of s. 22); all the brothers and their lineal descendants (cl. 5), every widow, her adopted son, and the descendants of that adopted son, cls. 6, 7 and 8), mother (cl. 9) and nearest agnate (cl. 10). All these persons according to the language of the Act come within cl. (2) of s. 13A, so it is difficult to understand how brothers and sons would be barred from entry into cl. (2) if the interpretation put upon that clause by me is correct.

It was questioned how the *talukdar* will know who would be his nearest male agnate at the time of his death? The answer to this question being that he would not know the argument was founded on this answer that the *talukdar* would not know how to make a bequest in favour of a particular agnate. The answer to such an argument is short. The *talukdar* must not take risks and should register a Will of his in favour of an agnate publicly. If such an agnate happens to be the nearest male agnate at the time of the testator's death the estate will remain in the entail otherwise it will go out of the entail. In my opinion the *talukdars* were more concerned with the preservation of the entail in certain cases than with doubt as to how to register their Wills. Even where a Will is openly registered in favour of an agnate and that agnate at the time of the testator's death happens to be the nearest male agnate, the entail will not be broken because at the time the bequest took effect that agnate would come within cl. (2) of s. 13A.

If the interpretation of the appellant that cl. (2) of s. 13A included every agnate of the *talukdar* and every relation who may be an heir under cl. (11) of s. 22 were right, no need arose of enacting the words "under the provisions of this Act applicable to such estate had the person so bequeathing died intestate as to his estate at the time when the bequest took effect." If all the agnates were to be included why should the possible heirs be limited to the time when the bequest took effect? It should also be observed that cl. (3) is not relegated to strangers as would be the case if cl. (2) included every conceivable relation of the *talukdar*.

Clause (10) of s. 22 does not designate a

class but only one person the nearest male agnate according to the rule of lineal primogeniture at the time of the *taluqdar's* death. It is noticeable that no intestate heir is mentioned as a class; for instance, the Act does not content itself by mentioning brother in cl. (5) of s. 22 to indicate all members of that class but goes on to mention one brother after another and also provides for lineal descendants of each. I am not in agreement with the interpretation put on the judgment of their Lordships of the Privy Council in *Thakurain Balraj Kunwar v. Rae Jagatpal Singh* (2) that the person who would have succeeded indicated a class of persons including the descendants of that person. The opinion of Pandit Kanhaiya Lal at present a learned Judge of the High Court of Allahabad appears to me to be correct that their Lordships interpreted these words as the immediate heir not including his descendants [*Ghulam Abbas Khan v. Bibi Ummatul Fatima* (3)]. I mention this point because an argument was sought to be founded on behalf of the appellant on an assumed analogy that just as the immediate heir as a class included, according to their Lordships, his descendants so the nearest male agnate in cl. (10) of s. 22 included every possible agnate.

I would, therefore, hold that the Will in favour of Achal Singh does not operate as a bequest of *taluqdari* property.

The other issues which arise in this appeal are grounds of appeal Nos. 5, 6, 7 and 9. Ground No. 8 was abandoned. It was admitted by the learned Counsel for the respondent lady that the lower Court omitted through an oversight to grant a decree to the plaintiff for Rs. 1,900 which was the balance of the current account in the Allahabad Bank at the time of the *taluqdar's* death and that the plaintiff appellant was entitled to mesne profits in respect of village Paicharwa since the date of the death of the *taluqdar*.

The fifth ground of appeal urges that Rs. 7,600 which was in deposit in the Allahabad Bank on the date of the *taluqdar's* death belonged to the *taluqdar* and not to the defendant lady, his widow. The lower Court has held that this money was part of a gift of Rs. 30,000 which the lady

received from her father-in-law to whom the money was presented by her father. The finding is one of fact and the learned Judge of the lower Court had the advantage of noting the demeanour of witnesses. We feel, however, that we cannot agree with this finding. The defendant lady did not offer herself for examination. A copy of the fixed deposit account (Ex. 91, p. 143) shows that this sum of Rs. 7,600 was deposited in cash on behalf of the *taluqdar* by his agent Munshi Baqar Ali on 31st July 1917. Baqar Ali is still in the lady's service but was not examined as a witness. The story that the money belonged to the lady is told by an inferior servant Gajadhar Prasad (D. W. No. 2). He narrates a strange story of the deceased *taluqdar's* father leaving the sum of Rs. 30,000 with him for two months after the marriage of the lady. He goes on to state that B. Sheo Sahai ordered him to take the money to the *zanana* house and give it to the defendant. For some 20 years he had no knowledge as to what became of the money. Then suddenly in 1917 the lady gave him Rs. 7,600 to deposit in the Allahabad Bank. He took the money to the Bank which refused to accept it, the usual practice of the Bank was not to accept a deposit from a married lady whose husband was alive. Gajadhar Prasad thereupon referred the matter to the *taluqdar* who ordered that the money may be deposited in his own name. The evidence of another servant Khuda Bakhsh is of no value. He deposes only to bringing a sum of Rs. 30,000 on his elephant as a present from the lady's father to B. Sheo Sahai. He has no knowledge of the alleged deposit nor of B. Sheo Sahai making over any sum to the lady. No accounts were produced to show that subsequent to 1917 the *taluqdar* paid interest on this sum to his wife. On behalf of the plaintiff it is proved by reference to an account in the District Co-operative Bank of Rae Bareilly (Ex. 93, page 221) that only a day previous to the deposit of Rs. 7,600 in the Allahabad Bank the *taluqdar* had withdrawn Rs. 7,530 and odd from the Co-operative Bank. It is true that there is nothing to connect the two sums but the proximity of the dates and the close identity of the amounts satisfy us that it was this sum with a small addition which was taken to the Allahabad Bank and deposited there. Better evidence to prove ownership of this amount, if it

(2) 3 Ind. Cas. 359; 26 A. 393; 8 C. W. N. 699; 11 Bom. L. R. 516; 1 A. L. J. 384; 7 O. C. 248; 31 I. A. 132; 8 Sar. P. C. J. 639.

(3) 31 Ind. Cas. 748; 18 O. C. 188 at p. 238; 2 O. L. J. 636.

did belong to the lady, was within her control and was withheld from the Court. The conclusion is that such evidence if produced would not have favoured her case. We hold that this sum of Rs. 7,600 belonged to the *taluqdar* and not to the lady and that the plaintiff is entitled to receive it.

As to ground No. 7 it was admitted that the decree ought to have been passed in the plaintiff's favour on this account for Rs. 1,960. This valuation of List A of the plaint was admitted by the defendant (see page 33 of the printed record, Part I). The list is printed on page 9 of the printed record. As to plaintiff's further claim for Rs. 1,000 as price of 22 guns (item No. 13 of his list) it is not proved. The lady has denied possession of the guns and there is no evidence produced by the plaintiff to the contrary.

My learned senior colleague is not in agreement with me in my decision on the question of law. He agrees in the other findings. The question of law, shall, therefore, be referred under s. 98, C. P. C., to another Judge of this Court for decision.

In any case the appeal must succeed with proportionate costs in the following matters:—

(1) The plaintiff shall be entitled to recover the deposit of Rs. 7,600 from the Allahabad Bank.

(2) He shall be entitled to recover Rs. 1,900 balance of current account in the Allahabad Bank.

(3) The valuation of moveables (see list printed at page 344) shall be altered from Rs. 1,015 to Rs. 1,960.

(4) The plaintiff shall be declared entitled to mesne profits of the Paicharwa property from the date of the *taluqdar's* death to the date of his taking over possession of that property from the defendant lady.

A decree shall be passed granting the above reliefs to the plaintiff in addition to the decree passed in his favour by the lower Court.

If my learned colleague's opinion prevails the plaintiff shall be further decreed possession with mesne profits of all the *taluqdari* properties of List A of the plaint Nos. 1 to 6. If the point of law is decided against the plaintiff-appellant his appeal as regards the *taluqdari* property shall be dismissed.

Parties shall receive and pay costs according to their final success and failure.

Daniels, J. C.—(February 23, 1925).—The question of law which arises in this

appeal is whether a Will executed on 18th June 1910 by Babu Sahdeo Bakhsh Singh, Taluqdar of Osah in favour of the plaintiff-appellant Babu Achal Singh *alias* Madho Singh was executed in accordance with the requirements of s. 13A of Act I of 1869, (hereinafter referred to as the Act) as amended by U. P. Act III of 1910. The Will was executed in accordance with sub-s. (2) of that section, that is to say, it was duly executed and attested more than three months before the testator's death, and was registered under ss. 42 and 43 of the Indian Registration Act two days after its execution. It was not registered with the formalities required by sub-s. (3), that is to say, it was not registered under the ordinary law relating to the registration of documents other than Wills in accordance with s. 35 of the Act. The question is whether the plaintiff is a person falling under sub-s. (2) or sub-s. (3) of s. 13A. If he comes under the former sub-section the Will was in all respects a good and valid Will, if he comes under sub-s. (3), the Will is invalid in respect of any property coming under the provisions of the Act. The learned Subordinate Judge has taken the latter view and has, therefore, dismissed the plaintiff's suit in respect of all the *taluqdari* property of the deceased. The remaining plaintiffs are the heirs of Raja Rameshwar Singh to whom Babu Achal Singh sold part of the estate for the purpose of obtaining funds to finance the litigation. The defendant Babuain Saghunath Kunwar is the widow of the deceased and is entitled to succeed to the estate under s. 22 (6) of the Act in the event of the Will being held invalid.

The estate is one entered in List II of the lists prepared under s. 8 of the Act and the succession is governed by s. 22. The plaintiff and the deceased were both descended through males from a common ancestor, though in different lines. The plaintiff was not, in the events which happened, the nearest male agnate when the succession opened, but he would have been entitled to succeed under s. 22, cl. (10) if certain other persons, including his own father, who were nearer to the testator in agnatic relationship, had pre-deceased the testator.

The question of law which arises appears to me to admit of only one answer, and it is not the answer which the learned Subordinate Judge has given. Section 13A divides possible legatees into three classes, Sub-

section (1) applies to the person who would have succeeded to the estate under the Act if the testator had died intestate at the time when the bequest took effect, that is to say, the immediate heir. With him are grouped the daughter, the daughter's son and the younger son of the testator. The only question of interpretation which is likely to arise under this sub-section is whether, when the immediate heir is the testator's son, it applies to a Will in favour of that son.

In the case of a Will in favour of these persons no registration is necessary.

In the case of a Will in favour of any person not included in cl. (1) certain additional formalities are required one of which is that the Will must have been presented for registration within one month of its execution and it must have been registered. The difference is that in the case of cl. (2) the Will may be registered by deposit with the Registrar in a sealed cover with the name of the testator and a statement of the nature of the document whereas in the case of a person falling under the third clause there must be what may be called open registration, that is to say, the document must be registered with the same formalities as any ordinary deed. There is this further difference that by ss. 14 and 15 a Will in favour of any of the persons mentioned in cls. (1) and (2) leaves the estate still subject to the provisions of the Act, whereas a Will in favour of a person under cl. (3), except where it is in favour of another *taluqdar*, takes the estate out of the Act and brings it under the operation of the ordinary law of succession. The second clause, omitting words which are immaterial for the purposes of this case, applies to a Will in favour of "a person who might, in the absence of other heirs, have succeeded to such estate under the provisions of this Act applicable to such estate had the person so bequeathing died intestate as to his estate at the time when the bequest took effect," that is to say it applies to any person who is a possible heir to the estate. Now the plaintiff comes precisely within the language of this clause. It is common ground that he is a person who would have succeeded to the estate had no nearer heir been in existence at the testator's death. The language of that section being clear and applying exactly to the circumstances before us, it would seem that there is nothing more to be said. Any enquiry as to the intentions of the Legislature becomes

unnecessary, though in fact there is no reason to suppose that such enquiry would lead to any different result.

The view pressed by the respondent's learned Counsel and accepted by the Subordinate Judge is that because the plaintiff was in fact not the nearest agnate at the death of the testator, therefore, he does not come within the clause. He wishes to read the sub-section as if it ran, in cases to which s. 22 applies, "to a person who might, in the absence of any heir belonging to any of the prior classes mentioned in s. 22, have succeeded to such estate had the person so bequeathing died intestate."

The words "in the absence of other heirs" apply just as much to the absence of heirs who might take in priority under cl. (10) as to the absence of other heirs falling under cls. (1) to (9).

The reasons which led to the passing of the Act lend further support to this view. It is common knowledge, and is the case of both parties to this appeal, that the main reason for the amendment of the law by Act III of 1910 was the decision of their Lordships of the Privy Council in *Thakurain Balraj Kunwar v. Rae Jagatpal Singh* (2) which reversed the decision of this Court in *Rae Jagatpal Singh v. Thakurain Balraj Kunwar* (1). The law as laid down by their Lordships was not acceptable to the *taluqdars* and steps were taken to alter it. In the judgment of this Court which their Lordships reversed Mr. Spankie had said :

"The testator ought to be in a position to know whether or not his legatee will hold the estate subject to the same rules of succession as himself, because he may wish that his legatee should hold the estate subject to those rules of succession. He cannot give effect to such wish unless the words refer to a legatee who may possibly succeed to his estate if he were to die intestate."

The view taken, therefore, was

(1) that the testator when he makes his Will ought to be in a position to know whether the bequest will have the effect of taking the estate outside the Act or not, and

(2) that it ought to remain subject to the Act if it was bequeathed to a person who might possibly have succeeded. If the view taken by the respondent is correct neither of these objects has been attained by the amending legislation. The defend-

ant's whole case depends on the contention that the second has not been attained. As regards the first the validity of the Will, according to the defendant's interpretation, must depend on a variety of uncertain circumstances. Suppose the two nearest agnates to be father and son. Then the validity of a Will in favour of the son made in accordance with sub s. (2) of s. 13 A will depend on whether the father survives the testator or not. Even a Will in favour of the nearest agnate at the time when it is made may turn out to be invalid, for a posthumous son may be born in an elder line.

I have passed over in silence a good deal of what the learned Subordinate Judge has said on this issue because I agree with the learned Advocate for the appellant that there are some passages from which it is impossible to extract any intelligible meaning, while others are wholly irrelevant to the matter at issue. What the learned Subordinate Judge means by talking about a possibility upon a possibility I cannot pretend to say. The simple question for decision is whether the words "in the absence of nearer heirs" include the absence of nearer heirs under cl. (10) of s. 22, or are confined to the absence of heirs who would take under the preceding clauses. Nor can I follow him in drawing any conclusion from the absence of the words "and his male lineal descendants" in cl. (10) of s. 22. He is willing to allow that a Will in favour of any descendant of a brother, however remote, is governed by sub s. (2) of s. 13A because the male lineal descendants of the brother are mentioned in s. 22 (5), but would exclude a Will in favour of the second nearest agnate because the words "male lineal descendants" do not occur in s. 22 (10). But on any construction of s. 13A these words are unnecessary. When the Legislature is dealing with a single line of succession such as that of a brother or a son they are appropriate, but they are quite out of place in dealing with an agnate. Inasmuch as the nearest agnate is to be found according to the rule of lineal primogeniture, as soon as the father dies the son becomes the nearest agnate in his place. As soon as that particular line is exhausted the senior representative of the next senior branch becomes the nearest agnate. In fact as soon as the nearest agnate dies the next nearest steps automatically into his place. A person who would be a remote agnate

in presence of another agnatic heir becomes at once the nearest agnate in his absence.

It is argued that what appears to be the natural construction of the Act would lead to results which the Legislature could not have contemplated, because if so, a Will in favour of any possible heir, however remote, will have the effect of maintaining the character of the property as an estate as defined in the Act. It does not appear to me that there is anything improbable in the Legislature having contemplated this result. The classification introduced by s. 13A is a perfectly natural and intelligible one, namely, first the immediate heir and one or two other persons who are grouped with him, then the remote heir and, lastly, the person who is not a possible heir at all; and there is nothing either absurd or improbable in the Legislature enacting that when the estate is bequeathed to a kinsman of the testator it should continue to be governed by the Act, whereas if it passes to a stranger it should cease to be so governed.

The defendant's Counsel supports his argument by a reference to cl. (11) of s. 22, under which cognate heirs are allowed to succeed in default of agnates, on the ground that this widens the scope of s. 13A (2) too much. Now there are two possible views of cl. (11). It may be said sub-s. (2) of that s. 13A does not apply to such an heir at all, because he takes not under the special rules of succession contained in the Act but under the ordinary law of inheritance applicable to the testator's family, or it may be said that though he would have been the heir apart from the Act, yet he does in fact take by reason of cl. (11) which might equally well have prescribed a different line of succession. The question is quite independent of the construction of s. 13A, and if the latter view is to be adopted for the purpose of testing the plaintiff's case it must equally be adopted for testing that of the defendant. But on the defendant's view of s. 13A it leads to a manifest absurdity. Defendant says that the person to whom s. 13A applies must be a person who at the time of the testator's death is named in s. 22.

Under cl. (10) the heir will be the person who happens to be the nearest agnate at that time.

Under cl. (11) he will be the nearest cognate. The defendant's construction of s. 13A leads to this manifest absurdity

that whereas according to the scheme of the Act cognates can only take when all the agnates are exhausted yet a Will in favour of the second nearest agnate at the testator's death is governed by sub-s. (3) of s. 13A, while a Will in favour of the nearest cognate is governed by sub-s. (2).

If the Legislature intended sub-s. (2) of s. 13A to apply to any possible heir under the Act it is difficult to see what language it could have used more apt to convey that meaning than that which is found in the section. Possible heirs and persons who might in the absence of other heirs have succeeded are equivalent expressions. If, however, it intended the construction for which the defendant contends it must be conceded that the language employed is singularly ill-adapted for the purpose it had in view. I have no doubt that the plaintiff's construction is the correct one, and I would accordingly allow the appeal and decree the suit in respect of the *talukdari* property.

As regards the other questions which have been argued I agree with the judgment of my learned colleague.

ORDER.

Daniels, J. C., and Dalal, A. J. C.—(February 23, 1925).—Under s. 98 of the C. P. C. we refer for the decision of a third Judge the following question of law on which we differ:

Whether a Will made by a *talukdar* in favour of an agnate of the testator who is not the nearest agnate at the time of the testator's death is governed by sub-s. (2) or sub-s. (3) of s. 13A of Act I as amended by the Oudh Estates Amendment Act of 1910.

As the present Second Additional Judicial Commissioner was Counsel for one of the parties in the Court below a date will be fixed in April when it is expected that there will be a Judge on the Court capable of dealing with the reference.

JUDGMENT.

Simpson, A. J. C.—(July 13, 1925).—Under s. 98 of the C. P. C. the following question of law has been referred to me, my learned colleagues Daniels and Dalal having differed.

"Whether a Will made by a *talukdar* in favour of an agnate of the testator, who is

not the nearest agnate at the time of the testator's death, is governed by sub-s. (2) or sub-s. (3) of s. 13A of Act I as amended by the Oudh Estates Amendment Act of 1910."

It is agreed by Counsel on both sides that the question of law arising in the case is slightly narrower than this. It refers to a Will made by a *talukdar* whose name is entered in List No. 2 of the Act. It is also restricted to a bequest in favour of a male agnate who is not the nearest male agnate. Section 13A runs as follows:—

"No *talukdar* or grantee, and no heir or legatee of a *talukdar* or grantee and no transferee referred to in s. 14, and no heir or legatee of such transferee, shall have power to bequeath his estate, or any portion thereof or any interest therein:—

(1) (a) to a person who would have succeeded to such estate, portion or interest under the provisions of this Act applicable to such estate, had the person so bequeathing died intestate as to his estate, at the time when the bequest took effect,

(b) to his daughter,

(c) to a son of his daughter, or

(d) to a younger son,

except by a Will duly executed and attested;

(2) to a person who might, in the absence of other heirs, have succeeded to such estate, portion or interest under the provisions of this Act applicable to such estate, had the person so bequeathing died intestate as to his estate, at the time when the bequest took effect,

except by a Will duly executed and attested not less than three months before the death of the testator and presented for registration within one month from the date of its execution and registered;

(3) to any person other than a person mentioned in cls. (1) and (2),

except by a Will duly executed and attested not less than three months before the death of the testator and registered according to the law for the time being in force relating to the registration of assurances but presented for such registration within one month from the date of its execution."

In order to ascertain who the persons are who would have succeeded to the estate in case of intestacy it is necessary to look to s. 22 of the Act, which runs as follows:—

"If any *talukdar* or grantee whose name shall be inserted in the second, third or fifth of the lists mentioned in s. 8, or his heir or

legatee, or if any *taluqdar*, grantee, heir or legatee whose name shall be inserted in the list referred to in s. 31A, sub-s (3), or his heir or legatee, shall die intestate as to his estate, such estate shall descend as follows, namely:—

(1) to the eldest son of such *taluqdar* or grantee, heir or legatee, and his male lineal descendants, subject to the same conditions and in the same manner as the estate was held by the deceased;

(2) or if such eldest son of such *taluqdar* or grantee, heir or legatee, shall have died in his lifetime, leaving male lineal descendants, then to the eldest and every other son of such eldest son, successively, according to their respective seniorities, and their respective male lineal descendants, subject as aforesaid;

(3) or if such eldest son of such *taluqdar* or grantee, heir or legatee, shall have died in his father's lifetime without leaving male lineal descendants, then to the second and every other son of the said *taluqdar* or grantee, heir or legatee, successively, according to their respective seniorities, and their respective male lineal descendants, subject as aforesaid;

(4) or in default of such son or his male lineal descendants, then to such person as the said *taluqdar*, or grantee heir or legatee shall have adopted, and his male lineal descendants, subject as aforesaid;

(5) or in default of such adopted son, or his male lineal descendants, then to the eldest and every other brother of such *taluqdar* or grantee, heir or legatee, successively, according to their respective seniorities, and their respective male lineal descendants, brothers of the whole blood and their descendants being preferred to brothers of the half blood and their descendants, subject as aforesaid;

(6) or in default of any such brother, or his male lineal descendants, then to the widow of the deceased *taluqdar* or grantee, heir or legatee, for her lifetime only, or, if there be more widows than one, to the widow first married to such *taluqdar* or grantee, heir or legatee, for her lifetime only;

(7) and on the death of such widow, then to such son as the said widow shall, with the consent in writing of her deceased husband, have adopted, and his male lineal descendants subject as aforesaid;

Provided that, after the expiration of six months from the commencement of this

Act such consent shall be expressed by means of a registered instrument or by means of a Will or codicil, executed and attested in the manner required by this Act;

(8) or on the death of such first married widow and in default of a son adopted by her with such consent as aforesaid, and his male lineal descendants, then to the other widow, if any, of such *taluqdar* or grantee, heir or legatee, next in order of marriage, for her life, and on the death of such other widow, to a son adopted by her with such consent as aforesaid, and his male lineal descendants; or in default of such adopted son, then to the other surviving widows in the order of their respective marriages for their respective lives and on their respective deaths to the sons so adopted by them respectively, and to the male lineal descendant of such sons respectively, subject as aforesaid;

(9) or in default of any such widow or any such adopted son or any such male lineal descendants, then to the mother of the deceased *taluqdar*, or grantee, heir or legatee, for her lifetime only;

Explanation:—In this clause the word 'mother' does not include a step-mother; and in the case where the deceased was an adopted son, it means that wife or widow of the father who joined in or made the adoption, or, if the adoption was made by the father alone and there are at the time of the death of the deceased more widows than one, it means the one who was first married, and, on her death, the other surviving widows in the order of their respective marriages in succession;

(10) or in default of or on death of such mother, then to the nearest male agnate according to the rule of lineal primogeniture, subject as aforesaid;

(11) or in default of any such agnate, then to such person as would have been entitled to succeed to the estate under the ordinary law to which persons of the religion and tribe of such *taluqdar* or grantee, heir or legatee, are subject;

Provided that, when there are more persons than one so entitled, the estate shall descend to a single person according to the following rules, that is to say:—

(i) where among such persons some are connected by blood relationship and some by reason of marriage, the blood relations shall exclude the relations by marriage;

(ii) where among such persons some

are related by the whole blood and some by the half blood, those related by the whole blood shall exclude those related by the half blood;

(iii) where, subject to the provisions of the rules (i) and (ii), among such persons some are related through males only and some through females, the persons related through males only shall exclude the others; and amongst the others those shall be preferred in whose relationship the steps from the deceased proceed furthest through males;

(iv) where among such persons some stand in a nearer and some in a more remote relationship to the deceased, but both are equally qualified under the three preceding rules, those in the nearer degree shall exclude those in the more remote;

(v) where such persons stand in equal degree of relationship to the deceased and are equally qualified under the four preceding rules, the estate shall descend to the eldest male in the senior line, but if there be no male heir in that line, then to the eldest male in the next senior line in which there is a male heir; and if there be no male heir in any line, then to the eldest female in the senior line."

In the present case the *taluqdar* made a Will in favour of the plaintiff, Achal Singh, who is his male agnate, but not the nearest male agnate. I have to decide whether Achal Singh is a person, who might, in the absence of other heirs, have succeeded to the estate if the testator had made no Will. The heirs in intestacy are to be found in s. 22, and we are concerned with cl. (10). The questions I put to myself are these:—

Q. Would Achal Singh have succeeded to the estate if the testator had died intestate?

A. No.

Q. Why not?

A. Because he would have been excluded by nearer heirs.

Q. Might he, in the absence of other heirs, have succeeded to the estate?

A. Yes.

My decision on the point of law, therefore, is that the Will is governed by sub-s. (2) of s. 13A of the Act.

FINAL JUDGMENT.

Dalal, J. C. and Wazir Hasan, A. J. C.—(July 24, 1925).—The reference has been decided by a learned Judge of this Court in favour of the plaintiff-appellant. This appeal shall, therefore, be decreed in

the terms mentioned in Mr. Dalal's judgment of 19th February 1925:—

(1) The plaintiff is hereby decreed possession with mesne profits of all the *taluqdari* properties of List A of the plaint Nos. 1 to 6.

(2) The plaintiff shall be entitled to recover Rs. 7,600 from the Allahabad Bank.

(3) He shall be entitled to recover Rs. 1,900 balance of current account in the Allahabad Bank.

(4) The valuation of moveables (see list printed at p. 344) shall be altered from Rs. 1,015 to Rs. 1,960.

(5) The plaintiff shall be declared entitled to mesne profits of the Paicharwa property from the date of the *taluqdar's* death to the date of his taking over possession of that property from the defendant lady.

The reliefs are granted to the plaintiff in addition to the decree passed in his favour by the lower Court.

The plaintiff has practically succeeded in obtaining all that he desired so he shall receive costs of both the Courts.

G. H.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1719 OF 1923.

April 30, 1925.

Present:—Mr. Justice Cuming.

KARUNA CHARAN DAS—DEFENDANT
—APPELLANT

versus

KRISHNA SUNDAR MAJUMDAR—
PLAINTIFF—RESPONDENT.

Res judicata—Appeal—Issue decided by Trial Court not decided by Appellate Court—Possession, suit for—Title—Burden of proof.

When the judgment of a Court of first instance upon a particular issue is appealed against, that judgment ceases to be *res judicata* and becomes *res subjudice* and if the Appellate Court declines to decide that issue and disposes of the case on other grounds, the judgment of the First Court upon that issue is no more a bar to a future suit than it would be if that judgment had been reversed by the Court of Appeal. [p. 481, cols. 1 & 2.]

Nilvaru v. Nilvaru, 6 B. 110; 3 Ind. Dec. (N. S.) 531, relied on.

In a suit for declaration of title and for possession the plaintiff must prove his own title and cannot succeed on the mere finding that the defendant has no title. [p. 481, col. 2.]

Appeal against the decree of the District Judge, Noakhali, dated the 12th March 1923, reversing that of the Munsif, First Court at Sudharam, dated the 26th February 1921,

[90 I. C. 1925]

ARUNACHELAM CHETTY v. KRISHNA IYER.

Babu Jatindra Mohan Chowdhury for
Babu Manindra Nath Roy, for the Appel-
lant.

Babu Bankim Chandra Banerjee, for the
Respondent.

JUDGMENT.—In this suit out of
which this appeal has arisen the plaintiff
sued for a declaration of his title to and for
recovery of possession of the land in suit, for
compensation for damages and for an injunc-
tion on the defendant.

The suit was dismissed by the Trial Court
and the plaintiff appealed to the District
Court. The learned District Judge held
that the question of the plaintiff's title was
res judicata by reason of a previous decision
of the same Court in 1915; and on that
finding the learned Judge allowed the
appeal, set aside the decree of the Court
of first instance and ordered that the plaintiff
would get a decree declaring his title to
the land subject to the defendant's right
of way. It was further ordered that each
party would bear their own costs.

The defendant has appealed to this Court
and the learned Vakil for the appellant has
contended first of all that the judgment of
1915 does not operate as *res judicata*;
secondly, that, the subject-matter of the
previous suit is not identical with the sub-
ject-matter of the present suit; and, thirdly
that with regard to the piece of land
which is common in both the suits the
plaintiff in the first suit stated that he
claimed no relief as he was in possession;
and the suit was dismissed on that ground.

I deal with the first point. In the previous
suit the present plaintiff was defendant and
the present defendant was the plaintiff and
the Trial Court in that case held that not
only had the plaintiff in that suit failed to
prove his title but that the defendant had
proved his. On appeal the learned District
Judge in dealing with the appeal said: "the
learned Munsif found that the plaintiff had
no title to the lands in suit that he had
not acquired any right in the land by his
alleged adverse possession and that he has
a right of way over the existing *darja* as
admitted by the defendant". Then in deal-
ing very briefly with the evidence he came
to the conclusion that the plaintiff had not
proved his title and he dismissed the ap-
peal. It cannot, therefore, be said that he
decided the question as to whether the de-
fendant in that suit who is the plaintiff in
the present suit had or had not any title to
the land in question. "When the judgment

of a Court of first instance upon a particu-
lar issue is appealed against, that judgment
ceases to be *res judicata* and becomes *res*
subjudice, and if the Appellate Court de-
clines to decide that issue and disposes of
the case on other grounds, the judgment of
the First Court upon that issue is no more a
bar to a future suit than it would be if that
judgment had been reversed by the Court
of Appeal". This is the principle enunciated
in the case of *Nilvaru v. Nilvaru* (1),
and applying this principle to the present
case it seems quite clear to me that the
Appellate Court did not decide the issue
as to whether or not the defendant in that
case who is the plaintiff in the present case
had or had not a title to the land. The
only question which the learned District
Judge decided was whether the plaintiff
who is the defendant in the present suit
had any title and he decided that he had
not. In the present suit the plaintiff, who
was the defendant in the former suit,
prayed for a declaration of title and for
possession. He has, therefore, as against
the defendant to prove his title. It is not
sufficient for him to say that the defendant
in this suit has no title which is the only
question which was decided in the other
suit. He must prove his own title in order
to succeed. In this view of the matter I
think the former judgment does not ope-
rate as *res judicata* so far as the title of
the plaintiff in the present suit is concern-
ed. I, therefore, set aside the judgment
and decree of the learned District Judge
and send the case back to him in order that
he may decide the appeal on the merits.
Costs of this Court will abide the result.

M. B.

Decree set aside.

(1) 6 B. 110; 3 Ind. Dec. (N. S.) 531.

MADRAS HIGH COURT.

CIVIL APPEAL No. 64 OF 1922 AND CIVIL
REVISION PETITION No. 117 OF 1922.

January 7, 1925.

Present:—Mr. Justice Phillips and
Mr. Justice Krishnan.

P. L. S. A. R. S. ARUNACHELAM CHETTY
—PLAINTIFF—APPELLANT

versus

KRISHNA IYER AND OTHERS—DEFENDANTS
—RESPONDENTS.

Contract Act (IX of 1872), s. 38—Sale of goods—

Vendor, duty of—Offer of goods—Opportunity for inspection—Duty of purchaser—Negotiable Instruments Act (XXVI of 1881), s. 45, scope of—Negotiable instrument, suit on—Partial failure of consideration, whether can be pleaded.

Clause (3) of s. 38 of the Contract Act only requires that the promisee should have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver. The promisor is under no obligation to prove the identity of the thing offered to the promisee's satisfaction. It is the promisee's duty to take the steps necessary to satisfy himself. The promisor has only to give him an opportunity for it. [p. 485, col. 1.]

Where on an offer by the vendor to deliver the goods, the goods could have been inspected if the purchaser had applied to the vendor to enable him to do so, for the purpose of satisfying himself that the goods offered corresponded with the goods contracted for, but the purchaser took no steps for this purpose but contented himself with writing letters with a view to raise a defence subsequently; in a suit for damages by the vendor for non-acceptance of goods:

Held, that the plaintiff had done all he was bound to do under the contract and there was no default on his part and that consequently the defendant was liable in damages. [*ibid.*]

Actual physical possession of the goods by the vendor is not necessary. It will be enough if the goods are under his control and he is able and willing to deliver on the price being paid. [p. 485, col. 2.]

Per Krishnan, J.—Partial failure of consideration in respect of a negotiable instrument is a defence *pro tanto* against an immediate party when the failure is an ascertained and liquidated amount, but not otherwise, that is, when a collateral enquiry becomes necessary for the purpose. Where a bill is drawn for the price of two bales and only one is delivered, the defence that consideration has failed to the extent of one half is available. Where a *hundi* amount represents the advance price paid for a number of bales, the advance towards each bale being definite and fixed, the consideration for the *hundi* can be pleaded to have failed with reference to the undelivered bales and that is a sum that can be computed without any inquiry. [p. 483, cols. 1 & 2.]

Appeal against the decree of the Court of the Additional Subordinate Judge, Madura, in O. S. No. 13 of 1920. (O. S. No. 1 of 1919 on the file of the District Court of Madura).

Petition, under s. 25 of Act IX of 1887, to revise the decree and judgment of the Additional Subordinate Judge, Madura, in O. S. No. 12 of 1920, (O. S. No. 13 of 1919 on the file of the District Court, Madura).

Messrs. K. V. Krishnaswami Iyer and K. Rajah Iyer, for the Appellant.

Mr. A. Krishnaswami Iyer, for the Respondents.

JUDGMENT.

Krishnan, J.—This appeal arises from a suit brought by the plaintiffs in the Subordinate Judge's Court at Madura on a *hundi* or Bill of Exchange, executed by

one Pasimuthu Pillai on behalf of the firm of one Kuppuswami Iyer, now deceased, in Madura whose agent he was. The *hundi* was drawn in favour of one Kolandavelu Pillai the 2nd plaintiff as representing the 1st plaintiff's firm on the 23rd of August 1918 and is for a sum of Rs. 22,066. It was drawn on the 1st defendant's firm in Madras and is marked Ex. A in the case. It was dishonoured when presented to the Madras firm; notice was given of it to the 1st defendant who was called upon to pay but failed to do so. Hence this suit was brought. Kuppuswami Iyer died, leaving the 2nd and 3rd defendants as his sons and heirs who succeeded to their father's estate and his trade. The 2nd plaintiff has been joined as a plaintiff to avoid any objection as to parties.

The circumstances under which this *hundi* was executed are briefly these:—

The 1st defendant's firm carried on trade in Madura in yarn and cotton thread and in the course of that trade, the agent of the firm Pasimuthu Pillai who was looking after the business entered into seven contracts with Kolanthavelu Pillai, the agent of the 1st plaintiff's firm about the middle of August 1918 for the purchase of 229 bales of yarn to be manufactured by the Madura Mills of certain counts at certain stated prices. Of these contracts, we are concerned in the suit with only four relating to 163 bales. The contracts were originally made orally but at the request of the 1st defendant's agent, they were reduced to writing on the 7th September 1918. They are called Varthamanam letters Nos. 21, 22, 23 and 24 and are filed in the case as Exs. B, B-1, B-2 and B-3. The terms of the contracts are fully set out in these letters. It appears from them that the suit *hundi* amount was made up of advances agreed to be paid under the contracts towards the purchase-moneys at the rate of Rs. 150 per bale, for 24 bales under Ex. B, 20 bales under Ex. B-1 and 10 bales under Ex. B-2, and at the rate of Rs. 142 per bale for 98 bales under Ex. No. B-3, less Rs. 100 paid in cash, which is the subject-matter of the suit Original Suit No. 12 of 1920 brought by the 1st defendant against the 1st plaintiff and tried along with this suit. Only two bales were actually taken delivery of and paid for by the 1st defendant under the contracts. Plaintiffs assert in their plaint that the contracts were broken by the 1st defendant

and not by themselves. They claim the amount due under the *hundi* with interest and costs.

The defendants pleaded that the plaintiffs committed breach of contract and were not, therefore, entitled to claim the *hundi* amount and further that the *hundi*, having been passed in part payment of the stipulated price for goods to be manufactured, and no goods having been sold or offered for sale to 1st defendant, was not enforceable. In reply to the defendants' plea, plaintiffs contended that the suit being one on a negotiable instrument, a collateral enquiry could not be held in this suit into the question as to who committed the breach of contract, as such an enquiry is barred by s. 45 of the Negotiable Instruments Act, even though as the payee, he was a holder standing in immediate relation to the 1st defendant the drawer. They also contended that if the question of breach could be gone into, the 1st defendant committed the breach and the damages they are entitled to being more than *hundi* amount, there was no failure of consideration on the *hundi*.

The Subordinate Judge overruled the objection under s. 45 and holding that the breach was committed by the plaintiffs dismissed their suit except to the extent of Rs. 284 of the *hundi* amounts which had been taken into consideration in paying the price of the two bales delivered, for which he gave a decree. He also decreed O. S. No. 12 of 1920 for Rs. 100. First plaintiff's legal representatives have appealed to us against the decrees in both these cases, the latter by way of a revision petition under s. 25 of Act IX of 1887.

As regards the objection raised by the plaintiffs against the defence under s. 45, I think the Subordinate Judge is right in overruling it. This section is based on the English Law on the point which is stated by Chalmers in his book on Bills of Exchange, 8th Edition, page 115 to be as follows:— "Partial failure of consideration is a defence *pro tanto* against an immediate party when the failure is an ascertained and liquidated amount, but not otherwise", "that is, when a collateral enquiry becomes necessary for the purpose. Illustration 1 given on the same page explains what a collateral enquiry is. Illustration 2, however, shows that where a bill is drawn for the price of two bales and only one is delivered, the defence that consideration has failed to the extent of one-half is available. That posi-

tion is supported by the case of *Agra and Masterman's Bank v. Leighton* (1). Now in the present case, as I have already stated, the *hundi* amount represents the advance prices paid for the 153 bales the advance towards each bale being definite and fixed. The consideration for the *hundi* can thus be pleaded to have failed with reference to all the undelivered bales and that is a sum that could be computed, without any inquiry. In this view, it will be the plaintiffs that will suffer if their objection is upheld. But it seems to me that the case should not be disposed of in that manner but the question of who committed the breach should be considered without driving the parties to another suit and thereby multiplying litigation. In England it is open now to the parties to raise the question as to breach in a suit on a bill by counter-claiming. In the present case, the question as to who committed the breach has been raised in the pleadings, each party charging the other with the breach and it has been fully tried out by the lower Court and dealt with by it in its judgment. In these circumstances it seems to me that we should deal with the case as if it were one for damages for breach of contract. If the breach is on plaintiffs' part as held by the lower Court its decree will be right if it is on the 1st defendant's part as contended for by plaintiffs, there is no reason why plaintiffs should not be allowed to recover the *hundi* amount as damages in this suit. No further amendments of the pleadings seems to be necessary for the purpose.

The question then is who committed the breach in this case. As the contracts referred, not to ready goods, but to goods to be manufactured hereafter by the Madura Mills and to be allotted by them to the purchasers from whom plaintiffs' vendors Ramachar and Brothers were to get them and the plaintiffs themselves were to get from the latter firm, it was naturally arranged that plaintiffs were to give notice in the first instance to the 1st defendant when the bales were issued by the mills and finally allotted to the plaintiffs by their vendors. The contracts provide that on the day after receiving such notice, 1st defendant was to pay the price deducting the advance on them and take delivery. The first two bales on which notice was given by Ex. C-1 to

(1) (1867) 2 Ex. 50; 4 H. & C. 656; 36 L. J. Ex. 33.

the 1st defendant under contract No. 24 were paid for and taken delivery of according to the terms of Ex. B-3. About 5 days after 1st defendant was again given notice by Ex. C-4 of a lot of 3 bales of 22½ counts being ready for delivery. The market seems to have fallen for these goods in the meanwhile. The 1st defendant instead of taking delivery as before, the next day after Ex. C-4 was received, as he was bound to do under his contract Ex. B-3, raised objections and sent his letter Ex. I and asked whether the mill had delivered the above mentioned goods at the prices stated in Ex. B-3., the Varthamanam letter and also said the mill invoice should be shown to him. The contract Ex. B-3 does not speak of any mill price but only of the price at which P. S. Latchmana Iyer and Sons bought the bales and there is no provision in it to show the mill invoices. In fact it is stated to us that the mill invoice remains with the original purchaser from the mill and it is not passed on to the subsequent purchasers of smaller lots. Even if the mill price were mentioned in Ex. B-3, it does not seem to be a part of the description of the goods purchased. The goods are here identified as being 22½ counts of yarn manufactured by the Madura Mills and sold by them to Tholasi Iyer and Sons and by them through the intermediary sellers to the plaintiffs. On receiving Ex. I, plaintiffs sent Ex. II, to say that they were not bound under their contract to answer the questions asked or to produce the mill invoices; they offered to show Ramachar's letter of intimation and called upon the 1st defendant to pay the price with interest for the period of the delay and take delivery at once. About 5 days after, 1st defendant sent another letter Ex. III in which he insisted on being shown the mill invoice and the bale number and stated that, on default, he would hold the plaintiffs liable in damages. Further correspondence passed between the parties Exs. D, G, D-1., H-4 and 5 but they made no difference in the position taken up by the parties. The contents of those letters are set out fully by the Subordinate Judge and need not be repeated here. It was argued that because in the last paragraph of Ex. G, the plaintiffs still offered to deliver the bales they condoned the previous breach if any, and kept the contracts alive; but this is of no importance as 1st defendant took no advantage of it, but

treated the contracts as broken even after Ex. H. As the 1st defendant failed to take delivery, plaintiffs failed to take the bale from their vendors and in consequence Ramachar and Brothers gave them notice that they had sold away the goods in public auction and this fact is mentioned in Ex. IV. With that, the controversy as regards these 3 bales came to an end.

In spite of the conduct of the 1st defendant, plaintiff again gave him notice Ex. X of 2 bales of Madura Mill yarn No. 24 being ready for delivery, and asked him to pay for them and take delivery. This notice was also under Ex. B-3. The 1st defendant again adopted the same tactics as before and instead of paying and taking delivery wrote letter Ex. XI in similar terms to Ex. I. The plaintiffs wrote Ex. XII offering to give 1st defendant all facilities to inspect the goods, as well as the "papers, etc., which they had, but he did nothing, except to send a lawyer's notice Ex. XII calling for a return of his advance with interest on the footing that the contracts were off.

With that the correspondence ended. The plaintiff failed to get the 1st defendant to pay and take delivery of the goods or even to inspect them to satisfy himself that the bales were those contracted for, if he really doubted their identity. There is evidence to show that the market was falling and as it was not to the 1st defendant's interest to perform the contracts, he was clearly trying to get out of his contracts. It is true as the Sub-Judge remarks relying on the observation in *Bowes v. Shand* (2) that if 1st defendant thought he was going to be a loser by accepting the goods, there was nothing to prevent him from trying to escape from a losing bargain, if he could do so lawfully. But he can do so, only for a legal and proper reason but not on mere subterfuges.

The bales about which plaintiffs gave notice of readiness to deliver or asserted by them to be bales contracted for, they were buying from Ramachar and Brothers and they got notices from that firm which are produced. There seems to be no reason to doubt that the bales about which notices were given were the bales contracted for. An attempt was made by the defendants to prove that there were no bales of the contract description to which the notices Exs. C-4

(2) (1877) 2 A. 455; 46 L. J. Q. B. 561; 36 L. T. 857; 25 W. R. 730.

[90 L. C. 1925]

ARUNCHELAM CHETTY v. KRISHNA IYER.

and X could apply by calling the mill clerk the only witness examined in the case, but the attempt has failed. He admitted by reference to the mill ledgers that before 25th September 1918, 21 bales of 24 counts and 15 bales of 22½ counts Madura Mills yarn were delivered to Tholasi Iyer and Brothers. He mentions different prices for these bales but I do not think that that matters as I have already explained above. The bales of which notice was given by the plaintiffs were evidently part of those bales; there is nothing to show the contrary.

The learned Subordinate Judge has held that the plaintiffs committed breach of contract because in his opinion the "plaintiffs failed to discharge the obligation cast upon them by s. 38 of the Contract Act in regard to the identity of the goods." It is contended that because the plaintiffs did not answer the questions put to them in Exs. 1 and 2 and did not produce the mill invoice or otherwise prove to the 1st defendant's satisfaction the identity of the bales they offered to deliver with the bales contracted for, they committed breach of contract. Section 38, cl. (3) does not, in my opinion, lay such a heavy burden on the seller as is claimed. It only requires that the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver. The promisor is under no obligation to prove the identity of the thing offered to the promisee's satisfaction. It is the promisee's duty to take the steps necessary to satisfy himself. The promisor has only to give him an opportunity for it. In this case, the goods could have been inspected if the 1st defendant had applied to the plaintiffs to enable him to do so, and to see the count and the number of the bales which according to the mill clerk are marked on the outside of the bale. If he wanted to see the mill invoice, he could have applied to Tholasi Iyer through plaintiffs or directly. But the 1st defendant took no steps for these purposes but contended himself with writing letters with a view to raise a defence subsequently. Plaintiffs offered to place all their "goods and papers, etc.," in 1st defendant's hands by Ex. XII but he did not accept the offer. In these circumstances I have come to the conclusion that plaintiffs did all that they were bound to do under their contracts and that there is no default on their part.

It was further argued that the plaintiffs

should have reduced the goods to actual physical possession before giving notice and not having done so, the notices were bad. I am unable to accept this argument. The goods were under the control of the plaintiffs and they were able and willing to deliver if the price was paid as they did in the case of the 2 bales which were taken delivery of by the 1st defendant at the beginning.

That is all the s. 38, cl. (2) requires. Actual physical possession of the goods is not necessary. Delivery is often given on delivery orders, in the trade.

Having come to the conclusion that plaintiffs committed no default, I must hold that 1st defendant committed breach by refusing to take delivery and calling back his advance and that he is liable in damages. Ordinarily an enquiry will have to be held to ascertain the amount of damages but as plaintiffs have sued for the *hundi* amount and as it is conceded that damages are likely to exceed the amount, I think we are justified in giving the 1st plaintiff a decree for the *hundi* amount. I would reverse the decree of the lower Court and give 1st plaintiff a decree for Rs. 22,066 with interest at 6 per cent. from the date of the *hundi* to the date of payment and costs in both this and the lower Court against the estate of the 1st defendant including the shares of his minor sons. Original Suit No. 12 of 1920 will be dismissed with costs in this and the lower Court.

Phillips, J.—I agree with the order proposed. I am satisfied for the reasons given by my learned brother that it was 1st defendant who committed the breach of the contract and, therefore, plaintiffs are entitled to damages. As plaintiffs only claim the amount of the *plaint hundi* which is less than the amount of damages claimable, it is unnecessary to decide the question of whether s. 45 of the Negotiable Instruments Act is applicable to the facts of this case and, therefore, on that point I reserve my opinion.

V. N. V.

Z. K.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 307
AND 308 OF 1922.

December 19, 1924.

Present :—Justice Sir Hugh Walmsley,
Kt., and Mr. Justice B. B. Ghose.

RAKHAL CHANDRA MONDAL—

DEFENDANT—APPELLANT

versus

GOUR GOPAL DUTTA AND OTHERS

—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 35—Costs—Discretion of Court—Appellate Court, whether can interfere.

An Appellate Court has no jurisdiction to interfere with the exercise of the discretionary powers of the Trial Court as to the award of costs.

Appeals against the decrees of the Subordinate Judge, Rajshahye, dated the 22nd May 1922.

Babus Hiralal Chuckerbutty, Upendra Narain Bagchi, and Satindra Nath Roy Chowdhury, for the Appellant.

Mr. S. C. Roy Chowdhury (with him Babus Krishna Kamal Moitra, Bejoy Kumar Bhattacharjee, Bireswar Bagchi, Jatindra Mohan Chowdhury, Pannalal Chatterjee and Girija Mohan Sanyal), for the Respondents.

JUDGMENT.

Walmsley, J.—These two appeals are directed against a judgment which disposed of two applications for setting aside a sale held under the provisions of Regulation VIII of 1819. The suits were brought one by the *putnidar* and the other by one of the *durputnidars* and the allegations were that there had been fraud on the part of the *durputnidars* defendants Nos. 3 to 6 who had agreed to pay the rent to the landlord and that the said *durputnidars* had further committed fraud by engaging a *benamdar* to buy the property. It was also said that the notices required to be served under the law had not been properly served by the landlord. Now, the learned Judge went into the questions of fact and found that the *durputnidars* defendants Nos. 3 to 6 who had agreed to pay the rent had abstained from doing so and brought about the sale in order to purchase the *putni* themselves and that they had engaged a *benamdar* to purchase the property when the sale took place. He also found that the notices were not properly served in accordance with the law. He thereupon ordered that the sale should be set aside. His order as to costs was that the defendant No. 1, that is, the present appellant—the landlord should pay the costs of the plaintiffs and

that the other defendants should bear their own costs in both the suits. Now, the costs for which the landlord has been made liable amount to Rs. 1,758 odd in one suit and to Rs. 886 odd in the other and the appeals are preferred by the defendant No. 1 the landlord against this order as to costs.

An objection is taken on behalf of the respondents—the *durputnidars* that no appeal lies against such an order. I think that is right. Under the present C. P. C., the Court which tries the suit has full power to determine by whom the costs are to be paid. The words of the section are “the costs incidental to all suits shall be in the discretion of the Court and the Court shall have full power to determine by whom such costs are to be paid.” Unless we read those words in a very restricted meaning which has not been the practice in this Court, I think it is clear that we have no authority to interfere with the learned Judge’s discretion. I think further that the learned Judge exercised his discretion with considerable care. It is impossible to read his judgment without coming to the conclusion that it was the *zemindar* who contributed to the length of the case by his attitude. Further, there is this peculiar feature of the final order that the learned Judge did not order re-conveyance of the property but simply set aside the sale. He also pointed out that the *zemindar* recovered all the rents due to him. I think, therefore, on that ground, the learned Judge had discretion to deal with the matter of costs and he exercised that discretion, so far as I can see with care. For the reasons given I am of opinion that we ought not to interfere with the order complained of. The result, therefore, is that these appeals are dismissed with costs—three gold *mohurs* in each case—two gold *mohurs* in each case to the *durputnidars* respondents represented by Babu Girija Mohan Sanyal, one gold *mohur* to Babu Bireswar Bagchi’s client in Appeal No. 307 and one gold *mohur* to Babu Jatindra Mohan Chowdhury’s client in Appeal No. 308.

B. B. Ghose, J.—I agree.

N. H.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 382 OF 1924.

August 17, 1925.

Present :—Mr. Simpson, A. J. C.

LACHHMAN DAS AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

BHAGIRATH AND OTHERS—DEFENDANTS—
RESPONDENTS.

Contract Act (IX of 1872), s. 233—Transaction with agent as principal—Suit against agent and principal, maintainability of—Evidence Act (I of 1872), s. 21—Admission, whether must be taken as a whole.

Where one person deals with another on the assumption that the latter is acting as a principal, it is open to the former, in a suit arising out of the transaction, to implead as defendants, along with the person with whom he had dealt, those persons for whom the latter acted as an agent and to claim that if it should be found, as a matter of fact, that the person with whom he had dealt had acted as an agent for the others, a decree may be passed both against the agent and against the principals. The provisions of s. 233 of the Contract Act would warrant the passing of such a decree in such a case. [p. 483, col. 1.]

Every admission which a party makes is evidence against him, and may properly be acted on without necessarily accepting other admissions or other statements which he might have made. [*ibid.*]

Appeal against an order of the First Additional District Judge, Lucknow, at Bara Banki, dated the 31st May 1924, reversing that of the Subordinate Judge, Bara Banki, dated the 7th April 1924.

Mr. K. P. Misra, for the Appellants.

Messrs. Haider Husain and Hari Kishan Dhon, for the Respondents.

JUDGMENT.—This is a second appeal. The plaintiffs are the appellants. The suit was one for the sum of Rs. 1,040 made up of three items.

1. Rs. 200 being the balance due on *bahi khata* account for goods supplied by plaintiffs to defendant. At that time there was only one defendant Bhagirath, now arrayed as defendant No. 1.

2. Rs. 831-4 the price of two bales of cotton supplied to defendant on 27th April 1923.

3. Rs. 8-12 interest.

The defence was, as regards the first item, that nothing was due. As regards the second the pleading is not absolutely clear, but, in the light of the course taken in the litigation, may be regarded as a pleading that defendant No. 1 had bought these two bales from the plaintiffs, but that he had done so as agent for the 2nd defendant Patan Din. As regards the third item, it was

pleaded that there was no agreement to pay interest.

On this defence, the plaintiffs denied that defendant No. 1 had acted as agent of defendant No. 2, but said that to avoid future litigation they would make defendant No. 2 a party. Subsequently, defendant No. 2, examined by the Court, admitted that defendant No. 1 had bought the bales as his agent. But he further stated that he himself had acted in the matter as the agent of defendant No. 3 Musammat Lalta Dei who is the real purchaser of the bales. She was made a party too, and in her written statement she admitted that she was the purchaser of these two bales from the plaintiffs, but she objected to paying for them, on the ground that her books showed various goods received and various payments made; and that the balance due to the plaintiffs was only Rs. 581-4.

On these pleadings the Court of Trial found in fact.

1. That defendant No. 1 had purchased on behalf of defendant No. 2 who was acting on behalf of defendant No. 3.

2. That plaintiffs were not aware that defendant No. 1 was an agent.

He found accordingly, as a matter of law, that defendant No. 1 was liable, but also that defendants Nos. 2 and 3 were liable. He does not discuss the grounds of their liability beyond saying that defendants Nos. 2 and 3 admit that they got the two bales. But the decision would appear to be correct. Section 233 of the Indian Contract Act lays down that "In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them liable." And the illustration runs:

"A enter into a contract with B to sell him a 100 bales of cotton, and afterwards discovers that B was acting as agent for C. A may sue either B, or C, or both, for the price of the cotton."

With regard to the words, "In cases where the agent is personally liable," s. 230, cl. (2) applied. It is unnecessary to quote it here, because the illustration to s. 233 is so exactly on all fours with the present case.

The interest was disallowed but the rest of the claim was decreed so that there was a decree against defendant No. 1 for Rs. 1,031-4, with proportionate costs. Defendants Nos. 2 and 3 were to be jointly liable with defendant No. 1 for the sum of Rs. 831-4.

and proportionate costs only. Future interest was allowed. Against this decree appeals were filed by defendant No. 1 and by defendants Nos. 2 and 3 together. The appeal of defendant No. 1 was dismissed with costs, but the appeals of defendants Nos. 2 and 3 were allowed with costs. The learned District Judge also made no reference to s. 233 of the Indian Contract Act. He said:

"The plaintiffs denied that they had sold the yarn to these appellants, and their allegation in this respect was in fact found to be true. Indeed the learned Subordinate Judge has remarked that there was no privity of contract between the plaintiffs and these appellants." But s. 233 is an answer to these arguments. The plaintiffs said throughout that they had dealt with defendant No. 1 and did not know that he was anybody's agent. But in impleading the alleged principals they in fact said that if it should be found as a matter of fact that defendant No. 1 had acted as an agent then they wanted a decree against both agent and principal. And according to s. 233 they were entitled to such a decree. It was further said by the learned District Judge that if the Court wanted to act on the admission of defendants Nos. 2 and 3 it should have taken the admission as a whole. There is no rule of law to this effect. Every admission which a party makes is evidence against him, and may properly be acted on without necessarily accepting other admissions or other statements which he may have made. It has been argued before me that defendant No. 3 was entitled to refuse payment until the Court had gone into all the accounts between herself and the plaintiffs and ascertained what was due on the balance. I do not think that that was necessary in a suit framed as the present one was. The plaintiffs sold two bales of cotton to defendant No. 1, and they brought a suit against him for the price of them. Defendant No. 1 pleaded that he had acted as agent of defendant No. 3, and the Court found this to be the fact. I do not think it was then open to defendant No. 3 to bring other transactions into this suit whether by way of set off or in any other way. The case is further complicated by the fact that defendant No. 1 has made a tender of the full amount due under the decree. If this tender had been made in time it would have left the plaintiffs with no ground for proceeding against

defendants Nos. 2 and 3, because it is plain that they cannot expect to be paid twice over for their goods. But this tender was made very late. The second appeal was admitted here in Lucknow on the 22nd of September 1924. The memorandum of appeal is dated the 1st September 1924. The tender by defendant No. 1 was made at Bara Banki on the 2nd of September 1924, and there is nothing to show that at the time the appeal was admitted the appellants knew of it. I must treat this tender as subsequent to the appeal, and the appeal must be decided on the state of things that existed before the tender was made.

I allow the appeal, set aside the judgment and decree of the lower Appellate Court and restore the decree of the learned Subordinate Judge. The appellants will get their costs of the First Court, that were awarded in the decree of that Court and will also get their costs in the lower Appellate Court and in this Court.

Z. K.

Appeal allowed.

CALCUTTA HIGH COURT.

CIVIL REVISION No. 733 OF 1923.

January 4, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Page.

KAMAL MANDALINI—PETITIONER

versus

PARAMASUKH CHAKRABUTTY—

OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 544, 547—Diet money due to witness, whether can be recovered by suit.

Where a witness pursuant to an agreement with the complainant in a criminal case attends the Court to give evidence and the Court directs the complainant to pay the witness a certain sum as his expenses, if such sum is not paid the witness is entitled to recover it from the complainant by a civil suit. [p. 489, col. 2.]

Suhrawardy, J.—Section 544, Cr. P. C., does not empower a Court trying a complaint to order payment of diet money of witnesses produced before it by the parties. Therefore, such money cannot be recovered under s. 547, Cr. P. C., but it can be recovered by the witness in a civil suit. [p. 489, col. 1.]

Rule against the judgment of the Munsif, Bolepur, dated the 27th March 1923.

Babu Mohes Chandra Banerjee, for the Petitioner.

Babu Surendra Nath Ghosal, for the Opposite Party.

JUDGMENT.

Suhrawardy, J.—This Rule arises

out of a suit brought by the plaintiff for recovery of a certain amount due to him on account of the diet expenses allowed to him by the Criminal Court in a case in which the defendant was the complainant and the plaintiff was cited as a witness on his behalf. The Munsif of Bolepur exercising Small Cause Court jurisdiction decreed the suit.

An objection is taken before us that the Small Cause Court Judge had no jurisdiction to take cognizance of the suit under the Provincial Small Cause Courts Act and it is based mainly on s. 547, Cr. P. C. The facts are as follows:—The plaintiff was cited as a witness on behalf of the defendant in a certain criminal case in which the defendant was the complainant. The plaintiff applied to the Court that he might be allowed the amount incurred by him as expenses for attending the Court on behalf of the complainant. On that petition the learned Sub-Divisional Officer passed the following order: "Complainant to pay." The sum allowed was Rs. 16-10-6. On the date on which the above order was passed the complainant paid Rs. 5. The plaintiff has now sued for the balance of Rs. 11-10-6.

It is argued on behalf of the petitioner that the only remedy open to the plaintiff was to request the Criminal Court under s. 547, Cr. P. C., to recover this amount as if it was a fine. In my judgment, that section does not apply. It provides that any money (other than a fine) payable by virtue of any order made under the Code..... shall be recoverable as if it were a fine. The learned Vakil for the petitioner has failed to point out any provision in the Code under which this order of payment of diet money to a witness on the side of the prosecution was made. He has fallen back upon s. 544, Cr. P. C., and contends that the order might have been made under that section. But that section deals with an altogether different state of things. It empowers the Court to order that the expenses of the complainant and his witnesses should be paid by the Government under circumstances that may be considered proper by the Court. It does not empower the Court trying a complaint to order payment of diet money of a witness produced before it by the parties. That power is vested in the Court under the general rules of the High Court. It is, therefore, clear that the money in suit is recoverable by the plaintiff and that a suit may be brought

for that amount unless the petitioner shows any authority to the contrary which he has failed to do. It is not contended that it offends any rule of public policy nor is it shown how the Civil Court loses its ordinary jurisdiction to entertain a suit for recovery of money payable by the defendant and which cannot be recovered in any other way. Some light upon this matter may be obtained from the decision of this Court in the case of *Nemai Chundra Ghose v. Ajahar Chowdhury* (1). I do not think that there is any substance in this Rule. It must accordingly be discharged with costs. We assess the hearing-fee at one gold mohur.

Page, J.—I agree. I do not think it necessary in this case to go the length of laying down any general proposition of law as to the alleged right of a witness in a criminal case to obtain travelling expenses from the complainant because in this case it is perfectly clear from the judgment that the complainant, who is now the defendant, arranged with the plaintiff that the plaintiff should give evidence in the suit. Pursuant to that agreement the plaintiff attended the Court and a certain order was made by the Court that the complainant should pay to the plaintiff a certain sum. A part of that sum was immediately paid but the rest has not been paid. In these circumstances I, speaking for myself, without deciding any question of law of a general nature, in the circumstances of this case, think that there is no substance in the application. The Rule is, therefore, discharged.

S. D.

(1) 8 C. W. N. 178.

Rule discharged.

PATNA HIGH COURT.

APPEALS FROM APPELLATE DECREES
Nos. 943 AND 950 OF 1922.

May 8, 1925.

Present:—Mr. Justice Kulwant Sahay.
GOBINDA BAURI AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

KRISTO SARDAR—DEFENDANT
—RESPONDENT.

Chota Nagpur Tenancy Act (VI of 1908), ss. 89, 139, 258—Suit to recover possession of occupancy hold.

inj—Denial of title by defendant—Suit, whether cognizable by Civil Court—Order of Attestation Officer revised by Settlement Officer—Suit to set aside order, whether maintainable—Ghatwali lands—Occupancy rights, whether can be acquired.

Section 139 of the Chota Nagpur Tenancy Act contemplates a case where the relationship of landlord and tenant is admitted to exist between the parties. It does not contemplate cases where there is a dispute as regards title. [p. 491, col. 1.]

A suit to recover possession of an occupancy holding on the allegation that the defendant denies the tenancy right of the plaintiff and has been asserting that the plaintiff has no right in the land in suit is not cognizable by the Deputy Commissioner under s. 139 of the Chota Nagpur Tenancy Act. The relationship of landlord and tenant not being admitted, the section does not operate as a bar to the maintainability of the suit in the Civil Court. [*ibid.*]

All orders whether by *khanapuri* officers or by Attestation Officers have to be made during the preparation of the draft Record of Rights and all such orders passed before final publication of the Record of Rights are subject to revision under the provisions of s. 89 of the Chota Nagpur Tenancy Act. Where an order made by an Attestation Officer before the final publication of the Record of Rights has been revised by the Settlement Officer under s. 89, the order is final and has the force and effect of a decree of a Civil Court and s. 258 of the Act operates to bar a suit in the Civil Court to set aside the order. [p. 492, col. 1.]

Occupancy rights cannot be acquired in *ghatwali* lands. [p. 492, col. 2.]

Upendra Nath Hazra v. Ram Nath Chowdhury, 33 C. 630 and *Mohesh Majhi v. Pran Krishna Mandal*, 1 C. L. J. 138, relied on.

Appeal from a decision of the Officiating Subordinate Judge, Manbhum, dated the 23rd June 1922, reversing that of the Munsif First Court, Purulia, dated the 24th January 1921.

Mr. A. K. Roy, for the Appellants.

Messrs. A. B. Mukherji and B. B. Mukherji, for the Respondent.

JUDGMENT.—These two appeals are by the plaintiffs and arise out of two suits brought by them for declaration of their title and for recovery of possession of certain lands set out in the schedules attached to the plaint. Their case was that the lands in dispute formed the ancestral *jote jamai* right of the plaintiffs and that the defendant, who is the *ghatwal* of the village where the lands are situated, forcibly dispossessed them in *Agrahayan* 1327 B. S. and that, therefore, they claimed recovery of possession on adjudication of their title to the land.

The defence of the defendant was that the Civil Court had no jurisdiction to entertain the suit and that the suit was triable in the Court of the Deputy Commissioner alone; that the suit was barred by limitation; that the plaintiffs had no *raiya* in-

terest in the lands; that the said lands were granted to the ancestors of the plaintiffs by way of maintenance and that on the death of the maintenance holders the defendant had resumed the lands and taken possession thereof; that during the settlement operations the plaintiffs tried to take possession thereof as tenants but that by an order of the Deputy Commissioner possession had been delivered to the defendant with the aid of the Police. It was contended that the suit was barred under the provisions of s. 258 of the Chota Nagpur Tenancy Act.

The learned Munsif who tried the suit held that the plaintiffs were *raiya*s with occupancy rights of the lands in dispute; that the suit was maintainable in the Civil Court, that it was not barred by s. 258 of the Chota Nagpur Tenancy Act; that the plaintiffs were in possession of the lands till they were dispossessed by the defendants through the help of the Police in *Agrahayan* 1327 B. S.; that although the lands in dispute were situated in a *ghatwali* village yet the plaintiffs could acquire occupancy right in the *ghatwali* lands. He believed the receipts for rent produced by the plaintiffs and decreed the suits for recovery of possession.

On appeal by the defendant the learned Subordinate Judge has set aside the decrees passed by the Munsif. He has held that the suit was barred under the provisions of s. 258 of the Chota Nagpur Tenancy Act and that the plaintiffs had no right as *raiya*s in the lands in dispute. He further held that the plaintiffs could not acquire occupancy right in *ghatwali* lands. He has accordingly dismissed the suits.

The plaintiffs have come up in second appeal to this Court.

At the hearing of the appeals a preliminary objection was taken on behalf of the respondent to the effect that the suit was not maintainable in the Civil Court. The learned Vakil relied upon the provisions of s. 139A of the Chota Nagpur Tenancy Act, and he contended that the suit being one for recovery of possession by a tenant against his landlord on the allegation that the plaintiffs as tenants had been unlawfully ejected by their landlord their proper remedy was by an application or a suit under cl. (5) of s. 139 of the Chota Nagpur Tenancy Act and under the provisions of s. 139A of the Act the Civil Court had no jurisdiction to entertain the suit. The

objection, in the form it has been taken, here does not appear to have been taken in the Court below; moreover it is not a preliminary objection to the hearing of the appeal but an objection on the merits of the case relating to the jurisdiction of the Civil Court to entertain the suit. Having regard, however, to the frame of the suit I am of opinion that this objection is not sound. Section 139 provides that certain suits and applications shall be cognizable by the Deputy Commissioner and shall be instituted and tried or heard under the provisions of the Chota Nagpur Tenancy Act and shall not be cognizable in any other Court except as otherwise provided in the Act; and cl. (5) of the section enacts that all suits and applications to recover the occupancy or possession of any land from which a tenant has been unlawfully ejected by the landlord or any person claiming under or through the landlord is one of the suits which is so cognizable by the Deputy Commissioner. This section contemplates a case where the relationship of landlord and tenant is admitted to exist between the parties; it does not to my mind contemplate cases where there is a dispute as regards title. In the present case the relationship of landlord and tenant is not admitted; the plaintiffs expressly stated in their plaint that the defendant denied their tenancy right and that he has been asserting that the plaintiffs had no right to the land in suit. There was a specific prayer in the plaint for an adjudication of the plaintiffs' title as occupancy *raiya*s of the land. Such a suit, in my opinion, was not cognizable by the Deputy Commissioner, and s. 139 does not operate as a bar to the maintainability of the suit in the Civil Court.

As regards the bar of s. 258 of the Chota Nagpur Tenancy Act the facts appear to be as follows:—One Manu Bauri had five sons. The eldest son was Haru Bauri who was the father of the defendant Krishna Sardar. The second son was Nafar Bauri who was the ancestor of the plaintiffs in Suit No. 986 which gave rise to S. A. No. 950. The third was Gokhul Bauri the father of the plaintiffs in Suit No. 985 giving rise to S. A. No. 943. The remaining two sons were Gopal and Mansaram. According to the plaintiffs their ancestors first came and began to live in village Dhakya and acquired lands there as tenants. Manu and his eldest son Haru subsequently became *ghat-*

wals of the village; but before the acquisition of the *ghatwali* interest, the plaintiffs assert that their ancestors had already acquired *raiya*ti interest in the lands. During the *khanapuri* operations the plaintiffs were first recorded as tenants of the lands in dispute under the defendant; but, subsequently, during attestation proceedings the names of the plaintiffs were removed from the category of tenants and recorded in the remarks column as being in possession of the lands with the share of rent and cess payable by them. The defendant thereupon went to the Deputy Commissioner of Manbhum and complained that he was the *ghatwal* of the lands in dispute and that he had been wrongfully dispossessed by his relations, namely, the present plaintiffs, and asked him for help to recover possession of the lands. The Deputy Commissioner by his *parwana* dated the 16th July 1920 directed the officer-in-charge of the Police station to oust the plaintiffs from the plots in dispute and to put the defendant in formal possession thereof. The defendant accordingly with the help of the Police obtained possession of the lands in dispute and the plaintiffs were thus dispossessed therefrom. The defendants thereafter went before the Settlement Officer. The learned Settlement Officer by his order dated the 31st January 1921 directed that the possession of the plaintiffs in respect of the lands in dispute in the *khatian* as made under orders of the Attestation Officer be cancelled. This last order of the Settlement Officer purports to be under s. 89 of the Chota Nagpur Tenancy Act, and it is contended that under s. 250 of the Act no suit can be entertained in any Court to vary, modify or set aside either directly or indirectly any decision, order or decree of the Deputy Commissioner or Revenue Officer in any suit, application or proceeding under s. 89 of the Act except on the ground of fraud or want of jurisdiction, and that every such decision, order or decree has the force and effect of a decree of a Civil Court in a suit between the parties and subject to the provisions in the Act relating to appeals, the order is final. The learned Munsif came to the conclusion that the order of the Settlement Officer dated the 31st of January 1921 was not an order under s. 89 of the Act inasmuch as s. 89 pre-supposes a proceeding under ss. 83, 85 or 86 of the Act, and as there was no proceeding under

any of these sections prior to the order of the 31st of January 1921 and, therefore, according to the Munsif the order purporting to be under s. 89 was *ultra vires* and without jurisdiction and that section did not apply to the present case. The learned Subordinate Judge, however, has held that there was nothing in the record to show that there was no previous case under s. 83 but that even if it were so, it would make no difference inasmuch as by the Amending Act VI of 1920 (Bihar and Orissa) any entry in the draft Record of Rights can be revised by the Revenue Officer if application be made to him within 12 months from the making of the entry. He was of opinion that the entry made by the order of the Attestation Officer was an entry made in the draft Record of Rights within the meaning of s. 89, and that, therefore, the Settlement Officer had jurisdiction to revise that entry under the provisions of s. 89 of the Act and, therefore, s. 258 which provides that such an order of revision will be final and shall have the force and effect of a decree of Civil Court operates as a bar to the present suit. In my opinion the view taken by the learned Subordinate Judge appears to be sound. The order of the Attestation Officer must be taken to be an order under s. 83 of the Act. All orders whether by *khanapuri* officers or by Attestation Officers have to be made during the preparation of the draft Record of Rights and all such orders passed before final publication of the Record of Rights are subject to revision under the provisions of s. 89 of the Act. It is contended that the Revenue Officer can revise the entries in the draft Record of Rights within 12 months from the making thereof and in this case there is nothing to show whether the order of the 31st of January 1920 was made within 12 months of the order of the Attestation Officer. Now, it must be presumed that the Revenue Officer acted regularly and if the bar of 12 months as provided in s. 89 is to be availed of, it has to be shown by the party pleading such bar that there was a bar of limitation and that the order had been passed beyond 12 months. There is nothing in the record to show that this was the case. The present suit, therefore, was barred under s. 258 of the Act.

Having regard to the suit being barred by s. 258 the other points raised in the appeal do not really arise. As regards the

title set up by the plaintiffs the learned Subordinate Judge has come to the finding that there was absolutely no evidence on the record to show that the ancestor of the plaintiffs had acquired any tenancy right before the acquisition of the *ghatwal* interest. He finds on a consideration of the evidence that the lands in dispute were held by the ancestor of the plaintiffs by way of maintenance; and that after the death of the maintenance holders the defendant, who is the *ghatwal*, was entitled to take *khas* possession of the lands. He moreover finds that the rent receipts produced by the plaintiffs were not genuine documents and there was no relationship of landlord and tenants between the parties. These are findings of fact which are conclusive in this second appeal.

As regards the question as to whether occupancy rights can be acquired in *ghatwali* lands the cases relied upon by the Subordinate Judge support his contention. In *Upendra Nath Hazra v. Ram Nath Chowdhury* (1), it was held that occupancy rights could not be acquired in *ghatwali* lands. The same view was taken in *Mohesh Majhi v. Pran Krishna Mandal* (2). The cases relied upon by the Munsif do not relate to *ghatwali* lands but to *chaukidari chakran* lands and have no application to the present case.

The appeals must be dismissed with costs.

Z. K.

Appeals dismissed.

- (1) 33 C. 630,
(2) 1 C. L. J. 138.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 73 OF 1923.

March 16, 1925.

Present:—Justice Sir Hugh Walmsley, Kt.,
and Mr. Justice Mukherji.

MOHAMMED KAMIL AND OTHERS—
PLAINTIFFS—APPELLANTS
versus

Haji HEDAYETULLA—DEFENDANT—
RESPONDENT.

Receiver, remuneration of—Partnership—Partner, whether can carry on business privately—Liability to account for profits of business carried on privately.

By consenting to act without remuneration so far as the keeping of the firm's accounts are concerned, a Receiver does not forego his right to such remuneration as he would be entitled to for managing and carrying on the business. [p. 493, col. 2.]

Unless expressly restricted by agreement, a partner may carry on another business privately so long as it does not compete with and is not connected with the business of the firm and so long as he does not represent it to be the business of the firm. A partner is not bound to account for the profits of a non-competing business even though he may be enabled to push the private trade better than would otherwise be the case, by reason of his connection with the firm. [p. 485, cols. 1 & 2.]

Appeal against a decree of the District Judge, Birbhum, dated the 20th of May 1922.

Babus Jogesh Chunder Roy and Probodh Chunder Kar, for the Appellants.

Messrs. S. C. Roy Choudhury, M. A. S. M. Akram and Syed Nashim Ali, for the Respondent.

JUDGMENT.

Mukherji, J.—This is an appeal preferred by the plaintiffs from a final decree passed by the District Judge of Birbhum in a suit for dissolution of partnership, for partition of partnership properties and for accounts. A preliminary decree was passed by the learned Judge directing accounts to be taken from the 11th October 1913 up to the 3rd August 1915, and declaring the shares of the plaintiffs and the defendants therein as being a half and half respectively. On appeal preferred by the plaintiffs a direction was inserted in the decree by this Court that the accounts were to be taken of the business also from the 3rd August 1915 to the date of the final decree and making all just allowance including fair remuneration to be allowed in favour of the defendant for managing the business and that the profits for that period will be divided in the same shares as mentioned before. The decree passed on appeal as aforesaid was carried on appeal to the Privy Council, but the said appeal was dismissed. In accordance with the aforesaid directions the usual investigations were held and the final decree that was ultimately passed is the subject-matter of this appeal.

The first ground urged on behalf of the appellants is that in calculating the profits of the business for the period from the 3rd August 1915 to the date of the final decree no remuneration should have been allowed to the defendant for the period during which he acted as Receiver appointed by the Court in respect of the partnership, and further that for such period for which he may be allowed remuneration, what has been awarded to him is excessive. As regards the first branch of this conten-

tion the position is this: The defendant was appointed Receiver on the 23rd September 1916 on the principle that "if the Court on being applied to for the appointment of a Receiver thinks that a proper case for such appointment is made, and the party actually carrying on the business has not been guilty of misconduct so as to render it unsafe to trust him, the Court generally appoints him Receiver without a salary". The learned District Judge found that the defendant was not guilty of any act of bad faith and was actually carrying on the business and being of opinion that the business would suffer if a stranger were appointed on a fixed remuneration, appointed the defendant as Receiver without remuneration as he was willing to act on that condition. The defendant deposited Rs. 5,000 as security and accepted the appointment. It is said that as the defendant consented to act as Receiver without remuneration he should get no allowance for managing the business. It appears, however, that the learned Judge did not pass any order interfering with the management of the business and the business continued to be carried on as before by the defendant. The terms of the defendant's appointment as Receiver limited his acts as such to the keeping of the assets and profits and accounts of the business and submitting proper accounts thereof. By consenting to act as Receiver without remuneration, the defendant did not forego his right to such remuneration as he would be entitled to for managing and carrying on the business. Moreover, this objection, if it had any substance, would have been put forward when this Court expressly directed by its decree dated the 27th January 1921 that the defendant should get all just allowance including fair remuneration for managing the business. It should be remembered that at that date the defendant had been acting as Receiver for about 15 months. The second branch of this contention rests upon the statement made by the defendant in his written statement that if Fazil, the father of the minor plaintiffs, or the defendant would personally conduct the business of the shop, the condition was that he would get Rs. 10 as diet money and expenditure, and also upon the evidence of the defendant to the same effect. In support of this contention reference is also made to the defendant's evidence that

after the death of Fazil the shop was in charge of one Abdul Rauf who used to get Rs. 55 or Rs. 60 a month as salary. The arrangement between the two brothers which obtained at a time when they jointly worked for the business, or the salary paid to a servant for doing the ordinary works in a shop can hardly be a criterion for determining the amount of remuneration that should be allowed to a surviving partner who employs all his energy, skill and experience for carrying it on. The Commissioners fixed his remuneration at 25 per cent. of the profits; the learned Judge has increased it to 6 annas in the rupee. The reason given by him for the variation is that when the shop was originally started the capitalist partner used to get at first 4 annas in the rupee and afterwards 3 annas in the rupee and the minor plaintiffs, after the death of Fazil, were more or less in the position of capitalist partners. While on the one hand the reasons given for departing from the conclusions of the Commissioners may not be very cogent, on the other hand it cannot be said that the variation is an altogether unreasonable one. The remuneration as allowed by the learned Judge works out at the rate, roughly of Rs. 150 a month, which cannot, in the circumstances of the case, be considered as altogether unreasonable or excessive.

The next ground of objection is to the effect that the assessment of profits has not been made on the basis of or in proportion to the assets which the respective parties had in the partnership in the different years. It is pointed out that the defendant withdrew from time to time large sums of money and on some occasions his withdrawal had the effect of taking out of the partnership all the assets that he had put in. This argument is based upon an examination of the statement of profits as made by the Commissioners and dated the 9th and 14th May 1922. It is true that at first sight an inspection of the statements leads to the same conclusion. On a close examination of them, however, it is clear that if the profits and respective shares of the parties therein are taken into account, the withdrawals made by the defendant were well within the amounts which would be due to him as profits, and that at no time would the amount of money belonging to the defendant and available to the partnership be less

than the money which the minor plaintiffs had in the partnership. The learned Judge has been at great pains to demonstrate it in his judgment and he has made the calculations up to a certain point. The respondent has pursued the calculations up to the date of the final decree, and we are satisfied that the conclusion is correct. In fact, as the learned Judge has pointed out in his judgment, this argument though originally pressed, was ultimately abandoned as the calculations showed that the plaintiffs were at a disadvantage as a result thereof.

The third contention put forward on behalf of the appellant is to the effect that the defendant was carrying on other and rival businesses to the prejudice of the partnership in suit, and that the profits of those concerns should have been taken into account. The precise nature of this objection as formulated before the learned Judge was that these businesses were started by means of the monies belonging to the partnership and the plaintiffs, therefore, are entitled to a share in the profits of these businesses as well. In this Court the objection has been slightly varied, and it has been urged that the defendant, without the consent of the other partners, carried on businesses of the same nature and competing with that of the firm, and must, therefore, account for and pay over to the firm all profits made by him in such businesses and he must also make compensation to the firm for any loss occasioned thereby. The argument is founded upon the evidence that out of the withdrawals made by the defendant, loans were given by him to persons, some of whom are his close relations, a son and a nephew for carrying on businesses of a similar nature and one of these businesses was located in the town of Suri itself where the partnership business in suit was carried on. Now this objection in this latter form was not put forward at any of the earlier stage of the suit, and it is clear from the order of this Court passed on the 8th August 1921 on the application made by the plaintiffs for further directions that it was in the contemplation of the Court that "there may be some controversy as to whether a particular business has or has not been carried on with money which would have belonged to Fazil if accounts had been taken on the 3rd August 1915". Upon the finding of the learned Judge that the

withdrawals made by the defendant were well within the amount of profits which accrued to the defendant's share—a finding which we endorse—no question can rise as to the monies lent as aforesaid belonging to Fazil's share, assuming that Fazil was alive at the dates of these loans. The controversy contemplated by this Court's order referred to above cannot, therefore, arise. As to the other contention noted above there are no materials upon which it may be held that the other businesses were businesses of a rival or competing nature or were such as would justify accounts being taken of their profits in determining the rights and liabilities of this partnership. The defendant was not cross-examined as to these matters when he was in the witness-box. After his evidence was completed the plaintiffs applied on the 20th July 1921 for directing the Commissioner to take the accounts of the different businesses mentioned therein. It was not possible for the learned Judge to accede to the prayer at that stage as nothing had been established till then which would justify the assumption that the defendant was liable to account to the plaintiffs for the profits of those businesses. The defendant was examined before the Commissioners in October 1921 and his cross-examination after a certain stage appears to have been given up. Thereafter, towards the end of December 1921 an attempt was made by the plaintiffs to get the defendant into the witness-box again in order to cross-examine him further, but it failed. Judging from the various orders that were passed in respect of this matter, it cannot be said that the plaintiffs were entitled to have a further opportunity of cross-examining the defendant. In our opinion, there are no materials on the record upon which we can reasonably hold that the profits of those other businesses should be taken into account in determining the liabilities under the partnership.

The mere facts that there were similar businesses in which the defendant was interested is not enough to justify the profits of those businesses being brought into the accounting. Unless expressly restricted by agreement, a partner may carry on another business privately, so long as it does not compete with and is not connected with the business of the firm and so long as he does not represent it to be the business of the firm. He is not bound

to account for the profits of a non-competing business, even though he may be enabled to push the private trade better than would otherwise be the case, by reason of his connection with the firm.

The next objection relates to certain items in the accounts which are referred to in objections Nos. 5, 6, 9, 12, 17, 20 and 21 as set out in the Report of the Commissioner dated the 9th July 1919. The plaintiff's objection which is common to all these items is that these items have been entered in the accounts as being monies taken by the defendant or his officer Abdul Rauf to Calcutta for the purchase of goods but no vouchers or details are forthcoming as to the goods purchased out of these monies. The explanation offered by the defendants as to these items generally is that both the partners had implicit confidence in each other and that though some notes of such purchases were kept they are not exhaustive. This explanation has been accepted by the learned Judge; and in view of the fact that during the period under account Fazil also took from time to time about Rs. 48,000 to Calcutta for purchasing goods for the shop and in no case detailed or full accounts of the purchases made by him are to be found in the books, the explanation, in our opinion, has been rightly accepted. As to the last of the aforesaid items the further objection of the plaintiffs is directed to the amount of Rs. 750 which, according to the Commissioner, would be due to the credit of the plaintiffs as the result of a double entry incorrectly made, but which has been disallowed by the learned Judge. The learned Judge has gone very fully into the matter, and the respondent has satisfied us that the learned Judge is right in his conclusion that having regard to the manner in which the accounts used to be kept the fact of a double entry, if any, does not matter, for Fazil was well enough at the time to know and see what money was actually in the shop at the time.

The last objection of the defendants is directed against the order passed by the learned Judge as regards the costs. The order of the learned Judge proceeds on the basis that the plaintiffs need not have instituted the suit, that the objections preferred by them were altogether frivolous and that they protracted the proceedings before the Commissioners and unnecessarily

delayed matters challenging every explanation and statement of the defendant and putting him to strict proof thereof and thereby causing him extreme inconvenience, harassment and pecuniary loss. We have considered the matter very carefully and we share in the view taken by the learned Judge of the plaintiffs' conduct in connection with the suit. We think if the plaintiffs had exhibited a little more of the spirit of tolerance, a good deal of the proceedings could easily have been avoided. We do not agree with the appellant's contention that a suit was absolutely necessary merely because there was no adjustment of accounts before the death of Fazil. Those responsible for the institution of the suit could very well have inspected the accounts, of which the defendant does not appear to have made any secret at any time, and if they had done so, this litigation perhaps would not have been necessary. The conduct of the respondent in depositing in 1916 an amount of Rs. 8,200 for the benefit of the minor plaintiffs is certainly praiseworthy, and we are not satisfied that there was at any time a refusal or failure on his part to disclose the accounts, such accounts as he had of the business, for the inspection of the plaintiffs.

The grounds urged in support of this appeal all fail, and the appeal, therefore, must be dismissed with costs.

Walmsley, J.—I agree.

Z. K.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1124 OF 1923.

February 26, 1925.

Present :—Mr. Justice Phillips.

NARASIMHA CHARYULU AND ANOTHER—
DEFENDANTS—APPELLANTS

versus

Sowcar Lodd GOVINDOSS KRISHNA-
DOSS VARU AND ANOTHER—PLAINTIFFS
—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, cl. 13—Civil Procedure Code (Act V of 1908), s. 102—Suit for rent and cesses, nature of—Appeal, second, whether lies.

Where cesses have been paid as part of the rent, a suit to recover them does not fall within cl. 13 of Sch. II to the Provincial Small Cause Courts Act and the suit is consequently of the nature of a small cause. Where the value of such a suit is less than Rs. 500, a second appeal would not be competent.

Second appeal against a decree of the Court of the Subordinate Judge, Chittoor, in A. S. No. 135 of 1921 (A. S. No. 534 of 1920 on the file of the District Court, Chittoor, preferred against that of the Court of the District Munsif, Chittoor, in O. S. No. 79 of 1920)

Mr. T. K. Srinivasathathachari, for the Appellant.

Messrs. K. Rajah Iyer and V. Ramaswami Iyer, for the Respondents.

JUDGMENT.—A preliminary objection is taken that no appeal lies as the suit is of a small cause nature of a value less than Rs 500. It is not disputed that this second appeal deals only with a matter of a small cause nature, namely, a claim for *jodi* and road-cess which has been held by this Court to be similar to a claim for rent, but it is contended that in the Original Court, the plaintiff included with his claim for rent a claim for a cess called Savari Nasar which is of the nature of the cesses mentioned in cl. 13 of the Second Schedule of the Provincial Small Cause Courts Act IX of 1887. It does not appear from the plaint that any special claim was made for Savari Nasar but the claim was made for *jodi*, *russums*, etc., as mentioned in the *adambadika* account and this coupled with the evidence of P. W. No. 1 would show that the claim was for rent including the *ressums* mentioned. It has been held in *Mullapudi Balakrishnayya v. Rathnavellu Chetti* (1) which was approved in *Harischandra Deo v. Narayana* (2) that where cesses have been paid as part of the rent a suit to recover them does not fall within cl. 13 of the Second Schedule of the Provincial Small Cause Courts Act. Applying that decision to this case it would appear that this suit was one for rent which rent also included certain cesses. This would be a suit of a small cause nature and not of the character mentioned in cl. 13. The objection must be upheld and the appeal dismissed with costs.

V. N. V.

Z. K.

Appeal dismissed.

(1) S. A. No. 593 of 1899.

(2) 24 M. 508.

CALCUTTA HIGH COURT.APPEAL FROM APPELLATE DECREE No. 1677
OF 1923.

April 30, 1925.

Present:—Mr. Justice Cuming.

PRASANNA KUMAR DATTA—PLAINTIFF
—APPELLANT

versus

KEDARNATH SAMANTA—DEFENDANT
—RESPONDENT.*Bengal Tenancy Act (VIII of 1885), s. 49—Ejectment—Raiyat holding homestead land, status of—Fixed rate tenant, whether can grant permanent lease.*

A raiyat at fixed rate of rent is competent to grant a permanent lease of the land.

Amar Chand Roy v. Prasanna Dasi, 61 Ind. Cas. 529; 25 C. W. N. 9, referred to.

A lessee from a raiyat in respect of homestead land, if he holds other lands as a settled raiyat in the village, would hold the homestead land as a raiyat and would be protected from ejectment.

Appeal against a decree of the Subordinate Judge, Second Court at Howrah, dated the 21st of March 1923, reversing that of the Munsif, First Court at Uluberia, dated the 20th of August 1921.

Babu Mahendra Nath Roy, (with him Babu Kanaidhone Dutt), for the Appellant.

Babu Rupendra Kumar Mitter (with him Babus Sisir Kumar Ghosal and Sadhan Chandra Roy Chowdhury), for the Respondent.

JUDGMENT.—In the suit out of which this appeal has arisen the plaintiff sued to eject the defendant on the ground that he was an under-raiyat and that he had served upon him notice to quit.

The First Court decreed the suit.

The defence of the defendant was that he was not an under-raiyat but a raiyat with a right of occupancy, the plaintiff being a tenure-holder. He also appears to have contended in his written statement that the holding in question was not an agricultural holding. The Trial Court decreed the plaintiff's suit holding that the plaintiff was an occupancy raiyat and the defendant an under-raiyat. On appeal the learned Subordinate Judge held that the land in question was governed not by the provisions of the Bengal Tenancy Act but by the provisions of the Transfer of Property Act and that the *kabuliyat* on which the defendant relied granted a permanent right. He further held that even if the land was not governed by the provisions of the Transfer of Property Act but by those of the Bengal Tenancy Act, the de-fendant was raiyat and so was not liable to be evicted. He held that if the case was governed by the Bengal Tenancy Act the plaintiff on his own showing was a raiyat at a fixed rate of rent and, therefore, he was competent to grant a permanent lease of the land in question in view of the decision in the case reported as *Amar Chand Roy v. Prasanna Dasi* (1).

On appeal the learned Advocate has contended that having regard to the defendant's own plea his case was that he was an occupancy raiyat and, therefore, he could not be allowed on appeal to make out a case that this case was one governed by the Transfer of Property Act. With regard to this contention, I think, it is clear from the written statement of the defendant and also from the judgment of the Trial Court that it was a part of the defendant's case that he did not hold the land in question as agricultural land. This, I think, is clear from para. 5 of the written statement and also from the discussion of the Trial Court in its judgment. I do not, therefore, think that the case that the suit was governed by the Transfer of Property Act was made for the first time in appeal.

The next point taken by the learned Advocate is that the learned Judge is wrong in holding that if the Bengal Tenancy Act applied, the defendant was protected from ejectment.

On the findings of fact of the lower Appellate Court I think this contention is not tenable. The lower Appellate Court has found that if the case is not governed by the Transfer of Property Act, then the defendant has the status of a raiyat because he holds other lands in the village as a settled raiyat and in view of the decision in the case of *Krishna Kanta Ghose v. Jadu Kasya* (2). I am of opinion that although with regard to the homestead land the lessor was a raiyat, the lessee, if he held other lands as a settled raiyat in the village would hold this homestead land as a raiyat and would, therefore, be protected from ejectment.

There is a third point too on which the plaintiff's case fails. The lower Appellate Court has found that the plaintiff on his own showing is a raiyat at a fixed rate of rent and, therefore, he was competent to

(1) 61 Ind. Cas. 529; 25 C. W. N. 9.

(2) 28 Ind. Cas. 839; 19 C. W. N. 914; 21 C. L. J. 475.

grant a permanent lease of the lands in suit. On all these grounds I think it is clear that the plaintiff's suit must fail.

The result is that this appeal is dismissed with costs.

Z. K.

Appeal dismissed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 55 OF 1924.

February 6, 1925.

Present:—Sir Victor Murray Coutts-Trotter, Kt., Chief Justice, and Mr. Justice Krishnan.
ALBERT KARUNAKARAN STEPHEN—

APPELLANT

versus

THE ADMINISTRATOR-GENERAL OF
MADRAS—RESPONDENT.

Will, construction of—Devise in favour of wife—Estate taken.

An Indian Christian left a Will in the following terms:—"I hereby give away to my second wife all the moveable and immoveable properties I possess. After me she should enjoy the said properties and she should at her death divide and give the same to the children of my deceased wife's daughter."

Held, that under the Will the widow of the testator got an absolute estate in the properties of the testator and not merely a life-estate coupled with a power of appointment. [p. 498, col. 2; p. 499, col. 2.]

Appeal from an order of Mr. Justice Kumaraswami Sastriar, dated the 23rd April 1924, made in the exercise of Original Testamentary Jurisdiction of the High Court, in O. P. No. 179 of 1922, in the matter of the last Will and testament of Mrs. Annie Shungu Pillai deceased.

Mr. N. K. Mohana Rangam Pillai, for the Appellant.

The Administrator-General, for the Respondent.

JUDGMENT.

Coutts-Trotter, C. J.—In this case a man called Shangu Pillai, who was an Indian Christian, left a Will, dated the 7th November 1903, which has been the subject of dispute as to its true construction. The material words are "I hereby give away to my second wife Annie Shangu Pillai all the moveable and immoveable properties I possess. After me she should enjoy the said properties and she should at her death divide and give (the same) to these three persons, namely, my first wife's deceased daughter Manoranjitamani Ammal's children (1) Samuel Rajarathnam (2) Alvert

Karunakaran and (3) Penelope Padma according to the wishes of the aforesaid Annie Shangu Pillai". It has been argued strenuously before us and to a certain extent accepted by the learned Judge that this is not an absolute bequest to the widow but is a mere life-estate coupled with a power of appointment. I personally, whenever I can, avoid holding that the technicalities of English Chancery practice about powers and so forth are to be imputed to Hindu testators who know nothing whatever about them and, as far as possible, I adopt a construction which will steer clear of rules of this kind with which the parties are totally unfamiliar. It seems to me that a plain man interpreting the language of the Will in the ordinary way would say this was a gift to his widow with an expression of opinion that it would be desirable for her to divide the property obviously in what shares she pleased. Nobody contends that definite shares were provided for in the Will for these three people. The words "according to the wishes of the aforesaid Annie Shangu Pillai", appear to me obviously to leave in her a discretion so that, if Samuel Rajaratnam or either of the others turned out to be unsatisfactory, the widow undoubtedly on the true construction of this document would be justified in saying "you will not get a penny." Then it is said that the language which she herself used implied that she thought she was acting under a power. I suppose the idea of the power was put into her head by Chelliah or John Stuart, a clergyman of the United Free Church Mission. I do not suppose they knew much more about powers than I do. I find that although, as I say, she purported to act under what is described as a power, the language she used is quite categorical "I hereby bequeath the properties, that is, all the properties devised by Shangu Pillai and inherited by me from my late husband along with my own properties". Who reading that language, if what was in her mind was relevant and material which I very much doubt, can come to any other conclusion than that this woman believed that she had an absolute power to dispose of this property though no doubt she would in all probability have endeavoured to respect the wishes of her late husband? In my opinion this is the most satisfactory solution of the case and the one which keeps us most in the domain of realities and does not seek to apply technical rules of

construction which are well enough in the case of instruments drawn by professional people who know exactly what language is apt to express the rules of construction laid down in the English cases to a *Tamil* document drawn by a person who knows nothing of the rules or their application.

This appeal fails and must be dismissed with costs.

Krishnan, J.—I agree with the learned Chief Justice that this appeal fails. I confess that I had some doubt in the beginning as to the interpretation to be put upon the Will. But after hearing the Administrator-General for the defence, I am quite clear that it is not possible to hold on the construction of the Will of Shanga Pillai, that his wife got only a life-estate under it. The learned Judge says that the words "should enjoy and should at her death divide and give" coupled with the fact that there are no words of absolute disposition in the Will suggest to his mind that the testator did not intend that his widow should do what she liked with the properties. In the first place it seems to me that there is a misapprehension here because the opening words of the Will do amount to an absolute disposition in favour of the widow. It says: "I hereby give away to my second wife all the moveable and immovable properties I possess." The use of the word "enjoy" in the second sentence does not connote to my mind that the absolute estate given in the first sentence was cut down to a life-estate. Enjoyment of property is possible not only for a life-estate holder but also for an absolute estate-holder. In fact both enjoy the property equally and, so far as enjoyment goes, there is no difference between the two. The absolute estate-holder will no doubt have powers of alienation which the life-estate-holder will not have. Then there are the words "she should at her death divide and give to these three persons". No doubt these words require some consideration; but I think that these words cannot be used as cutting down the absolute estate, for it is left entirely to the wishes of the lady under the Will, to give as she liked. That seems to show that the matter was left entirely to her discretion and that there was no binding disposition of the property in favour of the three persons named. It is a mere matter of recommendation to the lady to do what the testator would have liked to be done with his property at the time of her death.

A case very similar to this has been cited by the Administrator-General, *In re Hamilton; Trench v. Hamilton* (1), and Lord Justice Kay's observations there are quite apt and applicable to this case. There are no words here to show that the testator intended that the three persons named should get an estate subject to the exercise of a power by the widow. In fact it is not a case at all of any power of appointment. It is merely a case of absolute bequest to the widow with a recommendation to her, so far as I can understand, to deal with the properties in the manner mentioned which is not binding on her. The use of the word "power" by the widow in her Will is not important. The depositive words are "I hereby bequeath the properties devised by and inherited from my late husband along with my own properties in the manner following". It is only under the second Will by the bequest in favour of the plaintiff that he can get any right to the properties, and as there is no bequest in his favour of the property now in dispute, house No. 27, Venkata Maistry Street, he cannot possibly succeed.

The appeal should, therefore, be dismissed with costs.

V. N. V.

Z. K.

Appeal dismissed.

(1) (1895) 2 Ch. 370; 61 L. J. Ch. 799; 12 R. 355; 72 L. T. 748; 43 W. R. 577.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1285 OF 1923.

July 9, 1925.

Present:—Justice Sir Ewart Greaves, Kt., and Mr. Justice B. B. Ghose.

NEPALDAS MUKHERJEE—DEFENDANT
No. 6—APPELLANT

versus

PROBHAS CHANDRA MUKHERJEE
AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law — Dayabhaga — Inheritance—Test—Spiritual benefit—Daughter's grandson, whether heir.

The foundation of the theory of inheritance as propounded in the *Dayabhaga* proceeds on the doctrine that only those can inherit who can confer spiritual benefit on the owner whose property they claim to inherit. [p. 501, col. 1.]

Gooroo Gobind Shaha v. Anand Lall Ghosh, 13 W. R. F. B. 49 at p. 59; 5 B. L. R. F. B. 15, and *Digumber Roy Chowdhry v. Moti Lal Bundopadhyaya*, 9 O. 563; 12 O. L. R. 204; 7 Ind. Jur. 529; 4 Ind. Dec. (N. S.) 1023, followed.

A daughter's grandson, being unable to confer spiritual benefit, is not an heir under the *Dayabhaga* School of Hindu Law. Nor does he become heir on the ground of propinquity, even if there is nobody alive who can confer spiritual benefit on the deceased owner. [p. 501, col. 1.]

Radharaman Chowdhuri v. Gopal Chandra Chakravarty, 56 Ind. Cas. 122; 31 C. L. J. 81; 24 C. W. N. 316, distinguished.

Appeal against a decree of the Subordinate Judge, Faridpur, dated the 24th January 1923, reversing that of the Munsif, Third Court at Bhanga, dated the 5th April 1925.

Dr. Jadu Nath Kanjilal and Babu Surendra Nath Das Gupta No. 2, for the Appellant.

Babus Suresh Chandra Talukdar and Nibaran Chandra Samajpaty, for the Respondents.

JUDGMENT.—This is an appeal by defendant No. 6 from a decision of the Subordinate Judge of the Second Court of Faridpur reversing a decision of the Munsif of the Third Court of Bhanga. The suit was brought by the plaintiffs for declaration of their title to and for possession of a certain plot of *niskar* land, plot No. 137 of the cadastral survey which was in estate No. 1187. Some question was raised in the Courts below as to whether the property in dispute was *niskar* or *mal* land of the estate but it has been found that the property is *niskar* and this is not questioned in second appeal. The plots originally belonged to one Raghumani Banerji. He died leaving a daughter Dakhina who had a son Purno. Purno died leaving him surviving three sons who are the plaintiffs in the present suit. Their case was that Dakhina succeeded to the property on the death of Raghumani and that on Dakhina's death the property passed to her son Purno and on his death to his sons, the present plaintiffs. Their case was that they had been in possession through their *bhag tenants* and that they have been dispossessed. The defendants or some of them were owners of the estate No. 1187. As we have already stated they claim the land as *mal* land of the estate. The case was only contested by defendant No. 6 who had purchased the land from the other defendants. Although the plaintiffs' case was that Purno had inherited after his mother, they had inherited from him, it turned out in the course of the case that Purno predeceased his mother Dakhina. The suit was dismissed by the First Court but the lower Appellate Court allowed the

plaintiffs to raise what is said to be a fresh case, namely, that although Purno predeceased his mother, Dakhina, the plaintiffs inherited the property as Dakhina's heirs.

The only question that arises in this appeal is whether under the facts and circumstances stated, namely, that Purno predeceased his mother, the plaintiffs are entitled to claim the property as heirs of Raghumani. The lower Appellate Court has held that they were entitled and this is the proposition which is disputed before us. It is stated that in no case can the grandsons of a daughter inherit the property as they cannot confer spiritual benefit on the original owner Raghumani and that the power to confer spiritual benefit is the only test of inheritance. In support of this proposition we were referred, first of all, to a passage in Mayne's *Hindu Law* (8th Edition) page 706, s. 505 and also to a passage in Trevelyan's *Hindu Law* (2nd Edition) page 410 where the learned author states that the daughter's son's son is not an heir according to the Bengal School. Then we were referred to the actual test of the *Dayabhaga* in the translation by Colebrook, Ch. II, s. 2, verse (ii) at page 159 where it is stated as follows: "It is the daughter's son who is the giver of a funeral oblation, not his son, nor the daughter's daughter for the funeral oblation ceases with him" and in the analysis at p. IX it is stated that "in default of the widow the daughters inherit." The daughter that is barren or a sonless widow or female children, hence daughter's daughter and daughter's son's son are not heirs being incompetent to confer spiritual benefit; and in support of the proposition that inheritance depends on the power to confer spiritual benefit and on this alone we were referred to the Full Bench case of *Gooroo Gobind Shaha v. Anund Lall Ghose* (1). The passage relied on in the judgment of Mr. Justice Mitter is to the following effect: "Having shown by the preceding observations that the principle of spiritual benefit is the sole foundation of the theory of inheritance propounded in the *Dayabhaga*, we proceed to determine whether the particular claimant before us, namely, the son of a paternal uncle's daughter, is competent to confer any such benefit on the deceased proprietor. We are of opinion

(1) 13 W. R. F. B. 49 at p. 59; 5 B. L. R. F. B. 15.

[90 I. C. 1925]

CHRISTIAN V. PRASAD RAUT.

that he is, and we may add that this point was not even contested before us by the Pleader for the respondent." We think, therefore, that this passage clearly lays down the principle that the foundation of the theory of inheritance as propounded in the *Dayabhaga* proceeds on the doctrine that only those can inherit who can confer spiritual benefit on the owner whose property they claim to inherit. Similar authority is to be found in another Full Bench case of this Court in *Digumber Roy Chowdhry v. Moti Lal Bundopadhya* (2), the material passages in this judgment on this point being those occurring at page 567*. There is no doubt as has been pointed out by a reference to the text books and to passages in the case to which we have referred that from time to time attempts had been made to throw doubt on the proposition laid down in the passage to which we have referred in *Gooroo Gobind Shaha v. Anund Lall Ghose* (1), but the attempts that had been made to re-open the question have always failed on the ground that the Courts have stated that that principle must be taken as decided by the passage to which we have referred in the case which is a decision which has stood for 50 years. But it is argued on behalf of the respondents that even accepting this principle as there is no one alive who can confer spiritual benefit, the grandsons of a daughter may be entitled to inherit on the ground of their propinquity to the original owner of the property in default of the existence of persons who can confer such spiritual benefit. In support of this proposition we were referred to the case of *Radharaman Chowdhuri v. Gopal Chandra Chakravarty* (3). The cases to which we have referred are there considered and the argument that was propounded to the Court based on the right of persons standing in propinquity to the original owner to inherit in default of the existence of persons who can confer spiritual benefit was discussed. But in the result no decision was arrived at by the Court on the application which was merely an application to appear and contest certain probate proceedings. We do not think, therefore, that the learned Vakil who

appeared for the respondents is entitled to rely on anything that occurs in *Radharaman Chaudhari v. Gopal Chandra Chakravarty* (3) in support of his argument for as we have already stated we do not think that any decision was come to there. In my view the passages to which we have referred in the two Full Bench cases lay down clearly that unless a person is in a position to confer spiritual benefit on the owner of the property whose property he claims, he is not and cannot be an heir of such a person and cannot, therefore, claim to inherit such property.

This being so, we think that the appeal must succeed on this ground, namely, that the respondents here who succeeded in the Courts below are not heirs of Raghumani and have, therefore, no interest in the property which they claim. They were suing in ejectment and it was for them to establish their title. This they have failed to do and the appeal accordingly succeeds and with costs in all Courts.

N. H.

Appeal allowed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREES
Nos. 566, 663, 680 TO 687 AND 732 TO 737
OF 1922.

April 24, 1925.

Present:—Justice Sir B. K. Mullick,
Kt., and Mr. Justice Ross.

F. F. CHRISTIAN—PLAINTIFF—
APPELLANTS IN NOS. 663, 680 TO 687—
RESPONDENTS IN NOS. 566, 732 TO 737

versus

PRASAD RAUT AND OTHERS—

DEFENDANTS—RESPONDENTS IN NOS. 663 AND
680 TO 687—APPELLANTS IN NOS. 732 TO 737.

Execution of decree—Sale—Identity of property sold, determination of—Sale proclamation and sale certificate, conflict between—Mixed question of law and fact—Appeal, second—Finding of fact—Documentary evidence not considered—Finding, whether binding.

An auction sale like any other contract comprises an offer and acceptance. The offer is made by the Court and is advertised by the proclamation of sale. So far as the identification of the property to be offered for sale is concerned, this is the only declaration which is authorised or required. Unless, therefore, there is something to show that the Court sold something less than was advertised for sale, the sale proclamation is conclusive as to the identity of the property sold. [p. 503, col. 1.]

(2) 9 C. 563; 12 C. L. R. 204; 7 Ind. Jur. 529; 4 Ind. (N. S.) 1023.

(3) 56 Ind. Cas. 122; 31 C. L. J. 81; 24 C. W. N. 316.

*Page of 9 C.—[Ed.]

In granting a sale certificate, it is the duty of the Court not to determine what property is to pass by the sale, but merely to record the already accomplished fact of a transaction that has taken place and to state what has been sold. The Court has no power to do more or to alter the fact of the sale which has actually taken place. Its action in granting the certificate is ministerial and not judicial. [*ibid.*]

In the case of a conflict between the sale proclamation and the sale certificate subsequently granted, the property sold must be determined by reference to the terms of the sale proclamation. [*ibid.*]

Where an Appellate Court mentions certain documents in the course of its judgment in stating the argument on behalf of one of the parties but fails to consider the documents or their legal effect in arriving at its finding, the finding, even although one of fact, is not binding on the High Court in second appeal. [p. 504, col. 1.]

Per *Mullick, J.*—A finding as to the identity of property sold at a Court sale relates to a mixed question of fact and law and is open to revision in second appeal. [p. 504, col. 2.]

Appeal from a decision of the District Judge, Monghyr, dated the 27th March 1922, modifying that of the Munsif, Jamui, dated the 16th December 1920.

Messrs. *P. K. Sen, A. K. Roy and Raghunandan Prasad*, for Appellants in Nos. 663, 680 to 687 and Respondents in Nos. 566, 732 to 737.

Messrs. *N. C. Sinha and Bindeswari Prasad*, for Respondents in Nos. 663, 680 to 687 and Appellants in Nos. 566, 732 to 737.

JUDGMENT.

Ross, J.—In Appeals Nos. 663 and 680 to 687 of 1922, the appellant is the plaintiff in certain suits for rent against the defendants. The suits out of which these appeals arise were either wholly or partially dismissed. In Appeals Nos. 566 and 732 to 737 of 1922, the tenants are the appellants, these suits having been decreed against them.

The plaintiff sued for rent for the years 1324 to 1327 as being *mokarraridars* of certain shares in *Taluka Gadi Mahesri*. His title arose in various ways by private purchase, by lease and by mortgage from the co-sharers in the *mokarrari* and also by purchase in execution of two decrees. The execution cases in which these last purchases were made were No. 78 of 1913 and No. 253 of 1913; and it is with the shares purchased in these executions that the present controversy is concerned. The case for the plaintiff is that he purchased an interest in the *mokarrari* of the entire *Taluka Gadi Mahesri*. The case for the defendants is that the purchases were confined to shares in the *mokarrari* of *Mauza Gadi Mahesri* only; and as the suits relate

to villages in the *taluka* other than *Mauza Gadi Mahesri*, the defendants denied that the relation of landlord and tenant existed between the plaintiff and themselves so far as the interest claimed to have been purchased in these executions extends to these villages. The learned Munsif who tried the suits disallowed the plaintiff's claim under both executions. The learned District Judge on appeal disallowed the claim under Execution Case No. 78 of 1913, but allowed it so far as Execution Case No. 253 of 1913 was concerned. Consequently there are appeals by both parties.

I shall deal first with the plaintiff's appeals. The relevant documents are the petition for execution (Ex. 19), the writ of attachment (Ex. 24), the sale proclamation (Ex. 25), the writ of delivery of possession (Ex. 18) and the sale certificate (Ex. 21). The petition for execution shows that execution was sought in respect of certain shares in *Dakhinwari Khut*, *Khut Kalan* and *Uttarwari Khut* in *taluka Gadi Mahesri*, *asli mai dakhli* including *tolas*, *chaks*, *kitas*, houses, jungles, nills, mines, etc. together with the surface and subsoil rights appertaining to the lands of the said *taluka* held in perpetual *mokarrari*, *touzi* No. 327. The *jama sadar* of the entire *taluka* along with that of *nisf katauna* is stated and also the gross annual of *jama* of the shares proceeded against and their respective values. The writ of attachment follows the petition for execution exactly and the sale proclamation is in similar terms. The report of the peon who delivered possession of the property purchased in execution states that he reached *Mouza Dadi Mahesri* and put the decree-holder auction-purchaser in possession of the *mahal*. The receipt for delivery of possession granted by a servant of the auction-purchaser states that the peon arrived at *Mouza Gadi Mahesri* and delivered possession of the perpetual *mokarrari* right noted in the writ of delivery of possession. From the first three of these documents, therefore, it is clear that what the decree-holder proceeded against in execution and what the Court attached and proclaimed for sale was certain shares in the three *khuts* of *Mouza Gadi Mahesri* and the report of delivery of possession is not inconsistent with these documents. The sale certificate, however, while following the earlier documents in other respects in close detail, contains the words "*Mouza Gadi Mahesri*" instead of *taluka Gadi*

Mahesri;" and it is on this solitary expression that the whole defence in those suits has been based.

Now the law on the subject is clear and undisputed. As Lord Watson observed in *Pattachi Chettiar v. Sangili Vira Pandaya Chinnatambiar* (1) the question is "what did the Court intend to sell; and what did the purchaser understand that he bought." In *Balwant Babaji Phondge v. Hirachand Gulabchand Gujar* (2) there was a mortgage-decree directing that the interest of five brothers in the mortgaged property should be sold. The proclamation of sale followed the decree, but in the sale certificate, the name of one of the brothers only was mentioned. The learned Judges there pointed out that there was nothing in the Code which made a certificate of sale conclusive as to the property sold; that in granting a certificate, it is the duty of the Court not to determine what property is to pass by the sale, but merely to record the already accomplished fact of a transaction that has taken place and to state what has been sold. The Court has no power to do more or to alter the fact of the sale which has actually taken place. Its action in granting the certificate is ministerial and not judicial. It is pointed out that the sale is an offer and acceptance; that the offer is made by the Court and is advertised by the proclamation of sale; and that so far as concerns the identification of the property to be offered for sale, this is the only declaration which is authorised or required. In *Raja Thakur Barmha v. Jiban Ram Marwar* (3) in which there was a conflict between the sale proclamation and the certificate subsequently granted it was held by the Judicial Committee that what is sold at a judicial sale can be nothing but the property attached and that that property is conclusively described in and by the schedule to which the attachment refers. As against such description it was held that the certificate of sale had no effect. Unless, therefore, there is something to show (and it is not suggested in the present case that there is anything) that the Court sold something else than was advertised for sale, the sale proclamation is conclusive. This being

the law it seems clear that if the petition for execution, the writ of attachment and the sale proclamation are clear and unambiguous, any discrepancy from the description of the property contained in these documents which occurs in the sale certificate can have no effect. Then the sale certificate itself is by no means unambiguous and it is not necessary to suppose that it was intended to refer to a different property. The term "*mauza*" might include the whole *mahal*; and from the fact that the *tauzi* number is given this was apparently the intention. A village which was merely a constituent of the *mahal* would not have a *tauzi* number. The learned Munsif based his decision entirely on the fact that the annual *jama* as stated in the various documents was much lower than what the annual *jama* of the whole *mahal* would have been and was more likely to be the *jama* of the single village. The learned District Judge has also accepted this argument and has further proceeded on the ground that the price paid seems to be far too low for a share in the entire *taluka*. Now even if the *jama* is mis-stated, if the document is otherwise unambiguous, this item would be disregarded as misdescription. But there are in truth no materials for the conclusion that the *jama* stated in these documents is the *jama* of *Mouza Gadi Mahesri* rather than of the entire *taluka*. The learned Munsif seems to have confused the *jama* with the annual income. The sale proclamation and the other documents do not pretend to state what the annual income of the share is. The learned Munsif has pointed out that the cash rental of *Mouza Gadi Mahesri* is about Rs. 600 and that there are more than 250 acres of *kamat* lands and there is also *batai* land. Now the produce of *kamat* land would not naturally be included in the term *jama* and there is nothing to show what the income of the *batai* land is. Moreover there are no materials whatsoever for estimating the *jama* of the entire *taluka*; and the ground upon which the Munsif has decided this case must, therefore, be treated as purely speculative and it is not warranted by the terms of the documents themselves.

With regard to the observations of the learned District Judge on the price, it may be that the property was purchased cheap but there may be many reasons for that. It is impossible to say on the materials before us how low the price was and this

(1) 10 M. 211; 14 I. A. 81; 11 Ind. Jur. 272; 5 Sar. P. O. J. 38; 3 Ind. Dec. (N. S.) 921 (P. O.).

(2) 27 B. 334; 5 Bom. L. R. 217.

(3) 21 Ind. Cas. 936; 41 C. 590; 18 C. W. N. 313; 15 M. L. T. 137; 12 A. L. J. 156; 19 C. L. J. 161; 25 M. L. J. 89; 16 Bom. L. R. 156; (1914) M. W. N. 116; 41 I. A. 38 (P. O.).

is no criterion for construing the documents. It seems to me that this is a very plain case which does not admit of doubt; the documents with the doubtful exception of the certificate of sale are all consistent with only one conclusion, namely, that what was purchased was a share in the entire *taluka*. But the decisions above cited show that the certificate of sale cannot override the other documents which are conclusive as to the property actually sold.

The learned Vakil for the respondents contended that the case is concluded by findings of fact. In my opinion this is not so. It is true that the learned District Judge has mentioned the execution petition and the writ of attachment and the sale proclamation in stating the argument on behalf of the plaintiff; but there is nothing to show that he considered these documents or their legal effect. I would, therefore, allow these appeals with costs.

With regard to the appeals of the defendants, the ground upon which the Munsif limited the purchase in Execution Case No. 253 of 1913 to a share in *Mouza Gadi Mahesri* was that the shares mentioned in the sale certificate in this case are the shares which were actually owned by the judgment-debtors in that village, whereas they had different shares in the different villages constituting the *taluka*. He was, therefore, of opinion, that the proceedings in execution must be limited in their operation to *Mouza Gadi Mahesri* alone. The learned District Judge has properly refused to give effect to this argument pointing out that, if in fact the judgment-debtors have larger shares in some of the villages than those stated in the sale proclamation, the excess will not be affected by the sale. In this case all the documents are consistent and leave no room for doubt that the shares which were proceeded against in execution and were attached and proclaimed for sale and sold were the shares of the judgment-debtors in the entire *taluka*. It was suggested that the learned District Judge has erred in his calculation of the price because he has understated the shares that passed by the sale. But, as I have pointed out, in dealing with the plaintiff's appeals, there are no materials for ascertaining the real value of this property; and in any case if the purchaser purchased at a low price, that is not a matter which affects the present question.

The defence in these suits appears to me

to be entirely without merit and to rest on nothing better than a clerical mistake in a document of minor importance.

The result is that the plaintiff's appeals must succeed and are allowed with costs and the suits out of which these appeals arise must be decreed in full with costs throughout. The tenants' appeals are dismissed with costs.

Mullick, J.—I concur entirely. It was argued that this being a second appeal it was not competent to us to interfere with the District Judge's finding in regard to the identity of the property which was sold. The answer to this is that as the finding relates to a mixed question of fact and law it is open to revision in second appeal.

Z. K.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1444 OF 1924.

March 12, 1925.

Present:—Justice Sir Ewart Greaves, Kt., and Mr. Justice Cuming.

Rai HARENDRA NATH CHAUDHURY
—PETITIONER

versus

SONA GAZI AND OTHERS—OPPOSITE
PARTIES.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 7
—Order granting review—Appeal, whether lies.
No appeal lies against the order granting a review.
[p. 505, col. 1.]

An order granting an application for review of a judgment can only be objected to on the grounds specified in r. 7 of O. XLVII, of the C. P. C. [*ibid.*]

Rule against an order of the Court of the Additional Sub-Judge, Khulna, in Miscellaneous Appeals Nos. 180 and 181 of 1923.

Babus *Brojolal Chakerverty* and *Surendra Nath Bose*, for the Petitioner.

Babus *Rajendra Chandra Guho* and *Anilendra Nath Roy Chowdhury*, for the Opposite Parties.

JUDGMENT.

Greaves, J.—We think that this Rule should be made absolute. The facts of the case are as follows: A decree was obtained *ex parte* in the Second Court of the Munsif at Khulna on behalf of certain co-sharers. The decree was executed at the instance of one of the co-sharers alone and the standing crops of the judgment-debtor were attached. The other co-sharer on coming to hear of

[90 I. C. 1925]

INDER KUER v. MOHAMMAD TAQI.

the execution applied for being made and was made an executing decree-holder. Then apparently the other co-sharer arrived at a compromise with the judgment-debtor whereby the execution case was dismissed on certain terms. The petitioner who obtained the Rule objected to the compromise which involved the dismissal of the execution case and he, accordingly applied for a review on the ground of fraud. The review was granted which involved the rehearing of the execution case. Against the grant of the review an appeal was preferred and on appeal the order granting the review was set aside and the compromise arrived at in the execution proceedings was allowed to stand and this Rule was obtained against that order which had the effect of setting aside the review and restoring the compromise arrived at in the execution proceedings.

The Rule is supported on the ground that there is no appeal from the order granting the review. It is stated that by virtue of the provision of O. XLI, r. 7 of the C. P. C. the order rejecting the application for review is not appealable but that the order granting the application for review may be objected to on the grounds that are stated in r. 7 of O. XLVII but it is stated that inasmuch as the appeal directed against the review did not fall within any of the matters set out in r. 7 no appeal lay and we were referred to the case of *Hari Charan Saha v. Baran Khan* (1) which lays down that an order granting an application for review of a judgment can only be objected to on the grounds specified in r. 7 of O. XLVII. Various matters were urged before us in opposition to the Rule. First of all we were referred to a judgment to which I was a party which, it is stated, supports the view that an appeal in the circumstances does lie. We have read the judgment. I cannot see that it decides any such thing. It seems to me to have no application to the facts of the case now before us.

Then we were asked to say that the decision in *Hari Charan Saha v. Baram Khan* (1) to which we have referred and the other decisions to the same effect are all wrong for reasons which are stated and which it is said were not considered in these cases. We have listened to the reasons urged and we are not pre-

(1) 25 Ind. Cas. 903; 41 O. 746.

pared to say that the decision in *Hari Charan Saha v. Baran Khan* (1) is not correct or that the other decision to which we have been referred were arrived at under a misapprehension of the law such as the learned Vakil alleges.

The result is that the Rule succeeds with costs, hearing-fee one gold mohur and the execution-case will proceed on its merits.

Cuming, J.—I agree.

M. B.

Rule made absolute.

ODUH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 33 OF 1924.

August 16, 1925.

Present :—Mr. Simpson, A. J. C.
Rani INDER KUER—PLAINTIFF—
APPELLANT

versus

Syed MOHAMMAD TAQI—DEFENDANT
—RESPONDENT.

*Registration Act (XVI of 1908), s. 17 (3) (xi)—
Receipt for payment of mortgage-debt, whether requires
registration.*

The extinction of a mortgage-debt must be distinguished from the extinction of the mortgage itself, and a receipt which purports to be merely a receipt in full of the mortgage-debt is admissible in evidence without registration. [p. 507, col. 1.]

The Law of Registration in the case of a receipt of mortgage-money does not enquire how the receipt operates, but merely what it purports to do. [ibid.]

A receipt granted on behalf of a mortgagee to the mortgagor was in the following terms:—"Received from S the sum of Rs. 6,000 only in full satisfaction of the amount due from him under a mortgage-deed of his share in village B executed by him in favour of the late K, who had obtained a decree for possession of the mortgaged property :

Held, that the receipt did not require registration. [p. 506, col. 2.]

Case-law referred to.

First appeal from the judgment and decree of the Additional Subordinate Judge, Lucknow, dated the 11th February 1924.

Mr. Rajeshri Prasad, for the Appellant.

Messrs. Nazir-ud-din and Hakim-ud-din, for the Respondent.

JUDGMENT.—This is a first appeal. The suit is one by a mortgagee to be restored to possession. The plaintiff-appellant is the junior of the two widows of Kuar Girdhari Singh, the original mortgagee. The defendant-respondent, Syed

Muhammad Taqi, is the mortgagor. The mortgage is dated 3rd January 1914. The principal mortgage money was Rs. 6,000. The rate of interest was eight annas per cent per month compoundable every six months. The period was two years, and it was stipulated that if two successive instalments of interest were not paid, the mortgagee would be entitled to possession of the mortgaged property. The mortgagee brought a suit for possession based on this clause, and his suit was decreed on 22nd November 1918. He executed his decree and obtained formal possession on 2nd July 1919. Whether he obtained actual possession is not now material. He died on 6th August 1919.

It is alleged in the plaint that the appellant was dispossessed by the defendant-respondent in December 1919. She brought the present suit on 3rd July 1922. The defence was that the mortgage deed was satisfied by a payment of Rs. 6,000 on 4th November 1919. This payment is evidenced by a receipt, Ex. A-4, and the first question for decision in this appeal is, whether that receipt ought to have been excluded from evidence, on the ground that it is not registered. The receipt is in these terms:

"Received from Sayed Muhammad Taqi Saheb, of Naubasta, the sum of Rs. 6,000 only, in full satisfaction of the amount due from him under a mortgage-deed of his share in village Birhana executed by Sayed Sahib in favour of the late Kuar Girdhari Singh Saheb who had obtained a decree for possession of the mortgaged property."

Section 17 (1) (b), of the Registration Act makes registration compulsory in the case of instruments which purport or operate to create, declare, assign or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of Rs. 100 and upwards, to or in immoveable property, and cl. (3) makes registration compulsory for instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extension of an any such right, title or interest.

The first question which came before the Court was whether a receipt for part-payment of a mortgage-deed fell within these words. It is unnecessary to discuss the earlier decisions, because it was decided by a Full Bench of the Allahabad High Court

in *Jiwan Ali Beg v. Basa Mal* (1) that such receipts did not require registration, and this decision was given statutory force by an amendment of the Registration Act. In the present Registration Act the clause is s. 17 (2) (xi), and it is as follows:—

"Any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage-money, and any other receipt for payment of money due under a mortgage, when the receipt does not purport to extinguish the mortgage."

It will be observed that under s. 17 (1) (b), the words "purport or operate" appear, whereas in s. 17 (2) (ix), the only word is "purport." The word "operate" has been omitted. This omission is important for the decision of the question which arise in this appeal.

The Court of Trial has relied on two decisions. One of these is *Neelamani Patnaik Mussadi v. Sukaduvu Behara* (2). It does not appear from the report what relief was sought by the plaintiff, but he was suing on the basis of a mortgage, and in the capacity of a mortgagee. The mortgagors produced a receipt in these terms. "I have this day received payment from you of Rs. 350, on account of the principal and interest, due under the registered mortgage-bond executed by you in my favour on 26th July 1908. I have excused payment of balance of interest. Nothing remains due under the said document."

It was held that the receipt did not require registration. It was said,

"There is nothing in the document to show that the mortgage in suit was expressly extinguished by it, it is only a discharge of the mortgage-debt. We think there is a clear distinction between a discharge of a debt and the extinguishment of a mortgage interest, though one may be the result of the other. Where a receipt in terms only discharged the debt, it cannot be brought under s. 17 (b) of the Registration Act."

It is sufficient to say that I agree with that decision. But as the point does not appear to have been previously decided by this Court, I may add that I have considered all the decisions cited at Bar, and all that I was able to discover for myself. Some of the earlier cases, decided before the law assumed its present form, are in

(1) 49 A. 108; A. W. N. (1886) 310; 5 Ind. Dec. (N. S.) 503.

(2) 60 Ind. Cas. 255; 43 M. 803; 12 L. W. 269.

appellant's favour, but there is no subsequent case in his favour. There is clear authority for holding that the extinction of the debt must be distinguished from the extinction of the mortgage, and that a receipt which merely purports to be a receipt in full is admissible without registration. Another point is taken that this is not merely a receipt. It is also a remission of part of the money due. The sum of Rs. 6,000 was the principal money only. There was due Rs. 1,987, interest in addition, and this was remitted. There is some authority for the proposition that although a receipt may not require registration, a document remitting part of the debt will require it, in *Vishnu Chotla Venkatasubbiah v. Tallapragada Lakshmipathi* (3). It does not appear from the report what relief was sought, but the suit was evidently one by a mortgagee against two mortgagors. One of the mortgagors set up an agreement in which the other mortgagor was exonerated by the plaintiff on payment of a sum of Rs. 900 and a portion of the mortgage-money was remitted. This transaction was evidenced by a document, with regard to which it was said, that it was admissible as a receipt, but that if it was to be taken as evidence of the agreement, by which part of the mortgage-money was remitted, it would require registration, being a document which affects a right to immoveable property with a value of over Rs. 100. With the utmost respect to the learned Judge who decided that case, I do not think that the receipt before me requires registration. It does not purport to be anything but a receipt. It may operate in various ways, but the Law of Registration in the case of a receipt of mortgage-money, does not enquire how it operates, but merely what it purports to do. For these reasons, I think that the Court of Trial was right in admitting Ex. A-4 in evidence, although it is not registered.

Respondent's Counsel relies on nothing except Ex. A-14 itself, and the deposition of Babu Brij Narain Dayal. This gentleman is a Special Magistrate of the First Class. He has been practising in Lucknow as a Pleader for 25 years, and he is Chairman of the District Board of Lucknow. His dealings with the various parties are not altogether easy to follow. There is a recital in the mortgage-deed now in suit from

(3) 85 Ind. Cas. 392; (1925) A. I. R. (M.) 302; 20 L. W. 302.

which it appears that Muhammad Taqi, the mortgagor, now arrayed as defendant-respondent, borrowed the money in order to pay off a promissory-note, which had been executed jointly by himself and Brij Mohan Dayal. The witness has further stated that Muhammad Taqi has been on intimate terms with him all his life, and that it was at his request that Kuar Gir-dhari Singh lent the money to the defendant. While these were his relations with the defendant, Brij Mohan Dayal was also manager of the estate on behalf of the plaintiff. But relations had been strained between Babu Brij Mohan Dayal and the plaintiff, and ultimately he resigned the managership, apparently towards the end of 1920, after holding office for about one year. The plaintiff is the junior of the two widows, and, under the Hindu Law, she would not be entitled to the property. She claims as legatee under a Will dated 11th October 1916. That Will was accepted as proved by a Bench of this Court on 22nd April 1920. In that Will the testator had named as his executor the Deputy Commissioner of Lucknow, and, in the event of his refusal, the President of the British India Association. Both these gentlemen, however, refused to accept office, and, at the time when Ex. A-4 was written, it was believed by all parties that Probate would be granted to the plaintiff. As a matter of fact, this Court requested the Deputy Commissioner to withdraw his objections and Probate was refused to the plaintiff.

The questions of fact which have to be decided are these :—

1. Whether the alleged payment of Rs. 6,000 was made by Muhammad Taqi to Brij Mohan Dayal?

2. Whether Brij Mohan Dayal had the authority of the plaintiff to accept payment of Rs. 6,000 in full discharge of the debt, remitting the interest which was then due?

The two questions must be considered together. It is immaterial to the plaintiff-appellant's case whether no payment was made at all, but a fictitious receipt was given, or whether Muhammad Taqi did pay Rs. 6,000 to Brij Mohan Dayal, but Brij Mohan Dayal had no authority to accept payment much less to remit a large sum which was due as interest. Brij Mohan Dayal did not actually write the accounts of the estate. That was done by Parbhu

Dayal, Diwan, but the account book bears the signature of Brij Mohan Dayal on every date. Brij Mohan Dayal has said that this sum of Rs. 6,000, which he received, was all spent on various items of expenditure which are contained in the account book. The reasons for the omission of this item according to Brij Mohan Dayal were two.

A. Because the Deputy Commissioner was going to be appointed executor, Brij Mohan Dayal thought that it would not be prudent to show this amount, as the Deputy Commissioner might object that he had no business to realise debts.

B. If every expenditure incurred in litigation was shown to have been made from the income of the estate there would be no surplus out of which the daughters of the deceased might claim a share.

At first sight, the first explanation seems open to the objection that at the time the payment was made all parties believed that the plaintiff would succeed in obtaining Probate of the Will, and the second explanation is open to the objection, that if all the expenditure was certainly shown, while an item of Rs. 6,000 was left out of the income the result could hardly be to increase the surplus shown in the account. But both these difficulties disappear if the true nature of Ex. 14, the account book, is understood. It is not a regular account kept from day to day like the cash book of a Bank. It was not prepared at all until the decision of the case relating to the Letters of Administration. It is essentially a cooked account. For example, funeral expenses amounting to Rs. 1,266 are shown as incurred on the 29th of September 1920, but the Raja's death took place on the 6th August 1919. These expenses must have been incurred quite a year before this entry. On the same date, there is an item of Rs. 3,305-15 for various expenses connected with the mutation and the application for Probate. Now mutation itself took place on 8th March 1920, and the application for Probate was put in on 5th November 1919, and was decided on 22nd April 1920, so these large sums are clearly post-dated. According to respondent's Counsel, what Brij Mohan Dayal was doing was this. He was incurring expenses which exceeded the income. If he had shown a true account from day to day there would have been a deficit. He wished to represent that these expenses were being made out of the income, so he

did not enter them until there was sufficient income, on the income side of the account, to meet it. Actually they were met out of this sum of Rs. 6,000, which he received from Muhammad Taqi, together, of course, with the income of the estate and the funds which were found in the house of the Raja. This explanation also serves to meet the third objection that there could be no shortage of money at the time because the account itself shows a considerable sum left in cash by the Raja, considerable sums realized from the estate and no large items of expenditure up to the 4th of November. The fact is that we do not know what expenditure had been incurred up to that date. Exhibit 14 is no safe guide in the matter. Brij Mohan Dayal's ideas of keeping accounts are certainly not to be commended.

Devices of the kind described open a door to speculation. But these are not questions which have to be decided in the present appeal. The question is whether the account of the matter given by Brij Mohan Dayal can be accepted as true, and here I find myself in agreement with the Court of Trial. Brij Mohan Dayal is a man of position. He bears a good reputation. He was believed by the Court that heard him. His statement appears to be a candid statement. It contains admissions damaging to himself, such as the admission that there is still in his hands Rs. 6,000, which is not his own, and that this transaction was deliberately concealed from the Deputy Commissioner. I think his deposition is entitled to credit. And this is sufficient to decide the second question for he has stated very clearly that he had an interview with the plaintiff in which she gave him express authority to remit the interest and to accept the payment. His cross-examination was finished on the 25th January 1924 and this closed the defendant's evidence. On the following day plaintiff's Counsel said that he would examine only one witness, that is to say that he did not propose to have the plaintiff examined either in Court or on commission to repudiate the evidence of Babu Brij Mohan Dayal.

The result is that both on points of law and points of fact the appeal fails and is dismissed with costs.

Z. K.

Appeal dismissed.

[90 I. C. 1925]

PONNAPPA REDDI v. THIRUVENGADA PILLAI & CO.

CALCUTTA HIGH COURT.APPEAL FROM APPELLATE DECREE No. 1537
OF 1923.

June 24, 1925.

Present:—Justice Sir Hugh Walmsley, Kt.,
and Mr. Justice Mukerji.ANANDA CHANDRA KACHARU—
PLAINTIFF—APPELLANT

versus

BARADA KANTA DEY AND OTHERS
—DEFENDANTS—RESPONDENTS.*Limitation Act (IX of 1908), Sch. I, Arts 36, 49—
Deterioration of goods—Suit for compensation—
Limitation.*Article 36 and not Art. 49 of Sch. I to the Limita-
tion Act is applicable to a suit for compensation
against the *ijaradar* of a market, where as a result
of a quarrel between the plaintiff and the *ijaradar*
about the payment of tolls, the plaintiff's goods are
detained at the Police Station and there deteriorate.Appeal against a decree of the Subordi-
nate Judge, Second Court, Faridpur,
dated the 15th February 1923, reversing
that of the Munsif, Second Court at Madari-
pur, dated the 10th February 1922.Babu Hemendra Chandra Sen, for the Ap-
pellant.Babu Prakash Chandra Majumdar, for
the Respondents.**JUDGMENT.**

Walmsley, J.—This appeal is preferred by the plaintiff. He brought a cargo of oranges to the Madaripore Bazar where there was a quarrel between him and the *ijaradar* of the market about the payment of tolls. In consequence, the *ijaradar* informed the Police and the result was that the boat of oranges was detained at the *thana* for some days and, while so detained, the oranges deteriorated. The plaintiff brought the suit for compensation on account of the oranges so damaged. The learned Munsif found that the plaintiff was entitled to a sum of Rs. 143 odd and gave the plaintiff a decree for Rs. 68-13-6 against certain of the defendants who had not compromised the case with the plaintiff as the defendant No. 2 had done. These defendants then preferred an appeal to the District Court and the learned Judge of the Court of Appeal below held that the suit was barred by limitation. The suit was brought exactly three years after the date on which the boat was taken to the *thana* and the learned Subordinate Judge's view was that the appropriate Article of the Limitation Act applicable to the case was Art. 36 and not Art. 49 as held by the First Court. If the learned Judge was right in this view, then

undoubtedly the suit was barred by limitation. On behalf of the plaintiff-appellant, it is urged that Art. 49 is really the Article applicable to the present case, and, in this connection, our attention has been drawn to the decision of a Full Bench of this Court in the case of *Mangun Jha v. Dolhin Golab Koer* (1). It appears to me that the case does not really assist us much here. In the present instance, I think, we must go by the words of the Articles and consider which of those Articles does apply to the facts of the case. Clearly, the plaintiff did not bring the suit to recover any specific moveable property. He did not claim compensation against the defendants for having wrongfully taken any moveable property because the finding is that it was the Police who took the cargo of oranges to the *thana*. It was not a case for compensation for injuring the oranges or for compensation for wrongfully detaining the oranges because here again the finding is that it was the Police who kept the boat at the *thana*. It appears to me, therefore, that the substance of the claim cannot be brought within the purview of the words of Art. 49. In my judgment, Art. 36 is the appropriate Article applicable to the case. That being so, it must be held that the suit is barred by limitation. The result, therefore, is that the appeal is dismissed with costs.

Mukerji, J.—I agree.

N. H.

Appeal dismissed.(1) 25 C. 692; 2 C. W. N. 265; 13 Ind. Dec. (S. S.) 454
(F. B.).**MADRAS HIGH COURT.**APPEAL AGAINST APPELLATE ORDER
No. 65 OF 1923.CIVIL MISCELLANEOUS PETITION
No. 3143 OF 1924.

January 26, 1925.

Present:—Mr. Justice Devadoss and
Mr. Justice Wallace.PONNAPPA REDDI AND OTHERS—
APPELLANTS

versus

THIRUVENGADA PILLAI & Co. AND
OTHERS—RESPONDENTS.*Presidency Small Cause Courts Act (XV of 1882),
ss. 31, 42—Civil Procedure Code (Act V of 1908),
s. 47—Execution of small cause decree in respect of
immoveable property—Transfer to mofussil District
Munsif's Court for execution on regular side—Order,*

whether appealable—Evidence Act (I of 1872), s. 115—Estoppel—Suit for money due by deceased member of family—Plea of division of status—Decree against assets—Execution of decree—Plea of survivorship, whether competent.

When a decree of the Madras Small Cause Court is transferred to a *mofussil* District Munsif's Court for execution, not on its small cause side, but on its original side, against the immoveable property of the judgment-debtor, an order made by the latter Court in execution is appealable under s. 47 of the C. P. C. [p. 511, col. 2.]

A District Munsif's Court in executing a decree of the Madras Small Cause Court in respect of immoveable property exercises its powers not as a Small Cause Court, but as a Court of original jurisdiction, and the rules applicable to proceedings in execution of an original decree are applicable to the execution proceedings of the small cause decree so transferred to the original side of the Court. [p. 511, col. 1.]

Where in a suit to recover money due by a deceased member of a joint Hindu family, the defendants plead a division of status with the deceased and a decree is passed against the assets of the deceased in the hands of the defendants, it is not open to the latter afterwards in execution of the decree to contend that the properties in their hands are not liable since they have succeeded to the properties by survivorship. [p. 512, col. 1.]

A. A. A. O. No. 65 of 1923.

Appeal against a decree of the District Court, Chingleput, in Appeal Suit No. 362 of 1921, preferred against the decree of the Court of the District Munsif, Tiruvallur, in Execution Application No. 735 of 1921, in Execution Petition No. 554 of 1921, (in Suit No. 1525 of 1920 on the file of the Court of Small Causes at Madras).

C. M. P. No. 3143 of 1924.

Petition, praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to convert the Appeal against Appellate Order No. 65 of 1923, into a Civil Revision Petition.

Mr. S. Krishnamachariar, for the Appellants.

Mr. S. G. Sadagopa Mudaliar, for the Respondents.

JUDGMENT.—The Madras Court of Small Causes passed a decree in plaintiffs' favour for Rs. 1,386-10-9 and costs and Vakil's fee Rs. 60 against the assets of the deceased Angusamy, if any, in the hands of the defendants. This decree was transferred to the District Munsif's Court at Tiruvallur. The plaintiffs attached some property as the assets of Angusamy in the hands of the defendants. The defendants Nos. 1 to 8 applied to the District Munsif of Tiruvallur for releasing the property from attachment on the ground that the properties were the joint family

properties of the defendants Nos. 1 to 8 and Angusamy and that they were entitled to them by right of survivorship after the death of Angusamy. The District Munsif allowed the petition, and on appeal by the decree-holders, the District Judge set aside the order of the District Munsif and upheld the attachment so far as the share of Angusamy was concerned. Against this order the present appeal is filed by defendants Nos. 1 to 9. The first contention on behalf of the appellants is that no appeal lay to the District Court against the order of the District Munsif. The argument is that the District Munsif's Court is governed by the rules framed by the High Court under the Presidency Small Cause Courts Act XV of 1882, and under the rules no appeal is provided for against an order in execution. The decree of the Madras Small Cause Court was transferred to the Tiruvallur Court to be executed not in its Small Cause side but on its regular side. Under the rules the Madras Small Cause Court has no power to execute its decrees against immoveable properties. Under s. 31 of the Act, the Madras Small Cause Court may on the application of the decree-holder send the decree for execution

(a) in the case of the execution against immoveable property situate within such local limit to the Madras City Civil Court or the High Court of Judicature at Fort William or Bombay as the case may be;

(b) in all other cases to any Civil Court within the local limits of whose jurisdiction such judgment-debtor, or any moveable or immoveable property of such judgment-debtor may be found.

The procedure prescribed by the C.P.C. for the execution of decrees by Courts other than those which made them shall be the procedure followed in such cases. Section 8 of the C. P. C. makes only certain sections of the C. P. C. applicable to the Courts of Small Causes established in the Towns of Calcutta, Madras and Bombay. No doubt ss. 38, 39, 40 and 41 are not among the sections applicable to the proceedings in the Madras Small Cause Court, but the question is not what is the procedure governing the execution in the Madras Small Cause Court, but what is the procedure governing executions in the District Munsif's Court to which the decree of the Small Cause Court is transferred for execution. It is conceded that the District Munsif's

Court in executing a decree of the Madras Small Cause Court exercises its powers not as a Small Cause Court, but as a Court of original jurisdiction, for, in execution of the decree immovable property could be attached. If immovable property is attached the provisions which relate to claim petitions and other provisions of O. XXI of the C. P. C. would apply to attachment and sale of immovable property. The contention for the appellants is that the small cause decree which has been transferred to the Tiruvallur Court retains its character of a small cause decree and the rules governing its execution in the Madras Small Cause Court are applicable to the proceedings in the Tiruvallur Munsif's Court. Some provisions of the C. P. C. are made applicable to the Madras Small Cause Court by the notification of 17th May 1916 and s. 42 of the Code in its amended form is one of them and it is in these terms: "The Court executing a decree sent to it shall have the same powers in executing such a decree as if it had been passed by itself.....And its order in executing such decree shall be subject to the same rules in respect of application under s. 38 of Act XV of 1882 as if the decree has been passed by itself." It does not either expressly or impliedly apply to the proceedings in the Court to which a decree of the Madras Small Cause Court has been transferred. The amended section is only applicable to the Madras Court of Small Causes. There is no substance in the contention that the High Court intended that this section should apply to the District Munsif's Court or to any other Court in the *moffussil* to which the decree of the Madras Small Cause Court is sent for execution. The latter portion of this rule makes it abundantly clear that it could not have been the intention of the High Court, to make it applicable to any Court other than the Madras Court of Small Causes. The latter portion of the rule makes s. 38 of the Madras Small Cause Court Act apply to execution proceedings. Under s. 38 a defeated party may apply for a new trial or may apply to alter or set aside an order passed by the Court. Applications for a fresh trial are made before the Full Bench consisting of two or more Judges which either confirms or alters the order or decree passed by a single Judge. To say that s. 38 is applicable to execution pro-

ceedings in the Munsif's Court is to make the proceedings there a farce, for, a party against whom the District Munsif passes an order could apply for a new trial within 8 days. Is the same Judge to be asked to try a matter which he has heard and disposed of or is he to be asked to alter or set aside or reverse any order passed by him if the party against whom the order is made chooses to apply within 8 days for the reversal of that order? It cannot, therefore, be reasonably contended that s. 42 is applicable to proceedings in execution of a decree of the Madras Small Cause Court transferred to a Court in *moffussil*. Apart from that it is difficult to contend how the High Court by framing certain rules under the Presidency Small Cause Courts Act can abrogate or nullify the C. P. C., and the rules thereunder which govern the proceedings in the Courts in the *moffussil*. Section 42 only applies to execution proceedings in the Madras Small Cause Court, whether the decree sought to be executed was passed by the Madras Small Cause Court or transferred to that Court from a Court in the *moffussil*.

It is next contended that the right of appeal can only be given by a Statute, and the rules of procedure cannot give a right of appeal when it is not given by a Statute. It is well settled that when a small cause decree of the Sub-Court or of a District Munsif's Court is transferred to the original side of the Sub-Court or of the Munsif's Court for execution against the immovable property of the judgment-debtor there is a right of appeal under s. 47 of the C. P. C., and the rules applicable to the proceedings in execution of the original decree are applicable to the execution proceedings of the small cause decree transferred to the original side of a Court. The decree of the Madras Small Cause Court having been transferred to the original jurisdiction of the District Munsif's Court, it is difficult to see how it can be said that the C. P. C. is not applicable to such proceedings. If the C. P. C. is applicable the right given under the Code is also available to the parties to the execution proceedings. The moment the C. P. C. is made applicable to the proceedings in a Court, unless some portions of it are exempted by a special rule or enactment from being applicable to the proceedings of such Court the whole Code is applicable

and a party has the right of appeal which that Code gives. There is, therefore, no substance in the contention that the appeal by the decree-holders was incompetent. The District Judge had jurisdiction to hear an appeal from the decision of the District Munsif and his order is not without jurisdiction.

The next contention is that the learned District Judge was wrong in holding that the judgment-debtors were estopped from setting up the plea that they and Angusamy were members of a joint Hindu family. When the case came on for trial in the Madras Court of Small Causes, the defendant distinctly raised the following pleas amongst others:

(1) "Deceased Angusamy and defendants Nos. 1 to 8 are not members of an undivided family"

(2) Angusamy did not carry on any business for the benefit of defendants Nos. 1 to 8;

(3) defendants Nos. 1 to 8 have no concern in the plaint transaction and are not liable."

The learned Judge who heard the case gave a decree against the assets of Angusamy in the hands of the defendants. They distinctly put forward the contention that Angusamy was divided from them, and on that plea the Small Cause Court gave a decree against his assets in their hands. In the face of that plea and the judgment it is not open to the defendants now to contend that they and Angusamy were undivided in interest and that they succeeded to his property by survivorship. The District Judge was right in holding that it was not open to the defendants to raise the contention they did.

In the result the C. M. S. A. is dismissed with costs.

The connected C. M. P. is also dismissed.

V. N. V.

*Appeal dismissed; and
Petition dismissed.*

CALCUTTA HIGH COURT:

CIVIL RULE No. 405 OF 1925.

May 29, 1925.

Present:—Mr. Justice Suhrawardy and
Mr. Justice Duval.

Rai RAMESH CHANDRA GUHA
BAHADUR AND OTHERS—DEFENDANTS—
APPLICANTS

versus

DINESH CHANDRA GUHA AND OTHERS—
PLAINTIFFS—OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), O. IX, r. 13,
O. XVII, r. 3—Award in suit—Objections—Petition
for time to summon witnesses, refusal of—Decree in
accordance with award—Decree, whether ex parte.*

Where an objection is taken by the defendant to the award submitted by the arbitrators in a suit, and on the date of hearing an application by him for time to summon his witnesses is refused, and the Court pronounces a decree in accordance with the award, the decree passed is not *ex parte*, where there is nothing on the record to show that the Pleader for the defendant, who applied for time, had no further instructions to appear. [p. 513, col. 1.]

Rule against an order of the Subordinate Judge, First Court, Dacca.

Dr. Sarat Chandra Basak and Babu Jitendra Kumar Sen Gupta, for the Petitioner.

Dr. Naresh Chandra Sen Gupta, Babu Bimala Charan Das and Surendra Lal Mukherjee, for the Opposite Party.

JUDGMENT.—This Rule is directed against an order of the Subordinate Judge of Dacca, dated the 6th February 1925, by which the learned Subordinate Judge held that the application by the petitioners under O. IX, r. 13, C. P. C., could not be maintained. The facts are that a suit for accounts and declaration of title was instituted and subsequently referred to the arbitration of three arbitrators. The arbitrators submitted their award to which the defendants took several objections. On the date of hearing the petitioners applied for time for summoning their witnesses which was refused. Thereafter the Court pronounced judgment in accordance with the award. Subsequently the petitioners filed an application under O. IX, r. 13 which has been rejected on the ground that it is not maintainable. Two objections have been taken against this order. In the first place it is argued that the order of the Court below is wrong inasmuch as the order decreeing the suit was an order passed under O. XVII, r. 2 and, therefore, an application under O. IX, r. 13 would lie. With reference to this objection it appears from an examination of the record

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that an application was made on behalf of the petitioners for summoning his witnesses. The learned Subordinate Judge passed the following order:—"The defendant No. 1 has filed a petition for summons to his witnesses. Heard Pleader for defendant No. 1. petition will be considered in judgment." In the judgment that was passed, the learned Judge stated as follows:—"The objections were filed by the defendant on 28th February 1924 in Suit No. 274 of 1922. Since then he has been allowed sufficient time to bring his witnesses and adduce evidence. On a perusal of his objections I find that they are very vague. At this stage the defendants filed a petition for time to bring witnesses. I reject this application on the ground that it is made to harass the opposite party. I, therefore, affirm the award in both cases." The decree that was drawn up in pursuance of the judgment mentioned the names of the several Pleaders for the defendant in whose presence it was passed. There is nothing in the record to show that the Pleader who applied for time had no further instructions to appear and so the decree was passed *ex parte*. A decree on the face of it *inter parties* cannot be treated as *ex parte*. The decree does not purport to be *ex parte*; the present application does not accordingly lie.

Besides it cannot be said that it is an order passed under O. XVII, r. 3. That rule provides that if a party is allowed time to produce his witnesses and fails to do so, the Court will proceed to decide the suit forthwith. It is argued that this rule applies only to cases where there are materials before the Court upon which to decide the suit. In this case it cannot be said that there were no materials before the Court as the award was before the Court and on it a decision could be passed. Moreover, the rule says that if the party does not appear the Court will proceed to decide the suit. It is open to question if it refers to interlocutory proceedings such as one under O. IX, r. 13. In this view we think that the order of the Court below is correct.

The second objection taken is that on the application under O. IX, r. 13 the Court passed the order that it should be considered after taking the evidence of the parties. It is contended that the successor of the Judge who passed the order was not entitled to override the order of his predecessor. It

appears that the application under O. IX, r. 13 was made before Mr. Biswas. The only objection taken at that stage was that it did not disclose sufficient grounds under O. IX, r. 13. A supplementary affidavit was filed by the petitioner and the Judge accepted it as curing the defect but it is not decided by that order whether O. IX, r. 13 applies to the case at all. We, therefore, think that this successor was not precluded from going into the property of the application.

In this view the Rule is discharged with costs three gold mohurs.

N. H.

Rule discharged.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 86
OF 1921.

May 26, 1925.

Present:—Mr. Justice Das and Mr. Justice
Ross.

Raja SATYA NIRANJAN CHAKRA-
VARTY AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

SUSHILA BALA DAS AND OTHERS
—DEFENDANTS—RESPONDENTS.

Bengal Ghatwali Lands Regulation XXIX of 1814
—*Bengal Ghatwali Lands Act (V of 1859)*—Birbhum
ghatwalis—Zemindar and ghatwal, relation between
—Minerals, right to—Ghatwal, whether can be mau-
rashi mokarraridar—Lease by zemindar, whether
includes mineral rights.

A person may be a *maurashi mokarraridar* and
also a *ghatwal*. [p. 519, col. 1.]

Bengal Ghatwali Lands Act (V of 1859) applies
only to *ghatwalis* within the meaning of *Bengal*
Ghatwali Lands Regulation XXIX of 1814 and
even with regard to them it does not confer the
mineral rights but merely proceeds on the assump-
tion (which may be erroneous) that they have these
rights. [p. 519, col. 2.]

The distinction between a *ghatwali* within the mean-
ing of *Bengal Ghatwali Lands Regulation XXIX of 1814*
and a *ghatwali* which is outside the Regulation is that
in the former case there is no tenure between the
zemindar and the *ghatwal* who holds direct from the
Government, while in the latter such a tenure exists.
In the former case while the lands of the *ghatwali* are
still deemed to be within the *zemindari*, the *zemin-*
dar no longer pays the Government revenue for them
and has, therefore, no claim to the underground rights;
his only right connected with these lands is to receive
the difference between the rent paid by the *ghatwal*
and the amount of the Government revenue which
was assessed on that part of the *zemindari*. If the
Government does not claim the mineral rights, there
is no one to whom they can belong but the *ghatwal*.
In the latter case, however, the *zemindar* still pays
the Government revenue on the lands and if the

ghatwal claims the minerals he must show some transaction which grants the minerals either expressly or by necessary implication. [*ibid.*]

The *zemindar* is not divested of the mineral rights by a lease of the land unless the minerals are expressly granted [*ibid.*]

Appeal from a decision of the Subordinate Judge, Jamtara, dated the 30th June 1924.

Messrs. Syed Hasan Imam, C. C. Das, L. M. Ganguli and N. C. Ghosh, for the Appellants.

Messrs. B. N. Mitter, Naresh Chandra Sinha and B. B. Ghosh, for the Respondents.

JUDGMENT.

Ross, J.—The plaintiffs are the owners of 12 annas 7 *gandas* share in four *taluks* Jamjuri, Nagori, Chhota Ashna and Bara Ashna in Pergannah Kundahit Kareya in the Santhal Parganas. They allege that the principal defendants took the settlement of these *taluks* from their predecessors at an annual rental of Rs. 706 (*sikka*). They themselves, being the *zemindars*, have all the sub-soil rights in the said *taluks* and the defendants have no right to the sub-soil or to the minerals. In 1912 the plaintiffs brought a suit for a declaration of their title to the minerals, but this suit was dismissed by the Subordinate Judge and, on appeal, by the High Court on the ground that the Specific Relief Act did not extend to the Santhal Pargannas, and on the ground that as no overt act was alleged against the defendants the plaintiffs were entitled to no relief. Thereafter in June 1917, the defendants prevented the plaintiffs' agent from boring for minerals. They, therefore, claim a declaration of their right to the sub-soil and pray for a permanent injunction and damages.

The defence was that there had been a proceeding under s. 145 of the Cr. P. C. regarding the right to the sub-soil of the disputed *taluks* which was decided against the plaintiffs and, as the present suit was not brought within three years of the decision in that case, it was barred by limitation. The defendants claimed that the mineral rights belonged to them. They alleged that Nagori and Jamjuri consisting of 60 *mouzas* formed *ghatwali* tenures belonging to the predecessors of their ancestor Mahadeo Sadhu, and that Chhota Ashna and Bara Ashna consisting of 35 *mouzas* formed *ghatwali mouzas* belonging to Ratan Singh and Gobinda Singh who, however, abandoned them whereupon they were settled with Mahadeo Sadhu by Raja

Bahadur Uz-Zaman Khan on the 15th of *Baisakh* 1189 at a rental of Rs. 706 (*sikka*) by a *sanad*. They claimed that under this *sanad* as well as under the legal incidents of Birbhum *ghatwali* tenures, Mahadeo Sadhu had acquired a *mokarrari mourashi istemrari* and transferable interest in the said tenures with full rights in the surface and the sub-soil. They further pleaded that Raja Ram Ranjan Chakraborty and Rani Padma Sundari Debi predecessors of the plaintiffs brought a Suit No. 60 of 1892 for enhancement of the rent of the disputed *taluks* against the defendants Nos. 1 and 2 and the father of defendant No. 3, and that this suit was compromised in terms which admitted the said defendants to be entitled to all sorts of rights in *mokarrari* right in respect of the disputed *mouzas*.

Sixteen issues were framed and the Subordinate Judge recorded evidence on all the issues. But he decided only the twelfth issue "Was there any decision under s. 145 of the Cr. P. C. of the disputed *mouza* and is the suit barred by limitation?" He held that the suit was barred and, therefore, dismissed it. The plaintiffs appealed to the High Court which, without deciding the issue of limitation, remanded the case for a decision of the other issues. The remaining issues have now been decided in favour of the plaintiffs; except the issue on damages but, as they failed on the issue of limitation, their suit was dismissed and they have appealed.

I shall deal first with the issue of limitation. Exhibit E is a copy of the order-sheet in Civil Case No. 145 of 1909, in the Court of the Sub-Divisional Officer of Jamtara, Babu Hiralal Banerji. On the 1st of May 1909 the Sub Divisional Officer directed both parties, that is, Kumar Satya Niranjana Chakraborty and others of Hetampur and Dwarka Nath Sadhu and others of Jamjuri, to appear with their documents and evidence on the 9th to enable him to judge whether a case under s. 145, Cr. P. C., should be instituted or not. He at the same time ordered the *Amin* to make an enquiry. On the 9th an order was recorded that the *Amin's* report had been read and that the second party undertook to remove earth thrown on a small portion of adjoining lands belonging to the first party. The *Amin's* report showed that somebody, possibly the second party, dug out earth from a place in *Mouza Tarabad* belonging to first party. The second party denied that they did so

if any evidence was forthcoming on this point the first party might claim damages. Put up on 20th instant. In the meantime the earth must be removed by the second party and a report to this effect submitted through the Sardar. Exhibit F is the notice issued on the 2nd of May on the second party. It is in the following terms: "Whereas coal has been found within the limits of Mouza Tarabad appertaining to taluq Chaukhunda as well as within the limits of Mouza Khairbandi appertaining to (talug) Jamjuri, it is necessary to determine the right regarding the said coal mines. You shall, therefore, appear before me with your documents and witnesses at Camp Dhasulia on the 9th May". Exhibit J is the judgment which is produced by the defendants and alleged to have been delivered in this case. It is an uncertified copy which is said to have been taken from a certified copy. It bears no date and is very brief and declares the possession of the second party. The question is whether this is a genuine document or not. The Sub-Divisional Officer Babu Hiralal Banerji was examined. He said that he could not recollect any such order as having been passed in the case and that, while he could not be sure, it struck him that he could not pass such an order. He considered that the judgment was incongruous with the order-sheet, and said that as long as he was at Jamtara, he very rarely tried regularly any case under s. 145 of the Cr. P. C., but tried and almost always succeeded in getting the parties to compromise their disputes. Exhibit D is the letter to Dwarkanath Sadhu from Kanailal Sarkar, a *mukhtar*, dated the 3rd of May 1909. He says that the Magistrate remarked that s. 145 could not apply and that he appointed an *amin* and would make final order on the 9th of May. Exhibit H is a letter from Madanmohan Das, a *mukhtar* of Dwarkanath Sadhu, dated the 2nd of May. He refers to the case and to his argument that a proceeding under s. 145 could not go on and says that the Magistrate ordered that the s. 145 proceeding would not proceed. He further refers to the argument on behalf of the opposite party showing that the dispute was about the *jore* forming the boundary of Mouza Tarabad and says that it was ordered that the s. 145 proceeding could not be maintained and that he had won the case. Then comes a letter Exs. B and C from Kanailal Sarkar, the *mukhtar* of Dwarkanath Sadhu,

dated the 13th of May 1909 which says definitely that the s. 145 proceeding had been dismissed. He says that earth will have to be removed by the 20th of May as appears from the order-sheet itself and that he had undertaken to have this done and that his proposal was accepted. The whole tone of the letter indicates that the matter was at an end. The natural inference to be drawn from these letters is that there were no proceedings under s. 145 and that the matter was virtually at an end on the 9th of May, all that remained to be done being that the report should be submitted through the Sardar on the 20th that the earth had been removed. In the plaint of the suit of 1912 (Ex. T) the cause of action is said to have arisen in *Jeth* 1317, that is, May 1910, when the defendants asserted that they were entitled to the sub-soil of the *taluks*. If there had been an adverse order under s. 145, this must have been made the cause of action. Similarly in the written statement in that suit (Ex. 25) the defendants in para. 7 stated that the decision of the Sub-Divisional Officer in the case under s. 145 was on the 9th of May 1909. The oral evidence on the defendants' side is unconvincing. Defendants' witness No. 1 Jagabandhu Mitra, the *am-mukhtar* of one of the defendants is the scribe of Ex. J. He says that it was written out from a copy of an order in a case under s. 145. Defence witness No. 3, Madanmohan Das, the *mukhtar*, said in his examination-in-chief that he took a certified copy of the order and requested Jagabandhu to make a copy from the certified copy which was written in his presence and compared by him. This statement was made on the 17th of February 1919. After other witnesses had been examined this witness was re-called on the 24th of February when he made the additional statement that he compared Ex. J with the judgment itself. This was evidently an afterthought induced by the consideration that a copy of a copy could not be evidence and the witness, therefore, was made to say that he had compared the copy with the original. This statement must be rejected as untrue. The *amin* Pulinbehari Das was examined as a witness for the defendants and he said that the dispute was about the *jore* in village Tarabad and that he remembers that the case was dismissed. Defence witness No. 4 Rameshwar Jha is an *am-mukhtar* of one of

the defendants. He says that the certified copy of the judgment was burnt in 1319 Assin or Kartick, that is, September 1912; but in the list of documents filed by the defendants in the suit of 1912 on the 14th of January 1913 is given a certified copy of judgment in a proceeding under s. 145. If the certified copy was burnt in 1912, it is difficult to understand how it could have been filed in 1913. The document in any case could not be a true and complete copy of a judgment because it contains no date. It appears from the notice Ex. F and from the other evidence in this part of the case that the dispute then was about the boundary of *Mouza Tarabad* and *Mouza Khairbani*. The judgment (Ex. J) begins by reciting that the petition of the first party had alleged that there was a likelihood of a breach of the peace on the part of the second party in respect of the sub-soil mineral rights of *taluks* Nagori, Jamjuri, Chota Ashna and Bara Ashna comprising 95 *mouzas*. How a judgment dealing with rights of this extent could have arisen out of this petty proceeding about the disputed *jore* it is impossible to understand. The judgment is no judgment at all and I cannot believe that an officer in the responsible position of Magistrate of Jamtara could have disposed of a matter of this importance in a perfunctory order of this kind. The defendants relied on a petition (Ex. W-12) filed in the suit of 1912 by the plaintiffs in which they said that they had been compelled to bring this suit, otherwise their rights were likely to be barred by the Law of Limitation, and contended that this is by implication an admission that there had been an adverse order under s. 145. In my opinion no such inference can be drawn. The suggestion that the report which was to be submitted on the 20th of May gave rise to this extended proceeding dealing with the mineral rights of the four *taluks* which ended in the judgment Ex. J cannot be entertained in view of the written statement (Ex. 25) which not only does not refer to any such judgment but expressly states that the decision of the case was on the 9th of May. Even if there had been a judgment of this kind it could have no effect in barring the present suit because the first party to the proceedings was the present plaintiff who at that time had neither title nor possession because his father was alive and was the owner and possessor of the estate: *Patel Rao Gambhir Singh v. Laxman Das*

Guru Raghunath Das (1) and *Polai Chand Ghosal v. Samiruddin Mondal* (2). I am unable to believe that Ex. J is a genuine document or that there was a proceeding or a decision under s. 145 of the Cr. P. C. I, therefore, hold that the suit is not barred by limitation on this ground.

It was further contended, however, that the suit is barred by six years' limitation because the cause of action for a declaratory decree was alleged in the suit of 1912 to have arisen in 1317, that is, 1912, whereas the present suit was not brought until the 3rd of December 1917. Similarly it is argued that the limitation for an injunction is six years and that this relief is also barred. But the suit of 1912 was dismissed on the ground that there was no overt act on the part of the defendants and, therefore, no cause of action. The present suit is for an injunction on a declaration of the plaintiff's title and the overt act which was alleged took place within six months of the filing of the suit. The suit is, therefore, not barred by limitation on this ground. The appeal of the plaintiffs must, therefore, succeed unless the objections by the defendants result in the dismissal of the suit on the merits.

I shall now deal with these objections.

As already stated, the first title which the defendants set up is the title by the *sanad* granted by Raja Bahadur Uz-Zaman Khan (Ex. 1). This is a short document which purports to settle with Ruplal Sadhu son of Mahadeo Sadhu, as an ancient, *ghatwali mokarrari taluks* Jamjuri, Nagori Ashna Chota and Bara within Tappa Kundahit Kareya, the *jama* of the 95 *mouzas* being Rs. 706 (*sikka*) annually. It declares that the grantee and his heirs have every right to remain in possession of the said *taluks* and *mouzas* including hills and mountains, jungles and pits, cultivated and waste lands of the entire *mouzas* above and below (*zer-oo-bala*) the *taluks* with all rights. The document is dated the 15th of *Baisakh* 1189 and is in the Persian language. The signature is illegible but it bears a seal with the name of Bahadur Uz Zaman Khan. The learned Advocate for the defendants relies on this document. The learned Counsel for the plaintiffs contends that the document is a forgery, both on the internal evidence and on the fact that in a long course

(1) 28 B. 215; 5 Bom. L. R. 932.

(2) 19 C. 646; 9 Ind. Dec. (N. S.) 873.

of litigation the document was never produced when its production was to have been expected. The direct evidence relating to this document consists of the deposition of one of the *pro forma* defendants Chain Kumari Dasee the widow of Mahananda Sadhu. Her evidence has only to be read to be discarded as valueless. She is illiterate but professes to recognise the document. She says that it was put in a box and that when Dwarkanath Sadhu and others asked for the box containing the documents she brought it out and they said that they had got from the box the original deed of the Muhammadan Raja of Nagore. This evidence is clearly worthless. The argument against the genuineness of the document based on the internal evidence, apart from the question of the name of the seal, as to which opinions may differ, is that the word 95 is given in Urdu "Panchanabbai" while the word 706 is correctly given in Persian and it is argued that while the Persian numerals up to 10 are easy and fairly well known, the higher numerals are difficult and little known; but it is unlikely that in the Court of a Muhammadan nobleman in 1782, when the Persian language was in current use, the writer of the document would have been ignorant of the Persian word for "95". The same argument is applied to the mistakes in the spelling of the words "*mckarrari*" and "*haq haquk*" which are written with a *kaf* instead of *quaf*. This argument, however, appears to me to be unconvincing and speculative; and I am not prepared to draw any inference against the genuineness of the document from an inspection of the document itself. So far as appearance goes, it may, in my opinion, be genuine or it may not.

But what to my mind is conclusive against the genuineness of the document is that in a long course of litigation extending from 1804 to 1892 this document was never produced. The first litigation began in 1804 and was concluded by the judgment of the Sadar Dewani Adalat in 1808 (Ex. L). That was a suit relating to the tenure under which the Sadhus held these *taluks* and the rent which was payable for them. It was certainly a case in which the document if it had existed ought to have been produced. The learned Advocate for the defendants excuses its non-production on the ground that the defendants were then setting up a lower rate of rent than the

document itself showed and consequently the document would have gone against them. This is not an argument which can be entertained. A further point that appears from this judgment is that the actual settlement which is alleged to have been made by Raja Bahadur Uz-Zaman Khan was entirely different from that which the document itself shows. What was alleged was that from the time of their ancestors they had held the *taluks* Nagori and Jamjuri at a rental of Rs. 147-4-0 while Chhota Ashna and Bara Ashna had been *ghatwali mahals* in the names of Ratn Singh and Gobind Singh who absconded in the year 1188 when the Raja gave a *sanad* in respect of that *mahal* at a *mokarrari jama* of Rs. 76. This is entirely inconsistent with the *sanad* itself.

The next litigation lasted from 1827 to 1840. That was a suit by the predecessors of the present plaintiffs for recovery of possession of the four *taluks* or, in the alternative, for assessing the full rental (*kamil jama*) at the rate of Rs. 7,001. The First Court decreed the *kamil jama*. The Provincial Court of Murshidabad and the Sadar Dewani Adalat, however, held that the rental was Rs. 706 as determined in the earlier judgment of the latter Court in 1808. This was also a case in which the *sanad* should have been produced and the learned Advocate for the defendants admitted that he could give no satisfactory explanation of its non-production.

The third litigation was in 1852 when the Mukharjees of Punchra who had purchased shares in this Tappa in 1801 sued for an enhanced rent. In that case also the rent was decreed at Rs. 706 by the principal Sadar Amin in 1854. This was also a case in which the defendants might have been expected to produce their *sanad* if it had been in existence. There was further litigation in 1855 and 1863 relating to the saleability of the tenure and from 1863 to 1891 there seems to have been no litigation. In 1892 Raja Ramranjan Chakrabarty sued the predecessors of the defendants for rent and claimed assessment of full rent at the rate of Rs. 7,786. This suit was compromised on terms which will be referred to later. But this was also plainly a suit in which the *sanad* ought to have been produced. The learned Advocate contends that it was sufficient of the defendants in this litigation as well as in the litigation of 1854 to rely on the

earlier decrees of the Sadar Dewani Adalat; but the existence of these decrees does not, in my opinion, make it less likely that the *sanad* would have been produced if it had existed. Again in 1899 in a litigation between Mahananda Sadhu and Dwarkanath Sadhu a petition of compromise (Ex. 7) was filed in which it was expressly stated that there was no *ghatwali sanad*, and that according to the Record of Rights the properties were determined to be the ancestral *istemrari* and *mokarrari mahals* of the parties and that the first party admitted that the *mahals* were not *ghatwali mahals*. It is difficult to understand how these terms could have been agreed upon if there had been a *ghatwali sanad* in the possession of the family. Finally it is to be observed that two settlements had been made in the Santhal Perganas, one by Mr. Wood and another by Mr. Mc Pherson and in neither of these settlement proceedings had the *sanad* been shown. For all these reasons the conclusion seems to me to be inevitable that this document is not a document upon which any Court can act. I hold, therefore, that the defendants have failed to establish their title to the minerals of the *taluks* in suit by express grant.

The second title relied upon by the defendants is that the lands in suit are a Birbhum *ghatwali*. There are numerous references in the judgments in the earlier litigation about this property, which, have been referred to above, to its being a *ghatwali*. Thus in Ex. L the District Judge held that the *mahals* were *ghatwali mahals*. The Provincial Court at Murshidabad held that the lands had not been proved to be *ghatwali*, but the Sadar Dewani Adalat in view of the respondents' admission of the appellants' right to the possession of the lands the *ghatwali taluks* in dispute, on condition of payment of the actual *jama* ordered that the appellants should be put in possession of these lands and should perform the *ghatwali* duties. So in Ex. M the Provincial Court upheld the decision of the District Judge that the defendants should, on payment of the annual *jama*, perform the duties of *ghatwali*. In Ex. N the following passage occurs in the judgment of Robertson, J., which eventually prevailed "Though the disputed *mouzas* are not the *ghatwali mahals* settled by the Government under Regulation XXIX of 1814 and it appears that the Settlement of those was

not made by the Government servant, it seems that before the Settlement Tappa Khondahit Kareya which includes the disputed *mauzas* having been sold by auction the Government servant had nothing to do with the question of the *ghatwali* affairs thereof. But it is evidence from the existing papers especially from the Criminal Court *rubakaris* and *parwanas* produced by the appellants that according to the rules and custom the predecessors of the respondents' father and the respondents with their own employees had been supervising the *ghatwali* duties and performing the Police duties and they are bound to guard the paths and thoroughfares and responsible for occurrences and liable to damages on account of stolen property like the *ghatwal* of the *mahals* settled by the Government." Stockwill, J., in his judgment, pointed out that the *mahal* was not a *ghatwali mahal* "as described in Regulation XXIX of 1814 and was not settled along with other *ghatwali elakas*, from the copy of the *rubakari* of the Judge of Zila Birbhum and the copy of the *rubakari* of the Collector, dated the 15th August 1834 which are received in this Court on requisition". In Ex. P it was held that these *mahals* being *ghatwali mahals* could not be sold in auction. But in a later judgment (Ex. Q) it was decided according to the decision of the High Court that the second class of *ghatwalis* could be sold in auction. These classes of *ghatwalis* were defined in that judgment as first, the *ghatwali* right mentioned in Regulation XXIX of 1814, the rent whereof is paid direct to Government but in spite of the same it is considered to be a part of the *zemindari* of Birbhum and they pay a portion of their fixed rent to the Raja of Birbhum. The second class of *ghatwalis* at first belonged to the first class *ghatwalis*, i.e., those who were in possession in the said manner in that right on condition of service but they instead of paying rent to the Officers of Government pay rent to the *zemindar*. The third class of *ghatwalis* are like *chakran* and *chaukidari* lands and they hold possession of the same on condition of service". The argument is that although the lands in suit may not be a Birbhum *ghatwali* within the meaning of Regulation XXIX of 1814 yet that Regulation did not alter the status of the *ghatwalis*. All these *ghatwalis* had their origin in the same circumstances and all Birbhum *ghatwalis* as such had a right to the mine-

als. Alternatively it is argued that if this is not shown yet, the Legislature in Act V of 1859, which was an exposition of the law as it stood, acknowledged that the *ghatwalis* under Regulation XXIX had the mineral rights and there is no ground for distinction between the first and the second classes. Reliance was also placed on the Record of Rights of Bara Ashna (Ex. 27) Chhota Ashna (Ex. 28) Jamjuri (Ex. 29) and Nagori (Ex. 30) where the names of the Sadhus are shown as *maurashi mokarraridars* in Part I which deals with proprietary rights and duties. Clause 10 of Part I states that "The proprietor shall enjoy all the rights and shall perform all the duties of a proprietor according to the customary or enacted laws locally in force, except as restricted by the Record of Rights." Section 12 of Regulation III of 1872 gives the Settlement Officer power to enquire into and decide and record the rights of *zemindars* and other proprietors, and also any other landed rights to which by the law and custom of the country any person may have local or equitable claim. Section 25 makes the record after a period of six months from the date of publication conclusive proof of the rights and customs therein recorded. Mr. McPherson in para. 88 of his Settlement Report expressly refers to mineral rights as being also covered by Part I, s. 10. The learned Subordinate Judge has relied upon the Record of Rights as showing the defendants to be *maurashi mokarraridars* and has inferred from this that they were not *ghatwalis*. This argument is unsound, because a person may be a *maurashi mokarraridar* and also a *ghatwal*, as for instance in the *Handwe* case [*Keshobati Kumari v. Satya Niranjana Chakrabarty* (3) and *Kumar Satya Narain Singh v. Raja Satya Niranjana* (4)]. But the argument for the respondents that because they are recorded in Part I as *mokarraridars* and cl. 10 declares that the proprietors shall enjoy all the rights of a proprietor (which by implication include mineral rights) therefore they have the mineral rights appears to me inconclusive. Both the proprietors and the *mokarraridars* are recorded in this part and there is no reason why the mineral rights would belong to the *mokarraridars* and not to the proprietors it is not suggested

that they belong to both and as they are not expressly recorded as belonging to the *mokarraridars*, the question as between the proprietors and the *mokarraridars* must be decided independently of the Record of Rights. I take it then as established that these lands are *ghatwalis* which are not within Regulation XXIX of 1814 both because no Settlement was made with the *ghatwals* such as is referred to in the Regulation and because it is admitted that the rent is paid not to the Government but to the *zemindar*. What then is the position as regards minerals? Act V of 1859 applies only to *ghatwalis* within the meaning of the Regulation and even with regard to them it does not confer the mineral rights but merely proceeds on the assumption (which may be erroneous) that they have these rights. The distinction between a *ghatwali* within the Regulation and *ghatwali* which is outside the Regulation is that in the former case there is no tenure between the *zemindar* and the *ghatwal* who holds direct from the Government, while in the latter the tenure exists. In the former case, while the lands of the *ghatwali* are still deemed to be within the *zemindari*, the *zemindar* no longer pays the Government revenue for them and has, therefore, no claim to the underground rights his only right connected with these lands is to receive the difference between the rent paid by the *ghatwal* and the amount of the Government revenue which was assessed on this part of the *zemindari*. If the Government does not claim the mineral rights there is no one to whom they can belong but the *ghatwal*. But in the latter case the *zemindar* still pays the Government revenue on these lands and if the *ghatwal* claims the minerals he must show some transaction which grants him the minerals either expressly or by necessary implication. It is not suggested that in the present case there is any such transaction. The *ghatwal*, whatever the origin of his estate may have been, undoubtedly and admittedly holds, and for more than a century has held, of the *zemindar* and unless the minerals have been expressly or by necessary implication granted to him (and of this there is no evidence) they must be held to have been reserved. In short, the position of these *ghatwals* of the second class is indistinguishable from that of the Digwars of Jharia and what Lord Macnaghten said of the Digwars in *Durga*.

(3) 47 Ind. Cas. 179; (1918) Pat. 305.

(4) 79 Ind. Cas. 825; 3 Pat. 183; (1924) A. I. R. (P. C.) 5; 28 O. W. N. 351; 5 P. L. T. 171; 51 I. A. 37 (P. C.).

Prashad Singh v. Brojo Nath Bose(5) is exactly applicable to the position of the defendants in the present case: "The two *mouzas* are within the plaintiff's *zemindari*. Both the Courts below have so held. The Permanent Settlement was made with the *zemindar* of Jharia. No separate Settlement was made with the Digwar of Tasra, if there was a Digwar of Tasra at the date of the Permanent Settlement which seems more than doubtful. No attempt was made to prove that the mineral rights now in question were vested in the Digwar before or at the time of the Permanent Settlement if the lands were then held on Digwari tenure. Nor is there the slightest evidence tending to show or to suggest that the *zemindar* ever parted with his mineral rights to the Digwar. Mineral rights were vested in the *ghatwals* of *perganah* Sarhat, in the north-western part of the Birbhum *zemindari*, but those *ghatwals* paid their rent direct to the Government, and in other respects they were in a very peculiar position. They were dealt with by Regulation XXIX of 1814. They obtained the right to lease the minerals by the Act No. V of 1859. With every respect to the learned Judges of the High Court no inference can be drawn from the circumstances of their case that the Digwars in Manbhum had similar rights or powers."

The learned Subordinate Judge has laid down five tests of a Birbhum *ghatwali* tenure and has held that the defendants have failed by all these tests. It is certain that rents are not paid direct to Government and that the property has been partitioned on at least two occasions between members of the family, once in 1834 when Gourhari Sadhu and Ruplal Sadhu, the sons of Mahadeo Sadhu took respectively 6 annas and 10-annas shares in the *taluks* and again in 1899 in the compromise (Ex. 7) referred to above. I hold, therefore, that as *ghatwals* the defendants have no right to the minerals.

The learned Advocate for the defendants, however, strongly relied upon the third title the petition of compromise in the suit of 1892 (Ex. J-1) as an acknowledgment by the plaintiffs' predecessor that the defendants had every right and interest in the lands in suit. The learned

Subordinate Judge in his judgment has quoted the material part of this document in the original *bengali* and has given a translation. The words upon which the defendants rely are the words "the entire property detailed in the said schedule in all respects with all the rights and interests therein" and they contend that these words include the sub-soil rights. Now in order to understand the effect of the compromise it is necessary to read it along with the pleadings in the suit. The plaint (Ex. R) was simply a plaint in a suit for enhancement of rent. In the written statement (Ex. 10) the defendants pleaded that they were tenure-holders at a fixed and permanent rate liable to pay *sikka* Rs. 501 for Nagori and Jamjuri and *sikka* Rs. 205 Chhota Ashna and Bara Ashna and that the permanent nature of their tenure had been repeatedly admitted and acknowledged by the plaintiffs and that the plaintiffs' suit for enhancement of rent was not maintainable under s. 11 of Regulation III of 1872. This being the scope of the suit it is difficult to see how any admission with regard to sub-soil rights can be read into the document by which it was compromised. To read the document in this way is to put the plaintiffs in a worse position than they would have been in if their suit for enhancement of rent had been dismissed. No question of sub soil rights was in issue or could have been in the contemplation of the parties. The plaintiffs simply admitted that they could not enhance the rent and the construction which the learned Advocate for the defendants seeks to place upon this document cannot, in my opinion, be supported. The passage on which reliance is placed contains the words "*mokarrari satwa*" that is "in *mokarrari* right" and it seems to me that these words govern the whole clause. They lay down the ambit within which the rights are defined and the agreement comes to nothing more than this that the defendants have every possible right that a *mokarraridar* can have as such. The defendants read the words as admitting that they enjoy every sort of right but only as *mokarraridars*, that is, on condition of payment of the reserved rent; but to read the words in this way, in my opinion, begs the question as to what is meant by the *mokarrari* right because it implies that the *mokarrari* right imports the whole estate subject to the payment

(5) 5 Ind. Cas. 219; 39 C. 696; 16 C. W. N. 462; 10 W. N. 425; 11 M. L. T. 337; 9 A. L. J. 462; 15 C. L. J. 11; 14 Bom. L. R. 445; 23 M. L. T. 26; 39 I. A. 133 (P. C.).

[90 I. C. 1925]

SATYA NIRANJAN CHAKRAVARTY v. SUSHILA BALA DAS.

of a reserved rent. The argument is sought to be supported on the doctrine in *Abdul Aziz Khan v. Appayasami Naicker* (6) and *Lloyd v. Guibert* (7), namely, that "the rights of the parties to a contract are to be judged of by that law which they intended, or rather by which they may justly be presumed to have bound themselves." It is further contended that this is a case of contract and not of grant and that the cases which decide that where there is a *mokarrari* lease, the minerals remain in the lessor unless granted expressly or by necessary implication do not apply, as the parties must be understood to have contracted understanding that the law was that a *mokarraridar* had the minerals.

The first case referred to was *Sriram Chakravarti v. Hari Narain Singh Deo* (8) in which it was decided by the Calcutta High Court that a permanent tenure-holder would possess all under ground rights unless there was something express to the contrary. The learned Judge in deciding that case relied upon a passage in Mitra's Land Law of Bengal to the effect that "a person holding under a permanent lease in which there was no reversion to the landlord, has the right to open mines," and reliance was placed especially upon a passage in the judgment of Pratt, J., where he said: "But in this Province the grantors of such tenures consider that they have parted with all their interests in the soil and are entitled only to the quit-rent reserved." Now it is to be observed that no authority is given for this dictum while the statement in Mitra's Land Law of Bengal is expressly made as the opinion of the learned Author and not as a statement of the Common Law. When this case came before the Judicial Committee: *Kumar Hari Narayan Deo Bahadur v. Sriram Chakravarti* (9), the decision of the High Court was reversed, and the passage in Mitra's Land Law of Bengal was referred to but preference was given to the statement of the law in Field's Introduction to the Bengal Regulations, page 36, where he says

"The *zemindar* can grant leases either for a term or in perpetuity. He is entitled to rent for all land lying within the limits of his *zemindari* and the rights of mining, fishing and other incorporeal rights are included in his proprietorship". Their Lordships observed that: "It would seem, therefore, that Mr. Field did not regard his letting the occupancy right as presumptive evidence of his having parted with his property in the minerals" and they decided that the *zemindar* must be presumed to be the owner of the under-ground rights in the absence of any evidence that he had ever parted with them. Field's statement of the law was taken to be the correct statement of the Common Law on the subject.

The next case referred to was *Megh Lal Pandey v. Raj Kumar Thakur* (10) in which it was held by the High Court that the *mokarrari* lease of a *mauza* "*mai huk hakuk*" conveyed minerals which were not expressly reserved. This decision was reversed by the Judicial Committee in *Girdhari Singh v. Megh Lal Pandey* (11), where it was held that the expression "*mai huk hakuk*" in a *mokarrari* lease of land did not add to the true scope of the grant nor cause mineral rights to be included in it. Their Lordships observed that "On the assumption that the expression means 'with all rights' or may be properly amplified as 'with all right, title and interest', such expressions in their Lordships' opinion do not increase the actual corpus of the subject affected by the *pattah*. They only give expressly what might otherwise quite well be implied, namely, that that corpus being once ascertained there will be carried with it all rights appurtenant thereto, including not only possession of the subject itself, but it may be of rights of passage, water or the like which enure to the subject of the *pattah* and may even be deriveable from outside properties. It must be borne in mind also that the essential characteristic of a lease is that the subject is one which is occupied and enjoyed and the corpus of which does not in the nature of things and by reason of the user disappear. In order to cause the latter specially to arise, minerals must be expressly denominated, so as thus to permit of the idea of partial consumption of

(6) 27 M. 131; 8 C. W. N. 186; 6 Bom. L. R. 7; 31 I. A. 1; 8 Sar. P. O. J. 568 (P. C.).

(7) (1865) 6 B. & S. 100 at p. 133; 1 Q. B. 115; 35 L. J. Q. B. 74; 13 L. T. 602; 122 E. R. 1134; 141 R. R. 352.

(8) 33 C. 54; 3 C. L. J. 59; 10 C. W. N. 425.

(9) 6 Ind. Cas. 785; 37 C. 723; 37 I. A. 136; 11 C. L. J. 651; 7 A. L. J. 633; 12 Bom. L. R. 495; 8 M. L. T. 51; (1910) M. W. N. 309; 20 M. L. J. 589; 14 C. W. N. 746 (P. C.).

(10) 34 C. 358; 5 C. L. J. 208; 11 C. W. N. 527.

(11) 42 Ind. Cas. 651; 45 C. 87; 44 I. A. 246; 22 M. L. J. 358; 15 A. L. J. 851; 33 M. L. J. 697; 3 P. L. W. 163; 26 C. L. J. 584; (1917) M. W. N. 232; 22 C. W. N. 201; 7 L. W. 90; 20 Bom. L. R. 64 (P. C.).

the subject leased. Their Lordships accordingly are of opinion that the words founded on do not add to the true scope of the grant nor cause mineral rights to be included within it". Similarly in *Sashi Bushan Misra v. Jyoti Prasad Singh Deo* (12), it was held that a *talabi brahmottar* grant at a fixed rent did not carry with it the minerals rights in the soil and that mineral will not be held to have formed part of the grant in the absence of express evidence to that effect. Finally in *Raghunath Roy Marwari v. Durga Prashad Singh* (13), it was held that where a *zemindar* grants a tenure of land within his *zemindari* and it does not clearly appear by the terms of the grant that the right to the minerals is included, the minerals do not pass to the grantee. The only case which was cited on behalf of the defendants as expressing what they contend to have been the Common Law on the subject was *Nawab Sir Ali Quadir Syed Hossein Ally Mirza Bahadur v. Rai Jogendra Narain Roy* (14) in which it was held that a *patni* lease which contained the words "*darabust zemindari hakook*" conveyed mining rights. That decision stands by itself and it relates to a *patni* lease which may give rise to different considerations, and moreover, whereas in the document now under consideration the words are "*haq hakuk darabust mokarari*" the words in the *patni* lease were *darrabust zemindari hakook*." Now while it is true that the cases above referred to are cases on the construction of deeds of grant, they lend no support to the contention that the Common Law of the country by which the parties to the present contract may be presumed to have bound themselves was that the minerals passed to the *mokarraridar*. If such was the Common Law, it should have been proved either by evidence or by numerous decisions which would have shown that this law was so notorious that nothing else could have been contemplated by the parties. The Judicial Committee has consistently held that this is not the law in Bengal and there is nothing in any of the cases to afford any ground for

supposing that it was ever believed to be the law. On the contrary it has been held that the law has always been otherwise, namely, that the mineral rights are in the *zemindar* and he is not divested of them by a lease of the land unless the minerals are expressly granted. Consequently the words in the petition of compromise must be construed in their natural sense, namely, as acknowledging in the defendants all the rights that a *mokarraridar* as such can have and these rights do not include the right to the minerals. The third title set up by the defendants, therefore, also fails.

There remains only one small point which was urged on behalf of the defendants, that as the plaintiffs are only co-sharers to the extent of 12 annas 7 *gandas* while one of the defendants Chain Kumari is not only guardian of one of the Sadhus, a minor, but is herself proprietor of a small share, the plaintiffs are not entitled to an injunction. Now the plaintiffs do not claim any injunction against Chain Kumari as proprietor. She is not said by the defendants to have given to them any right to work coal. If she herself is working coal no injunction is sought against her. Injunction is sought against strangers. The defendants do not allege that they have taken any settlement from Chain Kumari and evidently they cannot do so because this would go to the root of their own alleged title. There is no substance in this objection.

The result, therefore, is that the appeal is decreed with costs. The title of the plaintiffs to the sub-soil of the *taluks* Jamjuri, Nagori, Chhota Ashna and Bara Ashna to the extent of their interest is declared and it is further declared that the defendants have no right to the minerals of these *mouzas*; and it is ordered that an injunction do issue permanently restraining the defendants from working coal or other minerals lying on or under the said *taluks*, and from obstructing the plaintiffs in exercising their rights to the sub-soil in the said *taluks*. As the learned Subordinate Judge found that no damage had been proved, there will be no decree for damages. The plaintiffs are entitled to their costs in both Courts.

Das, J.—I agree.

Z. K.

Appeal dismissed.

(12) 40 Ind. Cas. 139; 44 C. 585; 44 I. A. 46; 21 C. W. N. 377; 15 A. L. J. 209; 32 M. L. J. 245; (1917) M. W. N. 223; 25 C. L. J. 265; 1 P. L. W. 361; 21 M. L. T. 303; 19 Bom. L. R. 416; 6 L. W. 2 (P. C.).

(13) 50 Ind. Cas. 849; 47 C. 95; 17 A. L. J. 597; 36 M. L. J. 600; 1 U. P. L. R. (P. C.) 43; 23 C. W. N. 911; 26 M. L. T. 30; 30 C. L. J. 160; 21 Bom. L. R. 895; 10 L. W. 317; 17 I. A. 158 (P. C.).

(14) 16 Ind. Cas. 441; 16 C. L. J. 7.

[90 I. C. 1925]

GOUR CHANDRA DAS v. SUBASHINI DAS.

CALCUTTA HIGH COURT.APPEALS FROM APPELLATE DECREES NOS.
1262 AND 1263 OF 1923.

June 10, 1925.

[Present:—Justice Sir Ewart Greaves, Kt.,
and Mr. Justice B. B. Ghose.]GOUR CHANDRA DAS—DEFENDANT—
—APPELLANT

versus

SUBASHINI DAS—PLAINTIFF—
RESPONDENT.*Hindu Law—Joint tenancy—Females.*

The principle of joint tenancy appears to be unknown to Hindu Law, except in the case of coparcenary between the members of an undivided family. [p 524, col. 1.]

Jogeswar Narain Deo v. Ram Chandra Dutt, 23 C. 670, 23 I. A. 37; 7 Sar P. C. J. 13; 6 M. L. J. 75; 12 Ind. Dec. (N. S.) 445 (P.C.) relied on.

Hindu females taking property under an instrument take as tenants-in-common, where it is not shown that they were intended to take as joint tenants. [ibid.]

Appeals against the decision of the District Judge, Murshidabad, dated the 15th December 1922, modifying that of the Munsif, Additional Court at Jangipur, dated the 27th September 1921.

Babu Urukram Das Chakravarty, for the Appellant.

Mr. Mahendra Nath Roy and Babu Satindra Nath Mukerjee, for the Respondent.

JUDGMENT.

Ghose, J.—These two appeals are against the judgments and decrees of the District Judge of Murshidabad, modifying those of the Munsif of Jangipur. There were two suits for declaration of title and *khats* possession of two *jamias*. The lands originally belonged to Gagan Chandra Majhi and Uday Chandra Majhi and were mortgaged by them to one Keshab Choudhury. Keshab Choudhury died sometime in 1889 and left a widow, a grandson and two grand-daughters by his predeceased son. The widow was named Rukmini. The grandson Ashutosh died in the year 1899 leaving a widow Rajabala. The two grand-daughters of Keshab were named Subashini and Bindubashini. Rukmini, as guardian of Keshab's grandson Ashutosh, enforced the mortgage and purchased the mortgaged property in execution of the mortgage decree on the 16th June 1892. Thereafter, Rajabala brought a suit against her for possession of the properties left by her husband Ashutosh. This suit was compromised by a *solenama* dated the 22nd January 1902. Under that *solenama* it was stipulated that certain properties, including

the properties in suit, would be possessed by Rukmini during her lifetime and after her death her grand-daughters Subashini and Bindubashini would get them and they being entitled to them would possess them (*Satrabati* and *Dakhalkarini*). Then in 1914 and 1915 two rent suits were brought by the landlord against Rukmini with regard to the lands in dispute. Rukmini died on the 14th January 1915 and decrees in the rent suits were passed after her death without bringing on the record the legal representatives of Rukmini. The rent-decrees were then put into execution and then the defendant purchased the properties and took possession through Court in August 1917. Bindubashini died sometime in 1920. The present suits were brought by Subashini alone for possession of the entire lands in dispute. The Munsif passed a decree in favour of Subashini with regard to 8-annas share on the ground that the rent-decrees in execution of which the defendant No. 1 had purchased the property were void and infructuous as having been passed against a dead person. After the death of Rukmini, Subashini and Bindubashini were entitled to 8-annas share each of the properties in dispute and as the heirs of Bindubashini did not bring any suit, plaintiff was only entitled to a decree for joint possession of 8-annas share of the lands in each of the suits. There were appeals by both parties against the decree of the Munsif. The District Judge held that by the terms of the *solenama*, the plaintiff lands went to Rukmini and after her death to her two grand-daughters for their lives and he further held that after the death of Rukmini her two grand-daughters Subashini and Bindubashini succeeded to the properties in dispute as joint tenants, and that after the death of Bindubashini, Subashini was entitled to the whole of the lands as the survivor of the two joint tenants. In that view, he passed a decree for the entire lands in favour of the plaintiff. The defendant No. 1 appeals and the ground urged on his behalf is that the learned Judge was wrong in holding that Subashini and Bindubashini took as joint tenants. It ought to have been held that they were tenants-in-common. It was further contended that the two sisters were entitled to absolute interest in the properties and not only for their lives. It is not disputed before us that Subashini is not the legal heir of Bindubashini and

the decree of the learned Judge can only be supported if his decision that the two sisters took as joint tenants and not as tenants in common is correct. There is nothing in the *solenama* which would show that the two ladies were to take as joint tenants. As was observed by the Privy Council in the case of *Jogeswar Narain Deo v. Ram Chandra Dutt* (1) "The principle of the joint tenancy appears to be unknown to Hindu Law, except in the case of co-parcenary between the members of an undivided family." The District Judge, therefore, was in error holding that the two sisters took as joint tenants. The contention on behalf of the appellant that the ladies took an absolute interest was not persisted in, but it was argued that even if they took as life tenants the share which belonged to Bindubashini would revert to the true owner, and in this case it would be Rajabala. The mere fact that Rajabala's representatives do not dispute the interpretation of the *solenama* could not confer any right on the plaintiff to eject the defendant from the entire land. The defendant is entitled in a suit for ejectment to plead the title of a third party and to show that the plaintiff is not entitled to the whole of the interest she claims. The plaintiff's share is only 8 annas.

It must, therefore, be held that the plaintiff is entitled to recover possession of 8 annas share only in the lands in dispute. The judgment and decree of the District Judge must, therefore, be set aside and those of the Munsif restored with costs in both appeals in this Court and in the lower Appellate Court.

Greaves, J.—I agree.

N. H. *Appeal allowed.*

(1) 23 C. 670; 33 I. A. 37; 7 Sar P. C. J. 13; 6 M. L. J. 75; 12 Ind. Dec. (N. S.) 445 (P. C.)

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 29 OF 1924.

August 17, 1925.

Present:—Mr. Dalal, J. C.

THE SECRETARY OF STATE FOR
INDIA IN COUNCIL—APPELLANT

versus

BISHAN NARAIN BHARGAVA AND
ANOTHER—RESPONDENTS.

*Crown-debt—Competition between Crown and other
creditor—Moveables—Priority.*

Where there is competition between the claims of the Crown and that of another creditor as regards the moveables of the debtor the Crown has priority. [p. 525, col. 1.]

First appeal against a decree of the Additional Subordinate Judge, Lucknow, dated the 31st January 1924.

Rai N. N. Goshal Bahadur, for the Appellant.

Mr. Mukund Behari Lal, for the Respondents.

JUDGMENT.—It is conceded in this Court that under the terms entered into between the Secretary of State in Council through the *nazul* department and the defendant No. 2 Mr. Dixon, the *nazul* department cannot take possession of moveable property lying on leased land. The point urged by the learned Government Pleader was that a Crown-debt has a priority over the debts of the subject.

A certain plot of land was leased by the local *nazul* department to Mr. Dixon under certain condition of re-entry on non payment of the rent. No rent was paid and re-entry was made on 11th October 1922. Prior to such re-entry, so far as can be gathered from the record, defendant No. 1 Bishun Narain Bhargava attached moveable property lying on the leased land. The case for the Secretary of State is that he has a priority for his Crown-debt of Rs. 9,350 which was due from Mr. Dixon on 11th October 1922. No Crown-debt is proved, in my opinion, except with regard to a small item of Rs. 468-3-5. The *nazul* has obtained a decree for that amount and that is a Crown-debt in competition with the decree obtained by the defendant Bishan Narain Bhargava. As regards the rest it is not proved that any Crown-debt exists.

The learned Government Pleader argued that the lower Court has held it established that Rs. 9,350 was due as rent to the *nazul* department on 11th October 1922. The finding, however, is this:—"From the evidence of P. W. No. 1 supported by Ex. 5 it is clearly established that Rs. 9,350 rent was due from the defendant No. 2 when the right of re-entry was exercised by the *nazul*." This does not establish that after the *nazul* entered into possession so much money was due to it. We have no evidence as to whether any building stood at the land at the time or not, whether the *nazul* took possession of such building or not and what the value, if any, was of such a building. It was incumbent on the *nazul*

to obtain a decree of Court to establish the Crown-debt which it claims, if its claim was not satisfied by taking possession of the building, if any, under the terms of the contract. I hold that except the decree for Rs. 468 odd there is no Crown debt to come in competition with the decree of Bishan Narain Bhargawa.

There can be no doubt that in competing claims against moveables the Crown has a priority. This has been well-established by rulings of various Courts:—*Bank of Upper India v. Administrator-General of Bengal* (1), *Bell v. Municipal Commissioners for the City of Madras* (2), *Pichu Vadhiar v. Secretary of State for India* (3) and *Dost Muhammad Khan v. Mani Ram* (4).

The learned Counsel for the contesting defendant No. 1 conceded that the Crown had priority, but argued that the suit for a declaration with respect to the amount decreed to the Crown was premature. I do not agree. A decree does exist and the Secretary of State has failed in the execution department to obtain a priority for it when the defendant No. 1 put his own decree into execution. Under the circumstances the plaintiff has got a right for a declaration.

In the result I grant to the plaintiff a declaration that on his taking action in execution of his decree for Rs. 468-3-5, or whatever the present amount may be, he shall have priority of execution over the decree obtained by Bishan Narain Bhargawa. This means that the Crown has a right to have its own decree satisfied first. Time of two months from to-day shall be granted to the plaintiff to take necessary action in execution of his decree and execution of the contesting defendant's decree shall stay for that period. After that period execution shall take place in accordance with the declaration granted by this Court.

As to costs I think it will be equitable if in both Courts the plaintiff is made to pay half the costs of the contesting defendant. I order accordingly. The defendant No. 2 Mr. Dixon was not served. He is, however, not interested in the appeal

(1) 47 Ind. Cas. 529; 45 C. 553 at p. 665; 22 C. W. N. 793.

(2) 25 M. 457; 12 M. L. J. 208.

(3) 38 Ind. Cas. 986; 40 M. 767; (1917) M. W. N. 20; 21 M. L. T. 71; 5 L. W. 664; 18 Cr. L. J. 426.

(4) 29 A. 537 at p. 542; A. W. N. (1907) 157; 4 A. L. J. 720.

and I did not consider it necessary to wait for him. The decree against him shall be *ex parte* without any orders en as to costs against him.

Z. K.

Order accordingly.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 385 OF 1924.

August 18, 1925.

Present:—Mr. Dalal, J. C.

RAZA HUSAIN KHAN AND OTHERS—
DEFENDANTS—APPELLANTS

versus

Musammam SUBHANI AND OTHERS—
PLAINTIFFS AND

Musammam ZAINAB BIBI AND ANOTHER
---DEFENDANTS---RESPONDENTS.

Appeal, second—Custom, whether question of law or fact—Finding, whether can be questioned—Wajib-ul-arz, erroneous rejection of—Entry in wajib-ul-arz, value of—Burden of proof.

A question as to the existence of a custom is one of mixed fact and law. The question whether the facts found in any given instance prove the existence of the essential attribute of a custom or usage is a question of law and in second appeal an enquiry is permitted to be made whether all the attributes of a legal custom have been established or not by the evidence which is accepted by the lower Appellate Court. [p. 526, col. 1.]

Where a lower Appellate Court in deciding whether a custom does or does not exist has rejected a *wajib-ul-arz* on an erroneous view of the law, it is open to the High Court to interfere with the finding of the lower Appellate Court in second appeal. [p. 526, col. 2.]

A *wajib-ul-arz* unsupported by other evidence may be sufficient to establish a family custom. [*ibid.*]

Where a *wajib-ul-arz* is unambiguous and records a custom in clear terms, the burden is shifted on to the party which alleges a custom contrary to the terms of the *wajib-ul-arz*, to prove by oral and documentary evidence either that no such custom as recorded in the *wajib-ul-arz* exists or that it has fallen into desuetude. [*ibid.*]

Appeal against a decree of the Additional Subordinate Judge, Gonda, dated the 25th April 1924, modifying that of the Munsif, Tarabgunj, dated the 6th October 1922.

Mr. H. Husain, for the Appellants.

Mr. Aditya Prasad, for the Respondents.

JUDGMENT.—The dispute here is between sisters and brothers of a Muhammadan family. Two of the sisters claimed their share of the property of their father Tajuddin Husain. Their mother Musammam

Zainab Bibi was made a party to the suit and is here a party respondent. The plaintiffs sisters succeeded in both the Subordinate Courts and the brothers have appealed. Service was not made on *Musammam* Zainab Bibi. She is, however, not a necessary party as the question at issue is not of her legal share in the property. I direct that her name shall be removed from the list of the respondents.

The defendants pleaded a custom in bar of the daughters' right of succession. A copy of a *wajib-ul arz* prepared at the time of the Settlement in 1873 was filed and evidence was led to prove the exclusion of daughters in seven cases. There was no evidence in rebuttal and there was only a denial of the custom. Both the Subordinate Courts have considered the evidence produced by the defendants insufficient to support the custom and decreed the plaintiffs' suit. The question of importance here is whether I can inquire into the evidence in second appeal because on the evidence on the record there cannot be the slightest doubt that the custom is abundantly proved.

This was the point mainly argued by the respondents' learned Counsel. The position he took up was that all the evidence was admitted by the Trial Court and that evidence was considered insufficient both by that Court and by the Appellate Court. The contention was that no point of law arose. There are cases in which it is very difficult to disentangle law from facts. In *Munna Lal v. Jai Indar Bahadur Singh* (1). I recorded my opinion that the question of custom was one of mixed fact and law and the point whether the facts found in any given instance proved the existence of the essential attribute of a custom or usage is a question of law and in second appeal an inquiry was permitted to be made whether all the attributes of a local custom had been established or not by evidence which is accepted by the lower Court. The learned Counsel for the respondent distinguished this opinion from the present case on the ground that here the evidence was considered insufficient so no occasion arose for this Court sitting in second appeal to inquire whether all the attributes of a local custom had been established or not. According to him interference would be

possible where a custom has been held to be proved but barred where such a custom has been declared not to have been proved. There appears to be too much refinement in this argument. If this Court is entitled to inquire whether evidence produced in the lower Court established the attributes of a local custom or not then no difference should arise between cases where custom is accepted and those in which the existence of the custom is not accepted. The present case is one where the Subordinate Courts have rejected a *wajib-ul arz* on an erroneous view of the law. In such a case Mr. Daniels (now Mr. Justice Daniels) held that it was open to this Court to interfere in second appeal: *Bodhi Ram v. Menda* (2).

The contention of the appellants here is that the Subordinate Courts did not draw a proper inference from the *wajib-ul-arz* and that they were wrong in holding that a previous decision of this Court had distrusted that *wajib-ul-arz*. The point of view taken by Mr. Justice Daniels in *Bodhi Ram v. Menda* (2) and subsequently in another case by their Lordships of the Privy Council in *Balgobind v. Badri Prasad* (3) was not present to the minds of the Subordinate Courts that a *wajib-ul-arz* unsupported by other evidence may be sufficient to establish a family custom. In the Privy Council ruling great weight was attached to only one *wajib-ul-arz*. The Trial Court had held a custom proved on the basis of this one *wajib-ul-arz*. A Bench of this Court had set aside the decision of the Trial Court. In appeal the Privy Council restored the decision of the Trial Court on the ground that this one *wajib-ul arz* which was unambiguous was sufficient evidence to prove the custom. The view of law accepted by their Lordships, therefore, was that when a *wajib-ul-arz* was unambiguous and recorded a custom in clear terms the burden shifted on the opposite party to prove by oral and documentary evidence either that no such custom existed or that it had fallen in desuetude. The learned Counsel for the respondents drew the Court's attention to the observations of their Lordships of the Privy Council in *Thakur*

(2) 49 Ind. Cas. 514; 21 O. C. 334; 6 O. L. J. 151.

(3) 74 Ind. Das. 449; 26 O. C. 217; (1923) A. I. R. (P. C.) 70; 21 A. L. J. 578; 9 O. & A. L. R. 581; 45 M. L. J. 289; 45 A. 413; 38 C. L. J. 302; (1923) M. W. N. 799; 33 M. L. T. 317; 10 O. L. J. 368; 50 I. A. 196; 29 C. W. N. 465 (P. C.).

(1) 76 Ind. Cas. 774; 26 O. C. 386; (1924) A. I. R. (O.) 157.

Anant Singh v. Thakur Durga Singh (4), that the value to be attached to a *wajib ul-arz* was of a fluctuating character. Those observations, however, will not apply to a *wajib ul-arz* like the one produced in this case which is unambiguous and about which there was no reason to believe that it contained the opinion of one or two persons and not the record of a custom. Seeing this difficulty, the respondents' learned Counsel attempted to make out that the *wajib-ul-arz* in this case really contained the personal opinion of Tajuddin's brother Khadim Husain. This was not the reason given by the Subordinate Courts for discarding the *wajib-ul-arz* as valueless. Moreover Tajuddin being a young man at the time had not signed the *wajib-ul-arz*. There is a subsequent deposition of his on the file Ex. A-7 in support of the custom.

Reference was made by the respondents' learned Counsel to rulings reported as *Tilak Ram v. Sita Ram* (5), *Lalman v. Nand Lal* (6) and *Hamid Fatima v. Bhola* (7), where it was stated that the sufficiency of evidence was a question of fact. In all those cases, however, the evidence was examined by the learned Judges of this Court and when the inference to be drawn from such evidence was on the border line it was held that the opinion of the lower Appellate Court should prevail. It has nowhere been definitely laid down that the question regarding custom was purely one of fact. If that had been the case, no inquiry as to the basis of the judgment of the Subordinate Courts would have been necessary. In the case of *Lalman v. Nand Lal* (6), the learned Judicial Commissioner did allow that the question whether in any given instance the evidence led to prove the existence of the attributes essential for a valid custom is adequate proof of what the law requires is a question of law which can be discussed in second appeal. I cannot agree with the contention of the respondents' learned Counsel that the question would not arise in second appeal where the question is whether in any given in-

stance the lower Court had wrongly considered the evidence to be inadequate.

When the *wajib ul arz* was not relied upon by this Court in the previous decision, the inheritance in dispute was one from a female and not from a male as in the present case. That decision did not throw doubts on the value or adequacy of the *wajib-ul-arz* to prove a valid custom of exclusion of daughters from inheritance to the father's property.

I am of opinion that this is a case where the Court may interfere in second appeal. The evidence produced on behalf of the defendants was sufficient to prove the custom and there was an entire absence of evidence on the side of the plaintiffs.

I set aside the decree of the lower Appellate Court and dismiss the plaintiffs' suit. *Musammam Zainab Bibi's* name shall not be entered in the decree. As the parties are relations and the finding on the question of custom is opposed to law, I direct that the parties shall bear their own costs of all the Courts.

Z. K.

Decree set aside.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1161 OF 1924.

March 4, 1925.

Present:—Justice Sir Ewart Greaves, Kt.,
and Mr Justice Cuming.

KASIWAR DE—PETITIONERS

versus

ASWINI KUMAR PAL AND OTHERS—
OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), ss. 46, 73—
Rateable distribution of assets—Attachment of property,
whether entitles decree-holder to share—Procedure—
Execution, application for.*

A mere attachment of property after judgment is not sufficient to entitle a decree-holder to share in the rateable distribution of assets in the hands of the Court. [p. 528, col. 2.]

In order to entitle a decree-holder to share in the rateable distribution of assets in the hands of the Court it is necessary that he should make a formal application for execution to the Court, before the assets are actually received. [ibid.]

An application for attachment under s. 46 of the C. P. C. cannot be regarded as an application for execution [ibid.]

Pallonji Shapurji Mistry v. Edward Vaughan Jordan, 12 B. 400; 6 Ind. Dec. (N. S.) 752, referred to,

(4) 6 Ind. Cas. 787; 13 O. C. 163; 12 Bom. L. R. 504; 8 M. L. T. 79; (1910) M. W. N. 327; 14 C. W. N. 770; 7 A. L. J. 701; 12 C. L. J. 36; 32 A. 363; 37 I. A. 191; 20 M. L. J. 604 (P. C.).

(5) 30 Ind. Cas. 503; 2 O. L. J. 388.

(6) 20 Ind. Cas. 894; 17 O. C. 1.

(7) 52 Ind. Cas. 869; 6 O. L. J. 340.

Rule against an order of the Court of the Subordinate Judge, Nadia, in Money Execution Case No. 92 of 1924.

Babus *Probodh Kumar Dass* and *Pankaj Kamar Dutt*, for the Petitioner.

Babus *Satindra Nath Mookerjee*, *Hira Lal Ganguli* and *Bhupendra Kumar Ghose*, for the Opposite Party.

JUDGMENT.—This is a Rule issued against an order of the learned Subordinate Judge of Nadia rejecting an application by the petitioner for rateable distribution of certain assets which were held by that Court. The learned Subordinate Judge rejected the application on the ground that it was not made before the receipt of the assets by the Court. The facts appear to be these—the present petitioner obtained a decree on the 28th May 1924 on the Original Side of this Court and he applied on the 3rd June for the issue of a precept to the Court of the Subordinate Judge to attach any property which belonged to the judgment-debtor meanwhile this property was sold in execution of some other decree by the Court of the Subordinate Judge on the 26th of June 1924. The present petitioner applied for execution of his decree in the Court of the Subordinate Judge on the 16th July 1924. It will appear that some time before, the date of which the petitioner is unable to give us, he had applied to the Original Side of the High Court for the transmission of his decree for execution to the Court of the Subordinate Judge of Nadia. The order of transmission was made on the 7th July 1924. The date of this application has not been given to us and, therefore, it does not appear whether or not it was made before the 26th of June the date of the sale. It is quite clear that the application to the Court to share in the rateable distribution of the assets was made after the receipt of the assets being received on the 26th of June and the application for execution being made on the 16th July.

The learned Vakil for the petitioner argues that the attachment which he applied for on the 3rd of June was sufficient to allow him to share in the rateable distribution of the assets. But a mere application for an attachment of the property would not be sufficient to entitle the petitioner to share in the rateable distribution of the assets. In order to

entitle him to a share in the rateable distribution of the assets it was necessary that he should make an application in execution to the Court before the assets were actually received and an application for an attachment under s. 46 cannot be regarded as an application for execution.

A somewhat similar case is the case of *Pallonji Shapurji Mistry v. Edward Vaughan Jordan* (1). Though the facts of that case are in some way dissimilar, the principle to be applied is the same. In that case there had been an attachment before judgment and no further steps in execution were taken by the decree-holder. The learned Judges held that even though the attachment before judgment continued after the decree had been made it was still necessary to formally apply for execution of the decree in order to entitle the decree-holder to a rateable share in any assets which might come into the possession of the Court. Applying this principle to the present case it seems to me that a mere attachment of the property after judgment is not sufficient to entitle the decree-holder to a rateable distribution of the assets. It is necessary that he should make a formal application for execution. This admittedly was not done before the assets came into the possession of the Court. The order of the learned Subordinate Judge is, therefore, right. The Rule is discharged with costs. Hearing fee two gold *mohurs*. There will be one set of costs to be divided equally between the different sets of contesting opposite party.

Greaves, J.—I agree.

Z. K.

Rule discharged.

(1) 12 B. 400; 6 Ind. Dec. (N. S.) 752.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 210

OF 1925

AND

CRIMINAL REVISION No. 4 OF 1925.

May 28, 1925.

Present :—Sir Lancelot Sanderson, Kt.,
Chief Justice, and Mr. Justice Panton.

CHANDRA KUMAR SEN—APPLICANT

versus

Srimati MATHURIYA DEBYA.—

OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 476 (1), 476-A, 476-B—When superior Court can take action—Limitation Act (IX of 1908), Sch. I, Art. 154—Appeal from Criminal Court's order rejecting application for making complaint—Limitation.

If a subordinate Court neither makes a complaint nor rejects an application for the making of a complaint, the superior Court may take action and may make a complaint under s. 476-A, but where an application made to a subordinate Court for making a complaint is rejected then the procedure contemplated by the Code is by way of appeal to the superior Court and the limitation for such an appeal is 30 days under Art. 154 of Sch. I to the Limitation Act. [p. 530, cols. 1 & 2.]

Appeal against an order of the District Judge, Chittagong, dated the 31st January 1925.

Messrs. N. K. Bose, Probodh Kumar Das and Chandra Sekhar Sen, for the Petitioner.

Mr. Paresh Chandra Sen, for the Opposite Party.

Mr. Khundkar, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.

Sanderson, C. J.—This is a Rule obtained on behalf of Chandra Kumar Sen on the 23rd of April 1925, calling upon the District Magistrate and the opposite party to show cause why the order complained of should not be set aside or such other order passed in the matter as to this Court might seem fit and proper.

The order complained of was made by the learned District Judge of Chittagong on the 31st of January 1925, whereby the learned Judge directed that criminal proceedings should be instituted against Chandra Kumar Sen and Bijoy Singh Hazari, for offences under ss. 209 and 466 of the Indian Penal Code and for abetment of these offences.

This Rule deals with the case of Chandra Kumar Sen only.

I think it is necessary to mention certain dates. It appears that an application was made to the learned Subordinate Judge for filing a complaint against the petitioner

Chandra Kumar Sen. That application was disposed of on the 1st of October 1923. By that time the amendment of the Cr. P. C., created by the Act of 1923 had come into force and the learned Subordinate Judge declined to make a complaint under s. 476 of the Cr. P. C. as amended.

There was an appeal to the District Judge by the complainant. That was filed on the 7th of August 1924. It was not disposed of until the 31st of January 1925 by the learned District Judge, when, as I have already stated, the appeal was allowed, and the learned Judge decided that criminal proceedings should be instituted against Chandra Kumar Sen for the offences which I have already mentioned.

The point upon which the learned Advocate, who appeared for the petitioner, relied was that the appeal to the learned Judge was out of time and the learned Judge has no jurisdiction to entertain the appeal and to make the order. This point was taken before the learned Judge apparently, for he said as follows:—"It is urged in his case" (that is, the case of Chandra Kumar Sen) "that the appeal is barred by time as the Subordinate Judge passed orders on the 1st of October 1923 that he would not proceed against respondents Nos. 2 and 3. I do not think that I am bound by any rule of limitation in a case of this kind. When an offence in connection with the administration of civil justice comes to the notice of the District Judge it is open to him to lodge a complaint in the Criminal Courts although a subordinate Civil Court may not have thought it necessary to take action." The learned Judge then proceeded to say that the case was of such gravity that he would be failing in his duty if he did not institute a complaint.

With much respect to the learned Judge I am of opinion that the provisions of the material sections do not support the conclusion at which he arrived.

Section 476 of the Cr. P. C. deals with the procedure, which is to be adopted in cases referred to in s. 195, sub-s. (1), cl. (b) or cl. (c), by a Court, with regard to offences which appear to have been committed in or in relation to a proceeding in that Court; and s. 476A confers certain powers upon a superior Court where the subordinate Court has omitted to take action. It is desirable to refer to the terms of the section, which are as follows :

476A. "The power conferred on Civil, Revenue and Criminal Courts by s. 476, sub-s. (1), may be exercised in respect of any offence referred to therein and alleged to have been committed in or in relation to any proceeding in any such Court, by the Court to which such former Court is subordinate within the meaning of s. 195, sub-s. (3), in any case in which such former Court has neither made a complaint under s. 476 in respect of such offence nor rejected an application for the making of such complaint, and, where the superior Court makes such complaint, the provision of s. 476 shall apply accordingly."

In my judgment that section does not apply to this case, because there was an application made to the learned Subordinate Judge, and the learned Subordinate Judge rejected the application for the making of the complaint.

The next s. 476B gives certain rights of appeal not only to the person against whom a complaint has been directed but also to the person whose application for a complaint has been rejected. The words of the section are as follows :—

476B. "Any person on whose application any Civil, Revenue or Criminal Court has refused to make a complaint under s. 476 or s. 476A or against whom such a complaint has been made, may appeal to the Court to which such former Court is subordinate within the meaning of s. 195, sub-s. (3) and the superior Court may thereupon, after notice to the parties concerned, direct the withdrawal, of the complaint, or as the case may be, itself make the complaint which the subordinate Court might have made under s. 476, and if it makes such complaint the provisions of that section shall apply accordingly."

Therefore, it appears to me that the scheme of the sections is that, if the subordinate Court has neither made a complaint under s. 476 nor rejected an application for the making of a complaint, then the superior Court may take action and make a complaint. But where, as in this case, the subordinate Court has rejected the application for the making of such complaint, then the procedure, which is contemplated by the Code, is by way of an appeal to the superior Court.

This matter came before the learned District Judge by way of appeal, and in view of the above-mentioned sections, the learned

District Judge, in my judgment, should have considered whether the appeal was filed within the time specified.

The Article in the Limitation Act which applies to this matter is Art. 154, and the material section of the Act is s. 3 which provides that "subject to the provisions contained in ss. 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made after the period of limitation prescribed therefor by the First Schedule shall be dismissed, although limitation has not been set up as a defence."

Under Art. 154, the period of limitation for an appeal "under the Cr. P. C., 1898, to any Court other than a High Court," is "30 days" and the time from which the period begins to run is "the date of the sentence or order appealed from."

It is, therefore, clear that, as the order appealed from was made on the 1st of October 1923 and the appeal was not filed till the 7th of August 1924, the appeal was out of time.

This Rule, therefore, must be made absolute, and the order of the learned District Judge of the 31st January 1925, directing criminal proceedings to be instituted against Chandra Kumar Sen must be set aside.

No order need be made as regards the Appeal (No. 210 of 1925) in connection with the same matter.

Panton, J.—I agree.

S. D.

Rule made absolute.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 241 of 1924.
CRIMINAL REVISION PETITION No. 202
OF 1924.

January 15, 1925.

Present:—Mr. Justice Srinivasa Iyengar.
In re MANIA MANIKHA PADAYACHI

AND OTHERS—PETITIONERS.

Criminal Procedure Code (Act V of 1898), ss. 209, 210—Case triable by Sessions Court—Enquiring Magistrate, duty of—Discharge, order of, when can be passed.

In cases triable by the Court of Session only one trial is contemplated and the enquiry before the Magistrate is only in the nature of a preliminary enquiry. [p. 532, col. I.]

Sections 209 and 210 of the Cr. P. C. speak only of there being or not being sufficient grounds for committing the accused for trial. When the Legislature

speaks of sufficient grounds for committing for trial, it should not be supposed to have spoken of sufficient grounds for conviction and, similarly, when the Legislature speaks of there not being sufficient grounds for committing for trial, it should not be supposed to have spoken of there not being sufficient grounds for conviction. [p. 532, cols. 1 & 2.]

The intention of the Legislature is to make a distinction between grounds for conviction and grounds for committing for trial. Satisfactory proof of the guilt of the accused is the ground for conviction and satisfactory evidence to go to trial must be regarded as the ground for committing for trial. [p. 532, col. 2.]

If the enquiring Magistrate on the evidence before him comes to the conclusion that the charge is groundless, then he should discharge and not commit for trial. For a charge being groundless, it is not necessary that there should be no evidence at all of the charge. That will be a case of there being no evidence of the charge at all and not a case of the charge being groundless. [*ibid.*]

A charge may be said to be groundless when the evidence adduced at the enquiry is such that no Tribunal, Judge or Jury would ever on that evidence convict the accused. If no reasonable man taking into consideration the evidence adduced in the case could possibly on such evidence conclude that the accused was guilty, then it must be taken that the charge is groundless, and in such a case the duty of the enquiring Magistrate is clear to discharge the accused. [*ibid.*]

What the enquiring Magistrate has got to try and determine is not whether the case has been made out but only whether there is a case for trial. There is always a case for trial when the evidence is of such a nature that the guilt of the accused can be held to be proved or disproved only as the result of valuing and weighing of the evidence. [p. 533, col. 2.]

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise an order of the Court of the District Magistrate, Trichinopoly, dated the 29th January 1924, in Criminal Revision Case No. 28 of 1923, preferred against the order of the Court of the First Class Magistrate, Udayarpalayam, dated the 5th November 1923, in P. R. Case No. 1 of 1923.

Messrs. V. L. Ethiraj and K. P. Raman Menon, for the Petitioners.

The Public Prosecutor, for the Crown.

ORDER.—I am asked in this criminal revision case to revise the order of the District Magistrate of Trichinopoly by which under the provisions, as I take it, of s. 437 of the Cr. P. C. (and not 436 as it appears in the papers) he directed, setting aside the order of discharge passed by the First Class Magistrate of Udayarpalayam that all the accused in the case be committed for trial to the Sessions Court of Trichinopoly.

The order of the First Class Magistrate of Udayarpalayam was passed as the result of the enquiry into the case which was triable by a Court of Session and under

the provisions of s. 209 cl. (1) of the Cr. P. C. The learned District Magistrate has in his order set out as follows:—"I direct that under s. 436, Cr. P. C., that the accused be committed for trial for the offences for which they have been charged. Warrants will issue for the arrest of the accused and their production before the Court of Session." This order was made by him on a criminal revision petition filed on behalf of the first prosecution witness and the only persons who were made respondents to the petition were accused Nos. 1 to 13 and accused No. 18, and the prayer was that those respondents should be arrested and ordered to be committed for trial before the Sessions Judge of Trichinopoly. The other accused in the case, namely, accused Nos. 14 to 17 and 19 to 23, were not made respondents to that petition, and no notice appears also to have been ordered to or served upon them. In these circumstances, it must be fairly clear that the order of the District Magistrate to the effect that all the accused should be arrested and committed for trial to the Sessions Court without excluding accused Nos. 14 to 17 and 19 to 23 from the scope and operation of the order was due merely to a mistake but nonetheless serious so far as those accused were concerned. As those accused, namely, accused No. 14 to 17 and 19 to 23 were not respondents to the criminal revision case and were not required to be committed for trial under the petition the District Magistrate was considering and as in any case, they have had no opportunity of showing cause why an order of commitment should not be made against them also, the order of the District Magistrate so worded as to include them also is clearly wrong. The order, therefore, will be modified by substituting in the operative portion for the word "accused" the words "accused Nos. 1 to 13 and accused No. 18." The other accused, namely, Nos. 14 to 17 and 19 to 23 if already arrested under the order of the District Magistrate will be forthwith released and set at liberty. The order of commitment so far as the said accused Nos. 14 to 17 and 19 to 23 are concerned is also set aside. As regards the other accused, however, there is no such irregularity in the order of the District Magistrate and they were further parties respondents to the criminal revision case filed before him and it was after hearing them that the learned District

Magistrate has passed the order in question.

The learned Counsel here Mr. Ethiraj has contended before me that the order of the District Magistrate directing their commitment also was wrong and should be set aside. He based his contention on two grounds, firstly that the District Magistrate erred in his view of the law regarding the duty and function of the Committing Magistrate conducting the preliminary enquiry and secondly that in any case it was not on the merits a proper case in which the order of commitment should have been made.

It was thus argued before me on behalf of the petitioners that a Magistrate conducting an enquiry under Ch. XVIII of the Cr. P. C. was bound to commit the accused for trial before the Court of Session only if in his judgment the evidence before him was such that if nothing else or nothing more were proved, the accused should be convicted of the charge, or in other words that the Magistrate was entitled to discharge the accused if in his judgment the evidence produced before him was not conclusive of the guilt of the accused. The result of such a contention would undoubtedly make the enquiry before the Magistrate the first trial and the proceedings before the Sessions Court the second trial of the accused. It was said that such was, however, the intention of the Legislature because there was provision made in the Chapter not only for the examination-in-chief of the prosecution witnesses, but for their cross-examination and re-examination, for the accused calling any witnesses they might choose for the Court citing any witnesses of its own motion and so forth. This position was also sought to be supported by the learned Counsel for the petitioners by reference to a number of decided cases mostly of this Court.

It is clear from the Procedure Code that only one trial is contemplated and that the enquiry before the Magistrate in cases triable by a Court of Session is only in the nature of a preliminary enquiry. Sections 209 and 210 of the Cr. P. C. speak only of there being or not being sufficient grounds for committing the accused for trial. When the Legislature speaks of sufficient grounds for committing for trial, it should not be supposed to have spoken of sufficient grounds for conviction and, similarly, when the Legislature speaks of there not being

sufficient grounds for committing for trial, it should not be supposed to have spoken of there not being sufficient grounds for conviction.

It follows from this that the intention of the Legislature clearly is to make a distinction between grounds for conviction and grounds for committing for trial. Satisfactory proof of the guilt of the accused is the ground for conviction. What then is the ground for committing for trial satisfactory evidence to go to trial must be regarded as the ground for committing for trial. In fact, the expression in cl. 2 of s. 209 "considers the charge to be groundless" furnishes us with a clue as to the true meaning of the Legislature. If the enquiring Magistrate on the evidence before him comes to the conclusion that the charge is groundless, then it is indicated that he should discharge and not commit for trial. For a charge being groundless, it is not necessary that there should be no evidence at all of the charge. That will be a case of there being no evidence of the charge at all and not a case of the charge being groundless. For all practical purposes it may be stated that a charge may be said to be groundless when the evidence adduced at the enquiry is such that no Tribunal, Judge or Jury would ever on that evidence convict the accused. If no reasonable man taking into consideration the evidence adduced in the case could possibly on such evidence conclude that the accused was guilty, then it must be taken that the charge is groundless, and in such a case the duty of the enquiring Magistrate is clear to discharge the accused. From this, therefore, it follows that except in cases where the charge is found to be groundless, that is to say, in other words where the evidence on the record is such that no Tribunal Judge or Jury would ever convict the accused on that evidence, the enquiring Magistrate is bound to commit for trial. I do not really understand that in any of the decided cases which were referred to before me in argument a substantially different view was really taken by any learned Judge. In the case of *In re Damappa Pillai* (1) Justice Sadasiva Aiyar, says that "where most of the important witnesses are totally unworthy of credit according to the Magistrate and where the case itself bristles with improbabilities, the Magistrate

(1) 23 Ind. Cas. 741; 15 Cr. L. J. 373.

would be right in discharging the accused." And later on in the same judgment the learned Judge refers to the Sessions trial in such cases being practically foredoomed to failure. I take it that the learned Judge was merely referring in other words to a case in which no Tribunal would convict the accused on the evidence.

Again in the case of *Narasappayya v. Narasayya Shanbhogue* (2), Justice Tyabji states that what the Magistrate has to see is whether the prosecution has adduced such evidence as is not on the fact of it absolutely incredible in regard to every ingredient of the evidence that is charged. This differs if at all only in form from what I have said.

The case of *Karuppa Chakkili v. Palani-swami Goundan* (3) does not relate to a case triable by a Court of Session and has, therefore, no bearing on the present question.

In the case of *In re Ponniah Tirumali Vandaya Thevar* (4), Mr. Justice Kumaraswami Sastriar speaks of there being a *prima facie* case and the discretion of the Magistrate and his power to weigh the evidence. I cannot agree that the learned Judge intended to lay down anything more than that the enquiring Magistrate may discharge if he is of the opinion that the evidence relating to the guilt of the accused is most untrustworthy. It is significant that that learned Judge while speaking of a *prima facie* case also adds that it is not the business of the Committing Magistrate to usurp the function of the Sessions Judge or the Jury and in that respect the learned Judge speaks as in agreement with the observations of Justice Bakewell in the case of *National Bank of India, Ltd., v. Kothandarama Chetti* (5).

On the one side there is of course the extreme suggestion that the Committing Magistrate is bound to commit if there should be any evidence whatsoever in support of the charge whatever the quantity or quality of such evidence may be. Equally there is the contention on the other extreme that the Committing Magistrate is not bound to commit unless a *prima facie* case is made

out. On the authorities and on the reason of the thing, I have no hesitation in stating that both these extreme contentions are untenable. If it should be conceded that the Committing Magistrate has no right to usurp the function of the Judge or Jury, that is, the function of trying the case itself and deciding whether or not the accused is guilty, it follows that what the enquiring Magistrate has got to try and determine is not whether the case has been made out but only whether there is a case for trial. It must be held that there is always a case for trial when the evidence is of such a nature that the guilt of the accused can be held to be proved or disproved only as the result of the valuing and the weighing of the evidence. But, on the other hand, if the evidence be of such a nature that no reasonable person and no Tribunal Judge or Jury would ever on that evidence hold the accused guilty, it follows that there is no case for trial and it is then a case for the enquiring Magistrate to discharge.

Now in the case before me the enquiring Magistrate has no doubt written a long and considered judgment, but at the same time it is abundantly clear that he has really mistaken his function. If he had said that the evidence was of such a nature that no Court could possibly on that evidence regard the accused as guilty, I should not have hesitated to give effect to that opinion more especially having regard to the fact that the Magistrate saw the witnesses and had an opportunity of judging of their credibility. But what he set himself to decide was not whether there was a case for trial or in other words whether there was any reasonable ground for the charge but whether the prosecution had made out the case set up. In para. 24 of his order he states thus: "Some of the evidence on the side of the defence appears to be more probable. In the end I consider that the case against the accused has not been made out and accordingly discharge them under s. 209, cl. (1) of the Cr. P. C." It was not his province to decide whether the case had been made out by the evidence or not. All that he had to do was to find if the charge was groundless and if it was not, to commit the accused for trial. It is not merely a case in which the learned Enquiring Magistrate has failed to appreciate his proper function in the case but the whole of his judgment and order would seem to be vitiated by a belief that he was there and then to decide having re-

(2) 28 Ind. Cas. 643; 16 Cr. L. J. 307; (1915) M. W. N. 233.

(3) 53 Ind. Cas. 817; 20 Cr. L. J. 817; 10 L. W. 630.

(4) 65 Ind. Cas. 993; 23 Cr. L. J. 209; 42 M. L. J. 49; (1922) A. I. R. (M.) 43; 16 L. W. 460; (1922) M. W. N. 13; 30 M. L. T. 72.

(5) 21 Ind. Cas. 129; (1913) M. W. N. 728; 14 M. L. T. 200; 14 Cr. L. J. 529.

gard to the credibility of the witnesses, their statements etc., whether the case laid had been made out. I cannot consider that this was a proper course for him to take.

The order of discharge, therefore, being improper it follows that the District Magistrate was justified in interfering in revision. If I should at the present stage seek to go into the merits and express my opinion on the evidence, it may operate to the prejudice of the accused. If the order of discharge was wrong as having been the result of proceeding on a wrong principle, it follows that the District Magistrate was not only competent but justified in interfering and all that I am now concerned is to see whether the order of the District Magistrate is so clearly wrong as to call for my intervention. So far as the order of commitment made by the District Magistrate related to accused Nos. 14 to 17 and 19 to 23 I have already decided that the order was wrong and should, therefore, be set aside. As regards the other accused Nos. 1 to 13 and 18, not being satisfied that the order of the District Magistrate was clearly wrong, I do not feel called upon to interfere and with regard to these accused, therefore, the petition is rejected.

The accused Nos. 1 to 13 and 18 who have been committed for trial will be released on bail on their furnishing security to the satisfaction of the Sub-Divisional Magistrate of Udayarpalayam each in his own bond for Rs. 500 with two sureties of Rs. 250 each.

V. N. V.
Z. K.

Order modified.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 96 OF 1925.

July 8, 1925.

Present:—Mr. Justice Suhrawardy and
Mr. Justice Panton.

AHMED ALI AND OTHERS—ACCUSED—
APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 463, 467—“Intent to defraud,” meaning of—Signature, forgery of, as attesting witness—Valuable security, forgery of.

The expression “intent to defraud” as it occurs in s. 463, Penal Code, implies conduct coupled with intention to deceive and thereby to injure; in other words “defraud” involves two conceptions, namely, deceit and injury to the person deceived, that is, infringement of some legal right possessed by him but not necessarily deprivation of property. [p. 535, col. 2.]

Emperor v. Surendra Nath Ghosh, 7 Ind. Cas. 629; 14 C. W. N. 1076 at p. 1085; 12 C. L. J. 277; 11 Cr. L. J. 505; 38 C. 75, followed.

The signature of an attesting witness does not fix that witness with knowledge of the contents of the document or with any liability under its terms. Therefore, a forgery of the signature of the owner of a property as an attesting witness on an instrument granting a sub-lease of that property, purporting to be executed by the forger as the owner's lessee, does not fall under the definition of the offence under s. 467, Penal Code. [p. 535, col. 2.]

Criminal appeal against an order of the Sessions Judge, Noakhali, dated the 13th January 1925.

Babu Santosh Kumar Bose, for the Appellants.

Babu Probodh Chandra Kar, for the Complainant.

Mr. Khundkar (Deputy Legal Remembrancer), for the Crown.

JUDGMENT.—The present appellants have been convicted on the unanimous verdict of the Jury—the appellant No. 1 Ahmed Ali under ss. 193 and 467/109, Indian Penal Code—appellant No. 2 Sayadutulla Khan under s. 193 read with s. 109 and under s. 467, Indian Penal Code, and appellant No. 3 Yusuf under s. 193 read with s. 109 and s. 467 read with s. 109. They have been sentenced under the earlier of these sections to rigorous imprisonment for three years and under the latter section to rigorous imprisonment for five years, the sentences running concurrently. I may observe that the Jury returned also an alternative verdict of guilty under s. 465/109, 465, 465/109 respectively against these appellants. The case against them was that they were concerned in the preparation of a certain *borga kabuliyat* which recites that the appellant Ahmed took a sub-lease from the appellant Yusuf of certain land which Yusuf, according to the recital, held under the landlord Joy Gobind Chowdhury. This document was presented for registration with the signature as an attesting witness of one Chittaranjan Chowdhury. The case for the prosecution was that none of the appellants had any title to the land and that the signature of Chittaranjan Chowdhury was a forgery.

Three main points have been urged against the charge delivered by the learned Judge to the Jury. The first is that he has wrongly explained to the Jury the law in respect to all the offences charged. In the second place, it is said that he has not sufficiently directed them as to the defence set up by the appellants; and in the third place,

it is said that he has adopted a wrong method in placing long extracts from the depositions of the witnesses before the Jury.

Now as regards the second of these points, we do not consider that it is of very great importance having regard to the view which we take as to the convictions under Ch. XVIII of the Indian Penal Code. As regards the third point, I may say that the learned Judge might have adopted a better method of putting new evidence before the Jury, and he might have arranged the matter with greater skill; but at the sametime it is impossible to say that because he adopted the method which he did adopt, the Jury was in any manner misled in consequence.

The real objection to the learned Judge's charge is the first to which I have referred, namely, the mis-direction which is said to have been given to the Jury on the subject of the law applicable to the particular charges.

As regards the charge under s. 193, Indian Penal Code, it is urged that the material is insufficient to justify a finding that this document was prepared for the purpose of being used in any stage of a judicial proceeding. The purpose with which the document might have been prepared is a matter of inference and in dealing with this part of the case the learned Judge told the Jury that they would have to consider Ahmed Ali's intention in making in the *kabuliyat* this false statement *viz*, "that you are the owner in possession," and he went on to say "you will ask yourself what is the natural intention of the offender who manufactures a false document with regard to land"; and he finally leaves it to the Jury to decide what that intention was. It seems to us that the inference that the intention was that the document in question should be used in a judicial proceeding even though such a proceeding had not in fact been instituted is a reasonable one; and that the verdict arrived at by the Jury in this respect is justifiable.

It is in respect to the direction given by the learned Judge as to the offences under Ch. XVIII, Indian Penal Code, that, in our opinion, the learned Judge has fallen into error. But it is not necessary in view of our opinion as to the conviction under s. 193 and our view as to the punishment inflicted, that I should do more than very shortly advert to the learned Judge's charge

in this respect. It seems to us that on the two subjects the learned Judge has gravely mis-directed the Jury. In explaining s. 467, Indian Penal Code he said: "Here the injury would be the deprivation of Chittaranjan of the right in land to which prosecution asserts he is entitled." Then again when he was discussing the meaning of the expression valuable security he says in respect to the signature of Chittaranjan that it "purports to be an acknowledgment that he accepts the *kabuliyat* and the proposals made therein. His signature when joined to the forged *kubuliyat* purports to be an acknowledgment that he has no certain legal rights." That is distinctly wrong because the signature of an attesting witness does not fix that witness with knowledge of the contents of the document or with any liability under its terms. The learned Judge has fallen into a second error in discussing s. 463 Indian Penal Code. He says "But the forging of the signature may be regarded as fraudulent, *i. e.*, with intent to deceive since if the forged signature ever appeared before a Court it would deceive the Court and lead it to believe that the title of Ahmed or Yusuf was acknowledged by the over-landlord Chittaranjan which was not the case". That is not a correct explanation of the words as they occur in s. 463. In this respect it is only necessary to refer to the observation of Mr. Justice Mookerjee in the case of *Emperor v. Surendra Nath Ghosh* (1) which occurs at page 1085*. The learned Judge there says "The expression 'intent to defraud' (as it occurs in s. 463, Indian Penal Code), implies conduct coupled with intention to deceive and thereby to injure; in other words 'defraud' involves two conceptions, namely, deceit and injury to the person deceived, that is, infringement of some legal right possessed by him but not necessarily deprivation of property." Having regard to this observation it is clear that the learned Sessions Judge did not properly explain to the Jury the bearing of the word "defraud" upon the point at issue. For this reason we think that the conviction of offences under Ch. XVIII of the Indian Penal Code cannot be supported.

It has been argued, however, that the evidence does establish facts which in other respects would justify the conviction under this Chapter of the Indian Penal

(1) 7 Ind. Cas. 629; 14 C. W. N. 1076 at p. 1085; 12 C. L. J. 277; 11 Cr. L. J. 505; 38 C. 75.

*Page of 14 C. W. N.--[Ed.]

Code. We do not, however, think it necessary to go into this matter or to express any opinion upon it, because, as I have just now said, the conviction under s. 193, Indian Penal Code, is a good conviction and the punishment inflicted under it is in our judgment adequate. We, therefore, set aside the conviction, under s. 467/109 and confirm those under s. 193 and s. 193 read with 109.

The punishment that has been inflicted under these latter sections is three years' rigorous imprisonment. We have taken into consideration, however, the nature of the document in question. We think that it was not a very dangerous document and that we can safely reduce to two years' rigorous imprisonment which we accordingly do.

N. H.

*Appeal partly allowed:
Sentence reduced.*

ODDH JUDICIAL COMMISSIONER'S COURT.

JURY CASE No. 3 OF 1925.

August 13, 1925.

Present:—Mr. Dalal, J. C.

EMPEROR—COMPLAINANT

versus

MOHAMMAD SHAFI—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 307, 342—Trial by Jury—Disagreement between Judge and Jury—Reference to High Court—Duty of High Court—Verdict manifestly wrong or perverse, finding as to—Examination of accused, nature of.

Where in a case tried by a Jury the Sessions Judge disagreeing with the unanimous verdict of the Jury makes a reference to the High Court under s. 307 of the Cr. P. C., the question to be decided by the High Court is whether the verdict of the Jury is manifestly wrong or perverse. The High Court has not to decide what would appeal to it as true or false, but has to consider whether the view taken by the Jury was such as could not be supported on any consideration of the case whatsoever. [p. 537, col. 1.]

It makes a considerable difference to listeners like a Jury whether the statement of the accused made before the Committing Magistrate is read over by the reader of the Court, or whether the accused person is carefully examined in the presence of the Jury and his answers and demeanour noted by the Jury. In a case tried with a Jury the Judge should examine the accused person with care so that the defence of the accused and its hollowness, where it is untenable, may be fully impressed on the minds of the Jury. [*ibid.*]

Reference made by the Fourth Additional Sessions Judge, Lucknow, by his letter No. 35, dated the 20th May 1925.

Mr. R. F. Bahadurji, for the Accused.

The Government Pleader, for the Crown.

JUDGMENT.—This is a Reference made by the Fourth Additional Sessions Judge of Lucknow to this Court on his disagreeing with the unanimous verdict of the Jury. The appellant, Head *Mali* of the Victoria Park here, Mohammad Shafi by name, was prosecuted on three charges of forgery. He prepared the Muster Roll of the *Malis* serving under him and in accordance with the Muster Roll an Acquittance Roll was prepared and the *Malis* were paid. One *Mali* Ram Ratan was so paid on two occasions June and December 1923. The salary of the *Mali* Ram Ratan was admittedly taken by Mohammad Shafi who put his own thumb impression. The charge against him was that he forged the Acquittance Roll of the Victoria Park staff for the months of June and December 1923 in that he dishonestly and fraudulently affixed his own thumb impression against the name of Ram Ratan thereby making it to appear that the said Ram Ratan had served on the Staff of the Victoria Park as a *Mali* during June and December 1923 and that he had authority from Ram Ratan to acknowledge receipt of his pay for the same months whereas he knew that the said Ram Ratan had not so served during those months and, therefore, not being entitled to any pay could not have authorised him and did not authorise him to draw pay from those months on his behalf. The defence was an admission of the thumb impressions being those of Mohammad Shafi and an allegation that according to the procedure obtaining in the office of this garden any substitute may be entertained for Ram Ratan. Ram Ratan's name may be continued in the Acquittance Roll and salary may be drawn on behalf of the substitute by Mohammad Shafi.

The question is whether the unanimous verdict of the Jury is manifestly wrong or perverse. It is obvious what the Jury thought was that 20 *Malis* were really entertained in the garden, that a substitute did work for Ram Ratan and that what Mohammad Shafi took from the garden authorities for the two months was disbursed in paying a person or several persons working for Ram Ratan in the gardens. On these facts it would be admitted that no charge of forgery could be sustained. The Superintendent of the gardens one Mr. Johnson said that he never knew that less than 20

Mails were working under Mohammad Shafi. The accused's learned Counsel referred to a statement made by this witness before the Magistrate that whenever he paid a surprise visit he found the attendance to be correct. No evidence was produced on behalf of the prosecution to prove that less than 20 *Malis* worked during the months of June and December 1923. It is quite true that the accused definitely stated that he was unable to produce the substitutes, that he did not know their names nor where they lived. This statement when we consider that Ram Ratan left service in 1921 is highly suspicious. It was at the same time open to the Jury not to consider this circumstance as suspicious. It is possible that they thought that substitutes would be afraid of being dragged into this criminal prosecution and would not depose that they worked in the garden. Such an attitude of mind would be possible among menial Indians of the status of coolies and this consideration may have appealed to the Jury.

As Mr. Bahadurji who appeared on behalf of Mohammad Shafi submitted to the Court it is not for a Judge of this Court to decide what would appeal to his mind as true or false but he has to consider whether the view taken by the Jury was such as could not be supported on any consideration of the case whatsoever. It is also unfortunate that the accused was not carefully examined by the Sessions Judge himself who was satisfied with the examination before the Magistrate. It may be granted that the Magistrate examined the accused with great care but it makes a considerable difference to listeners like the Jury whether a statement is read over by the Reader of the Court or whether an accused person is carefully examined in the presence of the Jury and his answers and demeanour noted by the Jury. My opinion is that Sessions Judges of Oudh will be well-advised when so many offences are now being tried with the aid of a Jury if they examine accused persons in their own Courts with care so that the defence of the accused and its hollowness, where it is untenable may be fully impressed on the mind of the Jury. The angle of vision has to be changed with a change in the method of the trial.

There are some things in the charge to the Jury also which the Jury must have understood were not strictly correct. In one place the learned Judge says about the accused; "Although he knew English but

he used to affix his thumb impression against the name of Ram Ratan in the Acquittance Roll when he was drawing Ram Ratan's pay. This may show his bad faith. If he was drawing the pay of Ram Ratan in good faith, as he admits, he could not have affixed his thumb impression to the register, but signed it with a note that he had taken it on his behalf."

This is hardly a fair statement when it is remembered that the Superintendent of the gardens definitely stated that the name of the person who actually took the salary was never recorded. The Superintendent also stated that in a case where the pay was received by a person other than the one named in the Acquittance Roll thumb impression was always received. There may be a reason for this because thumb impression, if properly taken, is more easy to identify than a signature.

Having regard to the manner of the trial and the statement of the garden Superintendent I am not prepared to say that the verdict of the Jury was manifestly wrong or perverse.

The accused shall be acquitted and his bail cancelled.

Z. K.

Accused acquitted.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 161 OF 1925.

July 15, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Panton.

ABDUL GANI BHUYA—ACCUSED—
APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 288—Evidence not recorded for commitment, whether admissible—Evidence admitted under section, whether substantive evidence—Evidence retracted in Sessions Court—Charge to Jury—Duty of Court.

There is no special procedure laid down in Ch. XVIII of the Cr. P. C. for recording evidence, and any evidence recorded by a Magistrate before commitment, whether recorded with a view to commitment or in the ordinary course of trial, is evidence recorded in the presence of the accused under Ch. XVIII, for the purposes of s. 288, Cr. P. C. [p. 539, col. 1.]

The evidence recorded by the Committing Magistrate, if admitted under s. 288, Cr. P. C., must be treated as evidence for all purposes even as the basis of finding or verdict and on a par with any other evidence, before the Sessions Court or as a substantive

evidence on which the verdict of the Jury or judgment of the Judge can be based. [p. 540, col. 2.]

Case-law reviewed.

Witnesses who retract in the Sessions Court their statements made before the Committing Magistrate are lying witnesses, as they must have spoken falsehood either before the Committing Magistrate or in the Sessions Court. In their case the Sessions Judge must tell the Jury in his charge that their evidence should be regarded with great caution. The jurors ordinarily are not men who are used to weighing evidence and it is, therefore, necessary that all help should be given to them in estimating the evidence in the light of the observations made by learned Judges in decided cases. [p. 540, col. 2; p. 541, col. 1.]

Where instead of cautioning the Jury as to placing reliance on the evidence of witnesses who have retracted their statements made before the Committing Magistrate, the Judge expresses his opinion in his charge with a certain degree of assertion in the words: "It seems clear to me that these witnesses have decided to go as far as they possibly can towards altering their evidence in such a way as shall secure the acquittal of the accused", the charge is vitiated, although the Judge also tells the Jury "it is for you to say whether you feel convinced as to the truth of the Magisterial depositions to an extent which would warrant you as prudent men in acting upon them." [p. 541, col. 1.]

Criminal appeal against an order of the Additional Sessions Judge, Mymensingh, dated the 2nd March 1925.

Babu Suresh Chandra Taluqdar, for the Appellant.

Mr. Herambo Chandra Guha, for the Crown.

JUDGMENT.

Suhrawardy, J.—The appellant Abdul Gani Bhuya has been convicted under s. 324, Indian Penal Code, and sentenced to six months' rigorous imprisonment. He was tried with one Abdul Razak for offences under ss. 324, 323 and 325, Indian Penal Code. The Jury unanimously found Abdul Razak not guilty and found the appellant guilty under s. 324, Indian Penal Code.

On behalf of the appellant three points have been taken by the learned Vakil who appears for him relating to non-direction in the learned Judge's charge to the Jury. The first point is with regard to the admissibility of the depositions taken by the Magistrate. What happened in this case is that the case for the prosecution rested on the evidence of two alleged eye-witnesses to the occurrence Nawab-ud-Din and Wasiuddin and of another witness Madhu, a servant of the family, who had lodged the first information on hearing about the occurrence from one of the other witnesses. Before the Committing Magistrate they spoke of having seen the occurrence or part of it but in the Sessions Court

they practically denied having seen it. Nawab-ud-Din had said before the Committing Magistrate that there was an exchange of abuse. Gani Mia (accused) then began to cut Abdul Jabbar with his sword and Kalarbap (Abdul Razak) beat Abdul Jabbar on the head. Abdul Jabbar fell down and was beaten further. In the Sessions Court he said that Abdul Gani gave a stab to Abdul Jabbar with a sword but he could not say where it landed, and Abdul Jabbar struck Abdul Gani a blow with a pointed *lathi*. On being questioned by the learned Judge as to whether he was right as to the statement he was making he answered "I did not see". Wasiuddin had stated before the Committing Magistrate thus: "I heard a cry and went upon the courtyard. I found Abdul Jabbar and Nawabuddin lying on the courtyard in front of Mamudjan's hut. There were many injuries on their persons. Abdul Razak had a *lathi*, Abdul Gani had a weapon made of iron which is called *talwar*". In the Sessions Court he said as follows: "I heard a shriek, not the words. I saw Nawabuddin and Jabbar lying in the yard. Razak, Gani and Karim were there. I did not clearly notice what was in their hands but Gani had something in his hand." The servant Madhu had stated before the Magistrate that he saw the accused going out of Mamudjan's hut with a sword and he saw Abdul Jabbar lying unconscious in his hut. He was asked by Mamudjan to go to the *thana* and to lodge *ejahar* there and he did according to instruction. In the Sessions Court he had said "I saw nothing in their hands. Then I went in Jabbar Mia's hut and found Jabbar lying. Nawab told me to go to *thana*. He told me what to say". From the depositions of these witnesses before the Committing Magistrate and in the Sessions Court, it is clear that they were deliberately attempting to retract the evidence given by them before the Committing Magistrate. The learned Sessions Judge admitted their evidence before the Committing Magistrate under s. 288, Cr. P. C., and placed it before the Jury who apparently based their verdict upon it.

It is contended on behalf of the appellant that the evidence before the Committing Magistrate which was received by the learned Judge under s. 288, Cr. P. C., was not admissible under that section. It is pointed out that the Magistrate originally started the case with a view to try it himself but

at a later stage decided to commit it to the Sessions; the evidence in this case was, therefore, not recorded under Ch. XVIII. Section 288 as amended by the Act of 1923 stands thus: "The evidence of a witness, duly recorded in the presence of the accused under Ch. XVIII, may, in the discretion of the presiding Judge, if such witness is produced and examined be treated as evidence in the case, for all purposes subject to the provisions of the Indian Evidence Act, 1872". The words "duly recorded in the presence of the accused under Ch. XVIII" have been substituted by the Act of 1923 for the words "duly taken in the presence of the accused before the Committing Magistrate" and it is argued that the evidence in this case was not recorded by the Magistrate under Ch. XVIII and, therefore, it should not have been admitted by the learned Judge under s. 288, Cr. P. C. This contention has no substance. The amendment of the section by substituting the words "duly recorded in the presence of the accused under Ch. XVIII" for the words "duly taken in the presence of the accused before the Committing Magistrate," is intended to cover cases where evidence may be recorded by the Committing Magistrate but not for the purpose of commitment, as under s. 219, Cr. P. C. Besides, there is no special procedure laid down in Ch. XVIII for recording evidence and any evidence recorded by a Magistrate before commitment whether recorded with a view to commitment or in the ordinary course of trial is evidence recorded in the presence of the accused under Ch. XVIII.

The next ground raised by the appellant requires careful consideration. As I have already observed the conviction of the accused rests upon the evidence of three persons, who spoke of the occurrence before the Committing Magistrate but who in the Sessions Court declared that they knew nothing about it. The basis of the verdict of the Jury, therefore, in this case is the evidence of those witnesses recorded by the Committing Magistrate and admitted by the Judge under s. 288. It is argued that the conviction based solely upon evidence admitted under s. 288 is wrong and that the learned Judge should have directed the Jury that on the evidence as it stood in the trial there could be no conviction at all. It is necessary to note that there has been a substantial alternation in s. 288 by Act XVIII of 1923. The words "for all

purposes subject to the provisions of the Indian Evidence Act, 1872" have been added after the words "be treated as evidence in the case". Several decisions have been placed before us in support of the appellant's contention. In the case of *Queen Empress v. Amanullah* (1) it has been held that a conviction should not be based solely upon evidence admitted under s. 288, Cr. P. C., unless there is sufficient corroboration by other evidence. So far as this Court is concerned this case was followed in the case of *Queen Empress v. Jadub Das* (2). The case in *Queen-Empress v. Amanullah* (1) was a case in which the High Court had to confirm the sentence of death passed on the accused and, therefore, it had to go into the evidence to find out if the sentence could be upheld. The case of *Queen-Empress v. Jadub Das* (2) was a reference under s. 307, Cr. P. C., and the Court had to look to the evidence to find if the verdict of the Jury could be upheld. In the case of *Queen-Empress v. Nirmal Das* (3) the same view has been expressed. It does not appear that the trial in that case was held with the aid of a Jury. It would seem that the appeal was from the order of the Sessions Judge who acquitted some of the accused and convicted the appellant. These cases and others bearing on the point have been considered in a very recent case decided by the Patna High Court, namely, the case of *Jehal Teli v. Emperor* (4). Mr. Justice Bucknill in an elaborate judgment in which almost all the cases on this point were reviewed made the following observation on the conclusion reached by him. "I think, therefore, that the principle is quite clearly settled by this line of cases that unless there is clearly present, besides the evidence given before the Magistrate, evidence which will show that the evidence given before the Magistrate should be preferred to and substituted for that given before the Sessions Judge, the evidence given before the Magistrate cannot be effectively utilized in support of a conviction." This case was decided in 1924 and after the amendment of the section by the Act of 1923. I may add that this case was

(1) 21 W. R. Cr. 49; 12 B. L. R. Ap. 15.

(2) 27 C. 295; 4 C. W. N. 129; 14 Ind. Dec. (N. S.) 194.

(3) 22 A. 445; A. W. N. (1900) 169; 9 Ind. Dec. (N. S.) 1334.

(4) 84 Ind. Cas. 334; 3 Pat. 781; (1925) A. I. R. (Pat.) 51; 6 P. L. T. 53; 26 Cr. L. J. 270.

a reference under s. 374 Cr. P. C. The Allahabad High Court in a case decided under the old Code had struck a somewhat dissentient note. In the case of *Emperor v. Dwarka Kurmi* (5). Mr. Justice Aikman quoted with approval the observation of Plowden, J., in *Umar v. Empress* (6), which was to the effect that once the evidence is admitted under s. 288 it is on the same footing with all other evidence in the case, that is to say, "it is to be considered by the Jury or by the assessors and the Judge, according to the nature of the trial, as part of the materials upon which the verdict or a finding is to be given.... Whether any portion or the whole of the evidence thus admitted is entitled to credit, and if so, to such a degree that a conviction may be based upon it wholly or in part, are very important questions for the Jury or assessors, or for the Judge, as the case may be, but they are in no way affected by the section." I am of opinion that the view thus expressed is correct. Section 288 at any rate as it stands now, makes the evidence recorded by the Magistrate admissible at the discretion of the Trying Judge and it further enacts that it is to be treated as evidence in the case "for all purposes subject to the provisions of the Indian evidence Act." The only case decided after this amendment is, as I have observed, the case of *Jehal Teli v. Emperor* (4). But there the learned Judges did not consider the effect of the addition of the words "for all purposes" to the section. They rightly decided the point strenuously pressed on their attention as to the meaning of the words "subject to the provisions of the Indian Evidence Act," holding that such deposition can be used as evidence so long as the evidence is an evidence within the meaning of the Indian Evidence Act; or, in other words, that the evidence may be used for all purposes if it is admissible under the Indian Evidence Act. As to the important question as to how far it is possible to have a conviction upon evidence before a Magistrate when the evidence given at the trial differs from it and is exculpatory of the accused, the learned Judge has considered all the cases which were decided under the section as it stood before the amendment and has endorsed without further consideration the

decision in those cases in the words which I have already quoted. That decision, therefore, is of no help to us because the significance of the addition of the words "for all purposes" was not considered in it. The section before the amendment said that "such deposition is to be treated as evidence in the case." The addition of the words "for all purposes" must be with set design and for the purpose of attaining a definite object. It seems to me that these words have been added to remove the limitation to the value of that evidence as fixed by the cases referred to above. Under the present section it must be held that the evidence recorded by the Committing Magistrate if admitted under s. 288 must be treated as evidence for all purposes even as the basis of finding or verdict and on a par with any other evidence before the Sessions Court or as a substantive evidence on which the verdict of the Jury or judgment of the Judge can be based.

The third point taken by the learned Vakil for the appellant is, that in the circumstances of this particular case the Judge should have told the Jury not to take the evidence of witnesses who have retracted their statements before the Committing Magistrate into consideration and that it is not safe to rely upon a portion of their evidence as true and reject another portion as false; and for this view reliance has been placed on the case of *Emperor v. Satyendra Kumar Dutt Chowdhury* (7). That case was a Jury Reference in which the learned Judges had to consider whether the verdict of the Jury could be supported on such evidence. It is dangerous to lay down as a general rule of law that in this country it is not proper to believe the evidence of a certain witness in part. Be that as it may, in my opinion the learned Judge's charge is not quite free from this blemish. The witnesses who have retracted their statements before the Committing Magistrate are no doubt lying witnesses and they must have spoken falsehood either before the Committing Magistrate or in the Sessions Court. The learned Judge ought to have told the Jury that they should be looked upon as witnesses who are not above suspicion and whose evidence should be regarded with great caution. The Jurors ordinarily are not men who are used to weighing evidence and it is, therefore,

(5) 28 A. 683; A. W. N. (1906) 187; 4 Cr. L. J. 61; 3 A. L. J. 852.

(6) 51 P. R. 1887 Cr.

(7) 71 Ind. Cas. 657; 37 C. L. J. 173; 24 Cr. L. J. 193; (1923) A. I. R. (C.) 463.

necessary that all help should be given to them in estimating the evidence in the light of the observations made by learned Judges in decided cases. Instead of doing that the learned Judge has expressed his opinion with a certain degree of assertion in these words: "It seems clear to me that these persons have decided to go as far as they possibly can towards altering their evidence in such a way as shall secure the acquittal of the two men here on trial." This is a suggestion to the Jury that the witnesses were speaking the truth when they were deposing before the Committing Magistrate but that before him they were attempting to screen the offender. Though the learned Judge has stated in his charge "it is for you to say whether you feel convinced as to the truth of the three Magisterial depositions to an extent which would warrant you as prudent men in acting upon them," I do not think that it can be said that the Jury were left with the option of accepting the evidence given before the Committing Magistrate or that given in the Court of Sessions. In this view I hold that the charge is vitiated by the defect pointed out.

It next remains to consider whether it is a fit case in which we should order a re-trial. The whole of the evidence has been placed before us and we do not think that it is so strong as to lead us to hold that a re-trial would be in the interest of public justice. We accordingly set aside the conviction of and the sentence passed upon the accused and order that he be acquitted and discharged from his bail bond.

Panton, J.—I agree.

N. H.

Appeal allowed.

ODUH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 27 OF 1925.
July 23, 1925.

Present:—Mr. Wazir Hasan, A. J. C.
Musammāt MUQIM-UN-NISA AND OTHERS
—ACCUSED—APPLICANTS

versus

Musammāt AHMAD-UN-NISA AND ANOTHER
—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145, proceedings under—Final order—Breach of peace, apprehension of, finding as to, absence of, effect of—

Preliminary order not served on certain party—Order, whether binding.

The law does not require a Magistrate to record in his final order in a proceeding under s. 145 of the Cr. P. C. an express finding that a breach of the peace is imminent. A finding in respect of the existence of a dispute likely to cause a breach of the peace is a matter to be considered in relation to the preliminary order and where the preliminary order states that the Magistrate is satisfied on the materials before him that a dispute likely to cause a breach of the peace exists as regards the property in dispute, the final order cannot be objected to on the ground that it does not contain a finding as to the apprehension of a breach of the peace. [p. 542, col. 1.]

A party upon whom the preliminary order required by sub-s. (1) of s. 145 of the Cr. P. C. has not been served and who has not been given an opportunity to prove his possession over the subject of the dispute, cannot be subjected to the final order passed in the proceedings. [*ibid.*]

Reference made by the First Additional Sessions Judge, Lucknow, at Bara Banki.

Mr. R. F. Bahadurji, for the Applicants.

Mr. Niamatullah, for the Opposite Party.

ORDER.—This is a Reference by the First Additional Sessions Judge of Lucknow, exercising jurisdiction at Bara Banki, for an order by this Court under s. 438 of the Cr. P. C. In proceedings under s. 145, Cr. P. C., the servants of Musammāt Ahmad-un-nisa and Zamin Ali were declared by a First Class Magistrate of Bara Banki under his order dated the 18th March 1925 to be in occupation of a house situate in village Mailaraiganj. It was also declared that they were forcibly evicted therefrom on the 18th November 1924 and the consequential order was that they be restored to the possession of the house. The order further directed that Musammāt Muqim-un-nisa, Abdul Hasan and Muhammad Bukhsh do abstain from interfering with the possession of the other party over the house till that party were evicted in due course of law. The aggrieved party carried the matter in revision to the Court of the First Additional Sessions Judge of Lucknow, who, by his reference under consideration, recommends to this Court that the order of the Magistrate be set aside.

Two grounds are taken in support of the recommendation. The first is that the learned Magistrate does not hold that a breach of the peace was imminent and that the evidence adduced by the party in whose favour the Trial Court passed the order does not go to indicate that a dispute likely to cause a breach of the peace existed with respect to the house in question. The

second ground is that no preliminary order as required by the provisions of s. 145 of the Cr. P. C., was drawn up as against Muhammad Bakhsh nor was any such order served on him.

As regards the first ground, it is enough to say that the law does not require the Magistrate to record an express finding in his judgment that a breach of the peace was imminent. So far as the final decision is concerned it is required by law to clearly indicate whether any and which of the parties was at the date of the order before mentioned in possession of the subject of the dispute. See sub-s. 4, s. 145, of the Cr. P. C. As to a finding in respect of the existence of a dispute likely to cause a breach of the peace that is a matter to be considered in relation to the preliminary order and in the present case the preliminary order distinctly says that the Magistrate was satisfied on the materials before him that a dispute likely to cause a breach of the peace existed as regards the house in question. See sub-s. (1) of s. 145 of the Cr. P. C. As to the evidence the learned Magistrate found it in the admissions of the parties themselves and in my judgment admission of a dispute by both the parties concerned is certainly evidence of the existence of that dispute. This ground, therefore, fails.

The second ground deals with the case of Muhammad Bakhsh. Muhammad Bakhsh joined the proceedings of his own accord by making an application to the Trial Court. He supported the case of *Musammāt* Muqīm-un-nisa and finally he was included by the learned Magistrate in the group of the party against whom the order was passed. This could not be done. No preliminary order as required by s. 145, sub-s. (1) of the Cr. P. C. was served on Muhammad Bakhsh nor was he given an opportunity to prove his possession over the subject of the dispute. In the circumstances he could not be subjected to the final order passed by the learned Magistrate in the proceedings under s. 145 of the Code.

I accept the reference of the learned Judge in so far as Muhammad Bakhsh is concerned. His name will be eliminated from the final order of the learned Magistrate and all proceedings taken as against him shall be deemed to have been set aside. The rest of the order is maintained. Let the papers be returned.

Z. K.

Reference accepted.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 188 OF 1925.

July 8, 1925.

Present :—Mr. Justice Suhrawardy and
Mr. Justice Panton.

KABATULLA AND OTHERS—ACCUSED—
APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal trial—Stolen goods in possession of accused—Presumption—Rebuttal—Jury, charge to—Misdirection.

In a case where the evidence of the guilt of an accused as a thief or dacoit rests upon discovery of stolen property from his possession and which is tried by the Jury, the proper course is to direct that the Jury are entitled to take the explanation offered by the accused of his possession. It is not necessary that such claim by the accused must be proved. There may be a case in which it is impossible for the person who is in possession of the property to prove how he obtained possession of it and if he states the circumstances under which he obtained it the Jury as a Court of fact may accept it; and in that case it will be their duty to acquit the accused. [p. 543, col. 2.]

It is not the law that if the prosecution succeeds in proving possession by the accused of recently stolen goods, it is his duty to prove his innocence, and that the presumption raised of his guilt cannot be rebutted by mere denial. Such a statement of the law laid down by a Judge in his charge to the Jury amounts to a misdirection which vitiates the charge. [*ibid.*]

Hathim Mondal v. Emperor, 56 Ind. Cas. 849; 31 C. L. J. 310; 24 C. W. N. 619; 21 Cr. L. 545, *R. v. Isaac Schama*, (1914) 11 Cr. App. Rep. 45 at p. 49; 84 L. J. K. B. 396; 112 L. T. 480; 79 J. P. 184; 59 S. J. 288; 81 T. L. R. 88, *Satya Charan Manna v. Emperor*, 88 Ind. Cas. 515; 52 C. 223; (1925) A. I. R. (C.) 666; 26 Cr. L. J. 1155, relied on.

Appeal against an order of the Sessions Judge, Malda, dated the 11th January 1925.

Babu *Jatindra Mohan Chowdhury*, for the Appellants.

Mr. *Khundkar*, Deputy Legal Remembrancer, for the Respondent.

JUDGMENT.—This appeal is by three appellants who have been convicted under s. 395, Indian Penal Code, and sentenced to 7 years' rigorous imprisonment each, with the direction under s. 565, Cr. P. C., to notify the address to the Police in case of accused No. 1. Four jurors found the accused guilty under s. 395 while the 5th juror found them guilty under s. 412, Indian Penal Code. The learned Judge has accepted the verdict of the majority of the Jury and convicted and sentenced the accused as aforesaid. In appeal several grounds have been taken pointing to the misdirections alleged to have vitiated the learned Judge's charge to the Jury. It is enough for our present purpose to refer to

only one of them. The evidence, it appears, rested mainly upon the recovery of the stolen articles from the possession of the accused. With regard to the explanation of the law on this head the learned Judge made the following observation: "The law regarding finding of property is this, that if stolen or dacoited property is found in possession of any person soon after the commission of the theft or dacoity, you may presume him to be either the thief or dacoit or a receiver unless he accounts for possession." Then he proceeds to state the three necessary elements which give rise to the presumption under the law, namely, (a) that the property was found in possession of the accused; (b) that the property is stolen property and (c) that it was found soon after the theft or dacoity. Then the learned Judge adds that if these three conditions are satisfied you may presume against the accused until he proves his innocence, otherwise not. As to what is meant by the learned Judge by the word "proved" in a subsequent part of his judgment he says "if you are satisfied that the presumption can be made you will see how far the presumption has been rebutted. As to the claim of the articles, allegation is not the same as proof. But if you make the presumption, it cannot be rebutted by mere denial." Reading these passages together it is evident that what the learned Judge meant to hold and which the Jury understood is that if the articles are stolen properties and were found in possession of the accused it is sufficient to prove that they were thieves or dacoits and the rebuttable presumption that arises in law is that the accused are either thieves or dacoits until they succeed by adducing sufficient proof in establishing their innocence. This direction has been considered to be serious mis-direction in several cases decided by this Court. In *Hathim Mondal v. Emperor* (1) the learned Chief Justice quoted a portion of the judgment of the learned Chief Justice of England in the case of *R. v. Isaac Schama* (2) where it is said that in a case like the present the charge to the Jury should be to this effect; "Where the prisoner is charged with having receiving stolen pro-

perty, when the prosecution has proved the possession by the prisoner, and that the goods had been recently stolen, the Jury may be told that they may, not that they must, in the absence of any reasonable explanation, find the prisoner guilty. But if an explanation is given which may be true, it is for the Jury to say on the whole evidence whether the accused is guilty or not; that is to say, if the Jury think that the explanation may reasonably be true, though they are not convinced that it is true, the prisoner is entitled to an acquittal because the Crown has not discharged the onus of proof imposed upon it of satisfying the Jury beyond reasonable doubt of the prisoner's guilt. That onus never changes; it always rests on the prosecution." In a case where the evidence of the guilt of the accused rests upon discovery of stolen property from his possession and which is tried by the Jury the proper course is to direct that the Jury are entitled to take the explanation offered by the accused of their possession. It is not necessary that such claim by the accused must be proved. There may be a case in which it is impossible for the person who is in possession of the property to prove how he obtained possession of it and if he states the circumstances under which he obtained it the Jury as a Court of fact may accept it; and in that case it will be their duty to acquit the accused. The statement of the law made by the learned Judge in his charge to the Jury leaves no such option to the Jury. He insists that, if the prosecution succeeds in proving possession by the accused of recently stolen goods, it is his duty to prove his innocence and he emphasises it by explaining that mere allegation is not proof and that the presumption raised under the law cannot be rebutted by mere denial. We think that this explanation of the law is not correct and amounts to a misdirection which vitiates the charge. This view is in accord with that taken in *Satya Charan Manna v. Emperor* (3). Though there is difference in the language of the charge under consideration in that case from that in the present case the law as laid down there is equally applicable to the present case. We are accordingly of opinion that this charge is vitiated by the mis-direction referred to and that the trial must be held

(1) 56 Ind. Cas. 849 31 C. L. J. 320; 24 C. W. N. 619; 21 Cr. L. J. 545.

(2) (1914) 11 Cr. App. Rep. 45 at p. 49; 84 L. J. K. B. 396; 112 L. T. 480; 79 J. P. 184; 59 S. J. 288; 31 T. L. R. 88.

(3) 88 Ind. Cas. 515; 52 C. 223; (1925) A. I. R. (C.) 666; 26 Cr. L. J. 1165.

to be not according to law. There are other objections taken but it is not necessary to consider them. In the view above stated the conviction of and the sentences passed upon the appellants must be set aside.

We accordingly order that the conviction of and the sentences passed upon them be set aside and that they be re-tried according to law.

They will remain in Jail until further orders by the Trying Court.

N. H.

Re-trial ordered.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1095 of 1924.

March 3, 1925.

Present:—Justice Sir Babington Newbould, Kt., and Mr. Justice B. B. Ghose.

SRISH CHANDRA GHOSE AND OTHERS—
ACCUSED—PETITIONERS

versus

ABANI NATH HAZRA—COMPLAINANT
—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 345—Compoundable offence, trial of—Arbitration agreement filed in Court—Adjournment requested—Case, whether compounded.

The complainant and the accused in a compoundable case filed a petition of compromise agreeing to be bound by the decision of certain arbitrators and asking the Court to grant an adjournment for settlement of the dispute. The award was subsequently not accepted by the complainant, and he wanted the Court to proceed with the trial:

Held, that the petition of compromise had not the effect of compounding the case within the meaning of s. 345 of the Cr. P. C., as the fact that the parties asked for an adjournment of the case showed that what the parties contemplated was that the arbitrators should go into the matter, and that, after effect was given to their decision by mutual agreement, the case would be compromised.

Criminal revision against an order of the Sessions Judge, Murshidabad, dated the 5th December 1924, confirming that of the Deputy Magistrate, Berhampur, dated the 5th September 1924.

Mr. Narendra Kumar Bose and Babu Kanaidhan Dutt (for Babu Nirode Baran Banerjee), for the Petitioners.

Babu Satindra Nath Mukherjee, for the Opposite Party.

JUDGMENT.—A case was pending against the petitioners in which they were charged with an offence punishable under s. 427, Indian Penal Code, the opposite party being the complainant in that case.

The offence is one which is compoundable under s. 345, Cr. P. C., without the leave of the Court. On the 21st June 1924 both parties filed a petition of compromise agreeing to be bound by the decision of five gentlemen named therein and asking the Court to grant an adjournment for settlement of their dispute. On the 9th July another joint petition was filed reducing the number of arbitrators to three. The three arbitrators visited the locality, but while they were making their enquiry some unpleasantness occurred and one of the arbitrators ceased to take any further part in the deliberation. The two remaining arbitrators made an award which was not accepted by the opposite party. An application being made by the petitioners to the Trying Magistrate to record an order of acquittal under s. 345, he held that the case had not been compounded and that the trial should proceed.

The only question that arises in this Rule is whether these petitions filed on the 21st June and the 9th July 1924 had the effect of compounding the case within the meaning of s. 345 of the Code. We think the Magistrate is right in holding that it cannot be said that the agreement to refer the case to arbitration was a final settlement of the dispute which the Court was bound to accept. The fact that when agreeing to be bound by the decision of the arbitrators the parties asked for adjournment of the case shows that it was not their intention to treat the reference to arbitration as taking the case out of the jurisdiction of the Criminal Court. The decision of the arbitrators whatever it was could not have been enforced by the Criminal Court, and it is unlikely, therefore, that the parties would have considered that the reference to arbitration was the final ending of the dispute. What was probably contemplated was that the arbitrators should go into the matter and in accordance with their decision the parties would act and after effect had been given to their decision by mutual agreement the case should then be compromised, but that it should be kept pending until it was finally settled.

We accordingly discharge this Rule.

N. H.

Rule discharged.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 276 OF 1922.

February 12, 1925.

Present:—Mr. Justice Phillips.

RASAPPA PILLAI—PLAINTIFF—
APPELLANT

versus

Mitta Zamindar DORAISAMI REDDIAR
alias PETHU REDDIAR AND OTHERS—
DEFENDANTS NOS. 1 TO 6—

RESPONDENTS.

Contract Act (IX of 1872), s. 69—“Bound by law to pay,” meaning of—Failure of defendant to make payment under contract—Decree obtained by creditor—Properties belonging to plaintiff and defendant put up to sale—Payment by plaintiff—Suit to recover amount of payment from defendant, maintainability of.

The expression “bound by law to pay” in s. 69 of the Contract Act does not mean bound by law to the plaintiff, but that the defendant at the suit of any person might be compelled to pay. [p. 546, col. 2.]

Plaintiff purchased certain properties free of encumbrances. The plaintiff's vendor subsequently sold some other properties to the defendant, a portion of the consideration being left with the defendant to pay off a decree obtained against the vendor by one R. Defendant did not pay off this amount with the result that the properties sold to the plaintiff together with those sold to the defendant were sold by R in execution of his decree. In order to prevent the sale being confirmed plaintiff paid the decretal amount and then brought a suit to recover that sum from the defendant.

Held, that the suit fell within the purview of s. 69 of the Contract Act and that the plaintiff was entitled to a decree. [ibid.]

Second appeal against a decree of the District Court, Salem, in A. S. No. 186 of 1920, preferred against that of the Court of the District Munsif, Namakal, in Original Suit No. 440 of 1917.

Messrs. T. M. Krishnaswami Iyer and V. N. Venkatavaradachari, for the Appellant.

Mr. L. S. Viraraghava Iyer, for the Respondents.

JUDGMENT.—I think it is necessary in this case to set out the facts, for although the District Judge says in his judgment that the facts of this case are not in dispute, he has come to one conclusion of fact which has been questioned here. In 1905 the 3rd defendant sold certain properties to the plaintiff for Rs. 2,800 and in 1909 he sold certain other properties to the 1st defendant for Rs. 16,150. The sale to plaintiff was said to be free from encumbrances, whereas the sale to the 1st defendant recited various encumbrances on the property, which the 1st defendant was to discharge as a part of the sale price. In particular, he had to pay off a decree

debt of Rs. 2,000 obtained by one Rangaswami. Admittedly, the 1st defendant did not pay off this amount and subsequently the plaintiff's properties which together with those sold to the 1st defendant had been attached by Rangaswami before judgment, were sold. In order to prevent the sale being confirmed, the plaintiff paid the decree amount and now sues to recover that sum from defendants Nos. 1 to 3 and their families, the 2nd defendant being an alienee from the 1st defendant. The District Judge has found that neither s. 69 nor s. 70 of the Indian Contract Act supports the plaintiff, for he finds “the 1st defendant was under no legal obligation to clear the plaintiff's property from the attachment, nor can I find that he was under any contractual obligations which could have been enforced by law. Nor can I find he was under any legal obligation to contribute to re-imburse the plaintiff.” This finding appears to be based to a considerable extent on the finding of fact to which I have alluded above and which is now in dispute. Under his sale-deed, the 1st defendant undertook to pay Rangaswami's decree debt. But he did not do so although it appears that he did pay full consideration for the sale-deed in that he paid a debt not specified in that deed and paid certain amounts to other creditors in excess of the stipulated sums. In respect of this the learned Judge states “It also appears that the 1st defendant had his vendor's consent to the course he adopted,” and then adds: “the 1st defendant and his vendor might have entered into a new contract the next day after Ex. 1 and in fact did enter into a new contract when his vendor agreed to the 1st defendant being excused from paying up Rangaswami's debt.” This amounts to a finding that there was a novation of the contract of sale. Such a case is not set up either by the 1st defendant or by the 3rd defendant, and no issue has been framed on the point, and it has not been considered in the Trial Court. It further appears that this finding is directly opposed to an admission in the 1st defendant's evidence, for there he deposes “There is no particular reason why I should have paid off those advances and not Rengaswami's except that the others were more pressing and were mortgage decrees.” He does not rely on the novation of contract found by the District Judge but simply

says that he made these payments because some creditors were pressing harder than others. This finding, therefore, cannot be accepted and we must take it that the contract between the 3rd defendant and the 1st defendant is in accordance with the terms of Ex. 1. That being so, it remains to consider whether the plaintiff comes within the provisions of s. 69 of the Contract Act for in this appeal it is not suggested that s. 70 is applicable. Section 69 runs as follows:—

“A person who is interested in the payment of money which another is bound by law to pay, and who, therefore, pays it, is entitled to be re-imbursed by the other.”

It cannot be disputed that plaintiff was interested in the payment of this money inasmuch as it was the only means of saving the property which he had purchased from the 3rd defendant.

Then the question arises, whether the 1st defendant was bound by law to pay that money, namely, Rangaswami's decree debt. Under Ex. 1, he had contracted with the 3rd defendant to pay that amount and so far as the 3rd defendant is concerned he could have compelled the payment of the sum by the 1st defendant. These facts are very much the same as in the case reported as *Muthurakku Maniagarān v. Rakkuppa Maniagarān* (1), the only difference being that the money in that case was due under a mortgage. Both the learned Judges in that case based their decision on s. 69 of the Contract Act and one of them added that s. 70 was also applicable. This authority seems to me quite clear but in a subsequent case reported as *Kunchithapatham Pillai v. Palamalai Pillai* (2), some little doubt seems to have been expressed as to the correctness of *Muthurakku Maniagarān v. Rakkuppa Maniagarān* (1) although there was no express dissent, the observation relied on by the respondent being one made *obiter*. In considering the meaning of the words “bound by law to pay” the learned Judge says:

“What is intended is a contractual obligation and not a legal one.” If we accept these words in their literal sense, it would imply that a person who is bound by Statute to pay a certain money is not “bound by law to pay” and I do not think

that can possibly have been the meaning of the Judges. What I think is their meaning is that the contractual obligation must be one between the person paying and the person who is bound by law to pay. But if that is so, the person paying would not need to have recourse to s. 69, for he could base his action on his contract. If that is the meaning of the words, I must respectfully dissent, for I prefer to accept the definition of the words “bound by law to pay” given by Beaman, J., in *Somashastry v. Swamirao Kashinath* (3), where at page 98* he says “‘Bound by law’ does not mean bound by law to the plaintiff, but that the defendant at the suit of any person might be compelled to pay.” I entirely agree that this definition is the correct one and the same view is taken by a Bench of this Court in *Venkata Simhadri Jagapatiraju v. Sadrusanamarad* (4) where we find the following observation at page 801†: “The person who is interested in the payment mentioned in s. 69 must be a person who as between himself and the defendant was not bound to pay though the defendant may be under an obligation to pay to a third party.” On the facts of that case it was held that s. 69 was not applicable, but the same reasoning is adopted that we find in *Muthurakku Maniagarān v. Rakkuppa Maniagarān* (1), The same view is taken in *Mothooranath Chuttopadhya v. Kristokumar Ghose* (5) and *Chandradaya v. Bhagaban Chandra* (6). In this state of the authorities and also on the facts of this case, I am clearly of the opinion that s. 69 is applicable and that the plaintiff is entitled to recover the money he has paid.

There is one further argument put forward for the respondents relating to the question of the liability of the lands in 1st defendant's possession to be proceeded against for Rangaswami's decree. It is argued that the attachment of all the properties having been made before judgment and only plaintiff's property having been brought to sale, the other properties were no longer liable for the decree, apparently on the ground that the attachment ceased on the date of the judgment. I may note

(3) 43 Ind. Cas. 482; 42 B. 93; 19 Bom. L. R. 939.

(4) 31 Ind. Cas. 255; 39 M. 795; 29 M. L. J. 639; 2 L. W. 1046; 18 M. L. T. 464.

(5) 4 C. 369; 2 Ind. Dec. (N. S.) 234.

(6) 32 Ind. Cas. 200; 23 C. L. J. 125.

(1) 22 Ind. Cas. 9; 26 M. L. J. 66; 14 M. L. T. 591; (1913) M. W. N. 1047.

(2) 39 Ind. Cas. 405; 32 M. L. J. 347; (1917) M. W. N. 166.

*Page of 42 B.—[Ed.]

†Page of 39 M.—[Ed.]

here that if that were so, the attachment of plaintiff's land would also have ceased on that date, because the sale to him was after the date of the decree. But, I think, the 1st defendant is bound by the recital in his document which states that at the time when the lands were sold to him they were under attachment although there is no evidence let in to show that any subsequent steps were taken after the decree; I may also add that in the opinion of the Judges forming the Full Bench in *Meyyappa Chettiar v. Chidambaram Chettiar* (7) attachment before judgment continues in force until it is put an end to by the Court. It is, therefore, obvious, in the circumstances that this attachment was continuing at the time of the sale to the plaintiff and the sale to the 1st defendant. This argument, therefore, does not help the 1st defendant in any way. The appeal must, therefore, be allowed, but the plaintiff is only entitled to a certain portion of his claim. The District Munsif disallowed a certain portion of the claim and although I think he was wrong in doing so, plaintiff filed his memorandum of objections too late and it was dismissed consequently so far as that is concerned the order has become final. The lower Appellate Court's decree is, therefore, set aside and the decree of the District Munsif restored with costs both here and in the lower Appellate Court.

I may also note that 3rd defendant was not a party to the appeal in the District Court and consequently the suit was dismissed as against him also although in the judgment there is no discussion of his liability.

Z. K.

Appeal allowed.

(7) 79 Ind. Cas. 144; 47 M. 483; 46 M. L. J. 415; 34 M. L. T. 118; (1924) M. W. N. 392; (1924) A. I. R. (M.) 491.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 28 OF 1924.

August 17, 1925.

Present:—Mr. Wazir Hasan, A. J. C.

Chaudhari MOHAMMAD MAZHAR-UD-DIN HASAN—PLAINTIFF—APPELLANT
versus

Chaudhari ZAHUR-UD-DIN AND OTHERS—
DEFENDANTS—RESPONDENTS.

*Transfer of Property Act (IV of 1882), s. 41—
Evidence Act (I of 1872), s. 115—Estoppel—Attestation,*

effect of—Transferor represented as owner of property transferred, effect of.

The fact that a person has attested a deed does not by itself estop him from denying that he knew of its contents or that he consented to it, but there might be circumstances which would show that the attestation was intended to convey something more than a mere witnessing of the execution, and was meant as involving consent to the transaction. [p. 548, col. 2; p. 549, col. 1.]

Pandurang Krishanji v. Markandeya Tukaram, 65 Ind. Cas. 954; 49 I. A. 16; 26 C. W. N. 201; 3 U. P. L. R. (P. C.) 85; 20 A. L. J. 305; 42 M. L. J. 436; 15 L. W. 486; 30 M. L. T. 249; 35 C. L. J. 409; 24 Bom. L. R. 557; 18 N. L. R. 1; (1922) A. I. R. (P. C.) 20; 49 C. 334 (P. C.), followed.

Where one person by a mis-statement of fact intended to operate upon the mind of another induces a certain belief in the latter upon which he has acted, the person who has made the representation is estopped from subsequently denying its truth. [p. 549, cols. 1 & 2.]

Pandurang Krishanji v. Markandeya Tukaram, 65 Ind. Cas. 954; 49 I. A. 16; 26 C. W. N. 201; 3 U. P. L. R. (P. C.) 85; 20 A. L. J. 305; 42 M. L. J. 436; 15 L. W. 486; 30 M. L. T. 249; 35 C. L. J. 409; 24 Bom. L. R. 557; 18 N. L. R. 1; (1922) A. I. R. (P. C.) 20; 49 C. 334 (P. C.) and *Bloomenthal v. Ford*, (1897) A. C. 156; 66 L. J. Ch. 253; 76 L. T. 205; 45 W. R. 449; 4 Manson 156, followed.

Where a person attests a deed of transfer of immoveable property in token of the fact that the property belongs to the transferor and that he is competent to transfer it, he is estopped by the provisions of s. 41 of the Transfer of Property Act from subsequently contending that the property did not belong to the transferor but belonged to himself. [p. 549, col. 2.]

First appeal against a decree of the Subordinate Judge, Bara Banki, dated the 21st January 1924.

Mr. Niamat Ullah, for the Appellant.

Messrs. H. D. Chandra, Ram Chandra, Chaudhari Zahiruddin, and Chaudhari Abdul Karim, for the Respondents.

JUDGMENT.—This is the plaintiff's appeal from a part of the decree of the Subordinate Judge of Bara Banki, dated the 21st January 1924. The suit out of which it arises was instituted on the 27th April 1923 for the recovery of a one-third share in eight items of *zemindari* property. This property in its entirety originally belonged to one Musammam Mahmudunnissa. On her death in 1911 the inheritance devolved according to the Hanafi Muhammadan Law on three persons, Abdul Karim, Zahiruddin and Mazharuddin in equal shares. Abdul Karim is the son of a deceased brother of Musammam Mahmudunnissa and Zahiruddin and Mazharuddin are sons of another deceased brother of the lady. Zahiruddin, the brother of the plaintiff Mazharuddin, is the defendant No. 1 and Abdul Karim is the defendant No. 2 in the present case. The defendant No. 3 is Ratan Lal and de-

fendants Nos. 4, 5 and 6 are sons of Kundan Lal. Kundan Lal and Ratan Lal held a mortgage of two items of the property in suit and are in possession of those items by virtue of that mortgage. The deed of mortgage was executed by Zahiruddin on the 17th January 1913. Mazharuddin, the plaintiff-appellant, attested the deed of mortgage. One of the defences to the suit put forward by the defendants Nos. 3 to 6 was that the plaintiff was estopped under s. 41 of the Transfer of Property Act, 1882, from claiming title to the mortgaged property. The defence was succeeded in the Trial Court and the result was that the plaintiff's suit was dismissed as against the defendants Nos. 3 to 6 and decreed as against the other defendants. The appeal before me relates only to the two items held by the defendants Nos. 3 to 6 under the mortgage already mentioned. These items are an 8-annas share in village Tikaria and the entire *mahal* which once belonged to *Musammât Mahmudunnissa* in village Karanjawara both situate in *Pargana Dewa* in the District of Bara Banki.

A few facts may now be stated. In the mutation proceedings, which followed on the death of *Musammât Mahmudunnissa*, one Raushan Ali claimed the entire estate on the ground that *Musammât Mahmudunnissa* held barely a life-interest in the estate which had devolved upon her by inheritance from her husband and that on her death he as the nearest reversioner of *Musammât Mahmudunnissa*'s husband was entitled to that estate under a family custom. Zahiruddin objected to the claim of Raushan Ali and set up an oral gift of the whole property in his favour made by *Musammât Mahmudunnissa*. Zahiruddin's brother, Mazharuddin, the present plaintiff, supported the gift upon which Zahiruddin had founded his claim to the entire estate of *Musammât Mahmudunnissa* and added that in the event of the gift being held invalid he too had a share in that estate. Finally he said that he did not desire any mutation of names to be made in his favour. The Court of Revenue in charge of mutation proceedings rejected the claim of Raushan Ali and decided that "the property should be entered in the names of the legal heirs of the deceased widow who are the three nephews of the deceased lady, viz., Zahiruddin, Mazharuddin and Abdul Karim, but as Mazharuddin does not claim the property I agree with the Tahsildar that Zahir-

uddin should have two-third and Abdul Karim one-third of the property" (Ex. C-4). The conclusion at which I reach is that Zahiruddin's name alone was entered in the column of proprietors in the *khewat* of villages in respect of the two-third share in the estate of *Musammât Mahmudunnissa* with the express consent of Mazharuddin.

The plaintiff supported the gift put forward by his brother, Zahiruddin, all along until 1918 as he himself says. The reason for this attitude of the plaintiff is not far to seek. Both the brothers combined to resist Raushan Ali's claim and the line of defence which they chose to adopt was the alleged gift in respect of the whole property. Under pure Muhammadan Law they could have only two-thirds of the estate between themselves but they wanted the whole. Thus their object was not only to defeat Raushan Ali's claim but also the claim of Abdul Karim. The decision of the Court of Revenue was not final. The two brothers might well have been contemplating again to put forward Zahiruddin's claim on the basis of the alleged gift in a Civil Court. They might as well have been apprehending an attack by Raushan Ali in the same Court. In the circumstances it seems to be natural that both the brothers decided to stand by the gift. Mazharuddin says in his statement made in the witness-box in the present case that at the time of mutation proceedings Zahiruddin "told me that *Musammât Mahmudunnissa* had given the property to me only. I did not ask about it. I believed what he told me. I remained under this belief till 1918." It follows, therefore, that on the date of the mortgage in question Zahiruddin was the ostensible owner of the two-third share with the consent of the plaintiff and it was in that character that he executed the deed of mortgage in favour of Kundan Lal and Ratan Lal on the 17th January 1913. As already stated, the *khewat* bore the name of Zahiruddin only in respect of that share. In the circumstances it was only natural that he alone would execute the deed of mortgage in question. In the light of the same circumstances it is a reasonable presumption to make that Mazharuddin was a consenting party to Zahiruddin alone appearing as an executant of the deed of mortgage, Zahiruddin alone having the ostensible title to the mortgaged property.

The fact that Zahiruddin attested the

deed of mortgage does not by itself estop him from denying that he knew of its contents or that he consented to the mortgage but there might be circumstances which would show that the attestation "was intended to convey some thing more than a mere witnessing of the execution, and was meant as involving consent to the transaction." *Pandurang Krishnaji v. Markandeya Tukaram* (1). That such circumstances do exist in the present case I have already shown but there is also independent evidence leading to the same result. The substance of that evidence is that Mazharuddin assured the mortgagees that the title to the estate lay with his brother, Zahiruddin, and that he, Mazharuddin, had no interest in it and that with a view to signify that assurance he consented to attest the deed of mortgage. This evidence has been accepted as trustworthy by the learned Judge of the Trial Court and I am persuaded to accept as correct the opinion of the learned Judge. As to the merits of this evidence, I find that it is consistent with the probabilities of the case.

It was urged by the learned Advocate for the appellant that the mortgagees should have made further inquiries into the question of title. But in the circumstances of this case there was no reason for any such inquiry. The assurance given by Mazharuddin as to the title of the property under mortgage was enough to create a belief in the minds of the mortgagees and to act upon it. They accordingly believed and acted upon that belief. Mazharuddin cannot turn round and say that the mortgagees should not have believed him but made further inquiries. In the case of *Bloomenthal v. Ford* (2) quoted by me in my judgment in the case of *Mohan Singh v. Sewa Ram* (3), Lord Halsbury said:—"But once the conclusion is arrived at that belief was induced, and intentionally induced by a mis-statement of fact intended to operate upon the mind of another, upon which the man has acted, then I do not think any case can be found in the books in which it has been suggested that the

legal consequence does not follow, namely, that there is estoppel, and that it is open to the person who has made the representation to say 'I told you so and so; but you ought not to have believed me. You were too great a fool.'...I do not believe that any such case can be brought forward, or that there is any authority for such a proposition." I, therefore, hold that the estoppel under s. 41 of the Transfer of Property Act has been made out.

The appeal fails and is dismissed with costs.

Z. K.

Appeal dismissed.

MADRAS HIGH COURT.

REFERRED CASE NO. 19 OF 1924.

February 5, 1925.

Present:—Sir Victor Murray Coutts-Trotter, Kt., Chief Justice, and Mr. Justice Krishnan.

THE COMMISSIONER OF INCOME-TAX,
MADRAS—REFERRING OFFICER

versus

P. A. P. M. T. K. THILLAI CHIDAMBARA
NADAR—ASSESSEE

*Income Tax Act (XI of 1922), ss. 23 (2), 63 (2)—
Unregistered firm—Return filed by one partner—
Notice, service of, on another partner, whether sufficient.*

It is not necessary that in the case of an unregistered firm a notice under s. 23 (2) of the Income Tax Act should be served on the member of the firm who made the return. It is sufficient if under s. 63 (2) of the Act it is served on any member of the firm.

The word 'person' in s. 63 (2) of the Income Tax Act includes a firm as provided by the General Clauses Act, 1897; and when the return is made on behalf of the firm by a partner, it is the firm that is the person who makes the return.

Cases stated under s. 66 (2) of the Income Tax Act (XI of 1922), referring for the decision of the High Court the question of law, viz., "Whether in the case of an unregistered firm a notice under s. 23 (2) should be served only on the member of the firm who made the return under s. 22 (2) or whether under s. 63 (2) of the Indian Income Tax Act (XI of 1922), it can be served upon any member of the firm.

Mr. M. Patanjali Sastri, for the Referring Officer.

Mr. F. S. Vaz, for the Assessee.

JUDGMENT.

Coutts-Trotter, C. J.—It is with

(1) 65 Ind. Cas. 954; 49 I. A. 16; 26 O. W. N. 201; 3 U. P. L. R. (P. C.) 85; 20 A. L. J. 305; 42 M. L. J. 436; 15 L. W. 486; 30 M. L. T. 219; 35 O. L. J. 409; 24 Bom. L. R. 557; 18 N. L. R. 1; (1922) A. I. R. (P. O.) 20; 49 O. 334 (P. C.).

(2) (1897) A. C. 156; 66 L. J. Ch. 253; 76 L. T. 205; 45 W. R. 419; 4 Manson 156.

(3) 75 Ind. Cas. 579; 10 O. L. J. 424; 10 O. & A. L. R. 217; (1924) A. I. R. (O.) 209.

the greatest difficulty that I could extract a question of law of any sort in this case; but, if there is any, I suppose it is this, as to whether under s. 23 (2) of the Income Tax Act the person who made the return in the case of a firm means the identical person who made the original return. Common sense would indicate that the only requisite is that the firm who made the return should, as a firm, have the notice properly delivered to them. This is a matter of general law and it is obviously a question of fact in most cases whether the notice was such as to reach the legal entity known as the firm. Here it was addressed to one of the partners and by the ordinary law and the specific provisions of s. 63 (2) of this very Act each partner is an agent for all the others in the firm. The question must be answered in this way; the assessee must pay the costs of this reference Rs. 150 (Rupees one hundred and fifty).

Krishanan, J.—I agree to the answer proposed by the learned Chief Justice. The question put to us by the referring authority is whether in the case of an unregistered firm a notice under s. 23 (2) of the Income Tax Act should be served only on the member of the firm who made the return or whether under s. 63 (2) of the Act it can be served on any member of the firm. There can be no doubt about the answer and it must be in the affirmative. Notice can be served on any member as provided for in s. 63 (2) and such service is good service. The word 'person' as pointed out by the Referring Officer, clearly includes a firm as provided by the General Clauses Act, 1897; and when the return is made on behalf of the firm by a partner it is the firm that is the person who makes the return and any proper service on the firm as authorized by s. 63 (2) will be a proper service.

I agree to the order proposed as to costs.

V. N. V.

Z. K.

*Reference answered
in the affirmative.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 560 OF 1921,
November 29, 1923.

Present:—Mr. Prideaux, A. J. C.
SAMBA—DEFENDANT—APPELLANT
versus

Musammatt PAIKI AND OTHERS—
PLAINTIFFS—RESPONDENTS.

*Appeal—Agreement to abide by finding of Court—
Appeal, whether lies.*

Where both parties to a suit agree in a particular matter to abide by the finding of the Court in respect to it, such finding is final and binding on the parties and no appeal lies against it, the decision in such cases being in the nature of an arbitrator's award.

Sayad Zain v. Kalabhai Lullubhai, 23 B. 752; 1 Bom. L. R. 366; 12 Ind. Dec. (N. S.) 503, *Shahzadi Begam v. Muhammad Ibrahim*, 59 Ind. Cas. 787; 43 A. 266; 19 A. L. J. 14, *Nidamarthi Mukkanti v. Thammana Ramayya*, 26 M. 76 and *Sita Nath Goswami v. Baikuntha Nath Goswami*, 9 Ind. Cas. 296; 38 C. 421, referred to.

Appeal against a decree of the Additional District Judge, Chanda, dated the 9th August 1921.

Mr. *Atmaram Bhagwant*, for the Appellant.

Mr. *G. G. Hatwalne*, for the Respondents.

JUDGMENT.—In this case the plaintiffs sue to recover possession of occupancy field No. 148, area 2.74, of Mouza Belsany, Tahsil Chanda. They contend that they leased it out to defendant for one year but that he does not return it. Defendant stated that the field had been leased out to him by the plaintiffs in perpetuity along with *malik makbuza* field No. 5 under a sale-deed dated the 11th April 1917, and that the area of the field in suit was 1.54. It was further contended for the defendant that the defendant was led by the plaintiffs to believe that he had full right and title in the field and so the plaintiffs are estopped from claiming it. The defendant stated that he was willing to abide by the plaintiff Sona's special oath on *gangajal* if he swore that he did not give the occupancy field No. 148 at the time of the sale. Sona stated that he was willing to take the oath, and, as shown by the order-sheet, dated the 23rd March 1921, he took the special oath as proposed by the defendant. The defendant further stated that he would "admit the plaintiff's title to the occupancy field in suit with an area found by this Court on the evidence on record if special oath is taken," and the plaintiff Sona in return stated that he was willing to take

the special oath as proposed and abide by the decision of the Court about area.

The Trial Court on the oath decreed possession of the field and found that the area of the field was 2.74 acres. On appeal, as regards the area, the lower Appellate Court finds that no appeal lies, because the Munsif who tried the case was appointed an arbitrator by the parties and his decision as to the area is in the nature of an award.

It is here contended that the form in which the special oath was taken is not on record, and that vitiates the compromise. I do not think so. The defendant proposed a particular oath, and the plaintiff as the order-sheet shows, took that oath. As regards the field the finding is conclusive.

With regard to the area, there is ample authority for the proposition that where both parties agree in a particular matter to abide by the finding of the Court in respect to it, such finding is final and binding on the parties and no appeal lies against it, the decision in such cases being in the nature of an arbitrator's award. I need only mention *Sayad Zain v. Kalabhai Lullubhai* (1), *Shahzadi Begam v. Muhammad Ibrahim* (2), *Nidamarthi Mukkanti v. Thammana Ramayya* (3) and *Sita Nath Goswami v. Baikuntha Nath Goswami* (4).

The decision of the lower Appellate Court is correct. This appeal must, therefore, fail and is accordingly dismissed with costs. The appellant will pay the respondent's costs.

Z. K.

Appeal dismissed.

(1) 23 B. 752; 1 Bom. L. R. 366; 12 Ind. Dec. (N. S.) 503.

(2) 59 Ind. Cas. 787; 43 A. 266; 19 A. L. J. 14.

(3) 26 M. 76.

(4) 9 Ind. Cas. 296; 38 C. 421.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1609 AND 1610 OF 1922

February 2, 1925.

Present:—Mr. Justice Phillips.

NAGALLA KOTTAYYA—PLAINTIFF
—APPELLANT

versus

KOGANTI KOTTAPPA AND OTHERS—

DEFENDANTS—RESPONDENTS.

Madras Estates Land Act (I of 1908), ss. 5, 132—Contract Act (IX of 1872), s. 69—Limitation Act (IX of 1908), Sch. I, Art. 132—Payment of rent by one of several joint ryots—Charge on shares of other ryots—Contribution, suit for—Limitation.

Where one of two or more ryots holding a joint patta under a landholder pays the whole rent due to the landholder in order to save the holding from sale, he is, by operation of law, entitled to a charge upon the share of each of his co-sharers for the realisation of the latter's share of the rent. A suit to enforce such a charge is governed by Art. 132 of Sch. I to the Limitation Act. [p. 551, col. 2.]

Panangipalli Suranna v. Suryanarayana Jagapathiraju, 48 Ind. Cas. 794; 42 M. L. J. 443; (1919) M. W. N. 25; 25 M. L. T. 365, distinguished.

There is no distinction between a charge given under s. 5 of the Madras Estates Land Act and the charge given under s. 2 of the Madras Revenue Recovery Act. Both cases come within the purview of Art. 132 of Sch. I to the Limitation Act. [p. 552, col. 1.]

Section 132 of the Madras Estates Land Act relates only to a question of procedure and does not affect the substantive rights of the parties and does not prohibit a Civil Court from enforcing a charge for rent given by s. 5 of the Act. [p. 552, col. 2.]

Bollapragada Venkatalakshmana Garu v. Nenda Sectayya, 57 Ind. Cas. 764; 39 M. L. J. 30; 11 L. W. 466; (1920) M. W. N. 294; 28 M. L. T. 44; 43 M. 786, referred to.

Second appeal against the decrees of the District Court, Kistna, in A. S. Nos. 126 and 127 of 1921, and Nos. 140 and 143 of 1921, preferred against those of the Court of the Additional District Munsif, Godivadi, in O. S. Nos. 475 and 476 of 1920.

Mr. V. Ramdoss, for the Appellant.

Mr. P. Somasundaram, for the Respondents.

JUDGMENT.—The plaintiff held the patta for the suit land and took in with him four *lopayakari* tenants, but, in 1908 a dispute arose between them as to who was entitled to the occupancy right in the land, and it was finally decided that they all had occupancy right in the land. Subsequently, the plaintiff paid the whole of the rent and now seeks to recover a portion of the amount from the other co-sharers. In the present case, we are only concerned with one of these sharers. The plaintiff relies on the ruling of the Full Bench in *Rajah of Vizianagram v. Rajah Setrucherla Soma-sekhararaz* (1) in which it was held that, where one of two or more co-sharers owning an estate subject to the payment of revenue to Government pays the whole revenue in order to save the estate he is by the operation of law entitled to a charge upon the share of each of his co-sharers for the realisation of the latter's share of revenue, and contends that, in consequence of this, his suit which is brought more than three years after the payment is not barred by limitation as it is a suit to enforce a charge and comes within the scope of Art. 132 of

(1) 26 M. 686; 13 M. L. J. 83.

the Limitation Act. The District Judge has differentiated the present case from that, in that the present claim is one for rent under the Estates Land Act holding that under the Estates Land Act rent is not a charge on the land. Section 5 of the Act, however, clearly makes rent a charge upon the land and it is difficult to see how the present case can be differentiated from the Full Bench decision which is concerned with the payment of revenue. There seems to be no distinction between the charge given under s. 5 of the Estates Land Act and the charge given under s. 2 of the Revenue Recovery Act. In both cases the charge is actually given in favour of the landlord, in the latter case, the Government, but there is nonetheless the charge upon the land in both cases. It would, therefore, appear that the Full Bench decision is applicable here and that the District Judge is wrong.

The respondent, however, relies on a case of *Panangipalli Suranna v. Suryanarayana Jagapathiraju* (2) in which it was held that the charge under s. 5 of the Estates Land Act is not a charge within the meaning of s. 100 of the Transfer of Property Act. The correctness of the decision, to which I was a party, has been questioned in a subsequent case reported as *Bollapragada Venkatalakshmana Garu v. Nenda Seetayya* (3), but whether it is correct or not, the mere fact that the charge does not come within the meaning of s. 100 of the Transfer of Property Act does not necessarily imply that it is not a charge within the meaning of Art. 132 which is very general in its terms. I do not think that the decision in *Panangipalli Suranna v. Suryanarayana Jagapathiraju* (2) is any authority to the contrary.

Another argument is based on some of the remarks in *Bollapragada Venkatalakshmana Garu v. Nenda Seetayya* (3), namely, that because it is s. 132 of the Estates Land Act which gives the Revenue Court power to apply the provisions of Ch. VI (of that Act) to the execution of a decree for arrears of rent, the same provisions are not applicable in the case of a Civil Court which must act under the C. P. C. No doubt these remarks in a way support the respondent's case, that the charge

under s. 5 is limited in its application, but they were made *obiter* and if it was meant to lay down that a Civil Court cannot in any circumstances enforce the charge for rent given by s. 5 (of the Estates Land Act) with all respect, the remarks appear to me to go too far, for s. 132 relates only to a question of procedure and does not affect the substantive rights of the parties. The procedure to be adopted by the Revenue Court is that contained in Ch. VI of the Estates Land Act, whereas the procedure in execution by a Civil Court is that laid down by the C. P. C., but whichever form of procedure is adopted, it cannot remove a charge which is given by law. In this view, I think that the ruling in *Rajah of Vizianagaram v. Rajah Setrucherla Soma-sekhararaz* (1) must be held applicable to the present case and that, consequently, the plaintiff has a charge upon the land for the rent paid by him.

A further contention is put forward by the respondent that he is not liable for contribution under s. 69 of the Contract Act because the plaintiff alone was the person bound to pay the rent. It was held in *Jagapatiraju v. Sadrusannamarad* (4), that the only person who is personally bound to pay revenue to the Government is the registered holder and that as the plaintiff was the *pattadar* the other sharers were not personally bound to pay rent. This is a new argument put forward apparently for the first time in this Court and it would appear to be opposed to the facts, for it appears that the other co-sharers did actually obtain *pattas* in their own names from the landlord and, consequently, they would thus be liable to pay the rent under these *pattas*. Another case relied on is *Naraina Pai v Appu* (5), but that, again, was a case of contribution in which the persons ought to be made liable was not the *pattadar*. In the present case, as all the parties had *pattas*, they were all personally liable to pay the rent. Consequently, the plaintiff has a right under s. 69 of the Contract Act to ask for contribution.

The appeals must accordingly be allowed, and there will be a decree for the recovery of the respondent's proportionate share of the rent with proportionate costs throughout, with the direction that on failure to

(2) 48 Ind. Cas. 794; 42 M. 114; 35 M. L. J. 443; (1919) M. W. N. 25; 25 M. L. T. 365.

(3) 57 Ind. Cas. 764; 39 M. L. J. 30; 11 L. W. 466; (1920) M. W. N. 294; 28 M. L. T. 44; 43 M. 786.

(4) 31 Ind. Cas. 255; 39 M. 795; 29 M. L. J. 639; 2 L. W. 1046; 18 M. L. T. 464.

(5) 28 Ind. Cas. 456.

pay the amount, his share in the estate will be liable to be sold.

Time three months.

V. N. V.

Z. K.

Appeal allowed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 14
OF 1923.

July 27, 1925.

Present:—Mr. Justice Das and
Mr. Justice Adami.

RAM CHANDRA SINGH AND OTHERS
—APPELLANTS

versus

JANG BAHADUR SINGH AND OTHERS
—RESPONDENTS.

Hindu Law—Joint family—Manager's power to charge joint family property—Benefit, test of.

The manager of a joint Hindu family has no authority to charge any portion of the joint family property in order to enable him to embark on speculative transactions, but he can do so only in case of need or for the benefit of the estate. [p. 554, col. 1.]

Hunoomanpersaud Panday v. Babooee Munraj Koonweree, 6 M. I. A. 393 at p. 423; 18 W. R. 81n; *Sevestre* 253n; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147, *Ram Bilas Singh v. Ramyad Singh*, 58 Ind. Cas. 303; 1 P. L. T. 535; 5 P. L. J. 622; 2 U. P. L. R. (Pat.) 228 and *Sheotahal Singh v. Arjun Das*, 56 Ind. Cas. 879; 1 P. L. T. 136; (1920) Fat. 155, referred to.

The question of benefit must be determined by reference to the nature of the transaction and not by the result thereof, the test being whether it is a transaction into which a prudent man would enter. [p. 555, col. 1.]

Appeal from a decision of the District Judge, Gaya, dated the 13th June 1922, reversing that of the Subordinate Judge, Gaya, dated the 9th November 1921.

Messrs. S. M. Mullick and S. N. Roy, for the Appellants.

Messrs. Hasan Jan and Kailaspati, for the Respondents.

JUDGMENT.

Das, J.—Dasarat, Nankhu and Ramlochan were three brothers. Ramlochan died leaving a widow Sahodra Kuer and a son Raghubar Dayal. Bhupnarain cited as defendant No. 1 in this suit is the son of Nankhu. Bishundayal cited as defendant No. 8 is the grandson of Dasarat. Defendants Nos. 2 to 7 are the sons and grandsons of Bhupnarain. Defendant No. 9 is the son of Bishundayal and defendant No. 10 is the son of defendant No. 9. It has been found by the Court below, and the

finding is one which is binding on us in second appeal, that Bhupnarain and Bishundayal together with their sons and grandsons constitute a joint family. It has also been found that Raghubar Dayal was separate from Bhupnarain and Bishundayal.

Raghubar Dayal died leaving, according to the case of all the parties, three daughters Phalindra Kuer, Lalpari Kuer and Sabinda Kuer. It was the case of Bhupnarain that Raghubar Dayal died leaving also a son Baburam who died shortly after the death of Raghubar; and that, in the events which happened Sahodra Kuer became entitled to succeed to the properties of Baburam on his death as his grandmother and that the daughters of Raghubar Dayal had no interest in the properties which were once of Raghubar Dayal but which on his death came into the hands of his son Baburam. Bhupnarain contended that he was the reversionary heir of Baburam and would be entitled to succeed to the properties upon the death of Sahodra Kuer. Sahodra Kuer on the other hand contended that Raghubar Dayal died leaving three daughters and she applied in the Land Registration Department for registration of the names of the daughters of Raghubar Dayal who are all minors and whom Sahodra Kuer purported to represent in the matter of that application. On the 20th February 1909 the land registration case was decided against Bhupnarain and on the 27th April 1909 Bhupnarain instituted a title suit as against Phalindra Kuer, Lalpari Kuer and Sabinda Kuer in substance for a declaration that they as the daughters of Raghubar Dayal had no interest in the estate which was once of Raghubar Dayal and that he was entitled to succeed to the properties on the death of Sahodra Kuer. The suit was resisted by the daughters of Raghubar Dayal; but was ultimately compromised on the 14th February 1912 by which Bhupnarain got 7 dams 13 cowris out of 10 dams 13 cowris mokarrari in Mouza Senaria and 32 bighas of raiyati land and the daughters of Raghubar Dayal got 3 dams of mokarrari in the same village and certain other properties. In the course of this litigation Bhupnarain had to borrow certain sums of money from time to time from the plaintiffs who are the appellants in this Court. The money was required by Bhupnarain to enable him to prosecute the suit as against the daughters

of Raghubar Dayal. Five mortgage-bonds in all were executed between September 1909 and November 1910. Of these four mortgage-bonds were executed by Bhupnarain and Bishundayal and one was executed by Bhupnarain during the illness of Bishundayal. The suit out of which this appeal arises was instituted by the appellants to enforce these mortgage-bonds as against the entire joint family consisting of Bhupnarain, Bishundayal and their sons and grandsons. The suit was not resisted either by Bhupnarain or Bishundayal; but it was resisted by their sons and grandsons and the only question is whether the plaintiffs are entitled to a mortgage-decree in this suit. It is conceded that they are not entitled to any personal decree as against Bhupnarain and Bishundayal inasmuch as the suit was brought more than six years after the execution of the mortgage-bonds.

The Court of first instance dismissed the suit on the ground that the money was borrowed by Bhupnarain and Bishundayal without any legal necessity. The learned Judge in the Court below has reversed the decision on the ground that the expenditure of the money resulted in a benefit to the joint family and that accordingly the creditors are entitled to a mortgage-decree as against the joint family.

There is one passage in the judgment of the learned District Judge which requires immediate attention. He says: "At the outset I may say that I have not been able to find any authority for the proposition of law advanced by the learned Subordinate Judge, that is, that speculative expenditure will not bind a joint family, however, beneficial be the result. The law would appear to be that the test of the transaction is the question of the actual benefit, and that, if the joint family derived actual benefit from the expenditure incurred by the *kartas*, it would be bound by the expenditure, even though the latter may have been speculative at the outset." I entirely differ from the learned District Judge. It is necessary to remember that "the power of the manager for an infant heir to charge an estate not his own, is, under the Hindu Law, a limited and qualified power." I may point out that it is settled law that the power of a *karta* of a joint Hindu family stands on the same footing as that of the manager. In the leading case of *Hunoomanpersaud Panday v. Babooee Munraj Koon-*

weree (1), the position in regard to the power of the manager to charge an estate which belongs to an infant heir is stated in these terms: "It can only be exercised rightly in a case of need, or for the benefit of the estate. But, where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the *bona fide* lender is not affected by the precedent mis-management of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded." It is obvious, therefore, that the test which must be applied by the Court in each case is—is it a transaction into which a prudent owner would enter? Now I hold that a prudent owner would never think of entering into a speculative transaction which may benefit him, but which may also cause him loss. The question of the right of the creditor or the liability of the joint family cannot depend upon the spin of the coin or the throw of the dice. I may be possibly taking a very extreme case, but the test, in my opinion, is the same. In *Ram Bilas Singh v. Ramyad Singh* (2), the Chief Justice of this Court after pointing out that it is not desirable to lay down any general proposition, which would limit and define the various cases, which might be classed under the term beneficial as used in the cases, said as follows:—"It is clear, however, that all transactions of a purely speculative nature would properly be excluded." I may refer to a passage in my judgment in *Sheotahal Singh v. Arjun Das* (3): "I quite agree that the manager of a joint family has no authority whatever to affect or dispose of any portion of joint family property in order to enable him to embark on speculative transaction." In my judgment in that case I conceded that there is a certain element of risk in every business transaction and if we are to hold that when the business has succeeded and the entire family has benefited by it, we ought not to uphold the mortgage transaction entered into by the manager to enable him to embark on such a business, unless the mortgagee satisfies us that the business was bound to succeed and that benefit was

(1) 6 M. I. A. 393 at p. 423; 18 W. R. 81n; Sevestre 253n; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

(2) 58 Ind. Cas. 303; 1 P. L. T. 535; 5 P. L. J. 622; 2 U. P. L. R. (Pat.) 228.

(3) 56 Ind. Cas. 879; 1 P. L. T. 136; (1920) Pat. 155.

bound to accrue to the family, we would necessarily handicap the managers of joint Hindu families and place limitation on their powers, which would have the effect of stopping all business transactions in every Mitakshara family. But it is one thing to say that a manager of joint Hindu family has complete power to enter into business transactions, where the particular business is part of the ancestral joint family property; it is another thing to say that he has power to enter into speculative transactions. I still adhere to the opinion which I expressed in that case that the test is not whether benefit was bound to accrue to the joint family; but it is still necessary for the mortgagee to show that the transaction was one into which a prudent owner would enter; and as soon as this test is laid down we must hold that it is not in the power of the *karta* of a joint family to bind the joint family by entering into speculative transactions. In my opinion the question of benefit must be determined by reference to the nature of the transaction, and not by reference to the result thereof; although the result may properly be taken into consideration in determining whether the transaction was one into which a prudent owner would enter. The proposition rests on principle and is covered by authorities and it is not necessary to pursue the subject.

The question, however, is somewhat different in this case. It is conceded that the creditor must establish that the transaction was for the benefit of the joint family. The money was borrowed and the mortgages were executed to enable Bhupnarain to establish his title to the estate of Baburam. On his own case Bhupnarain was the nearest heir of Baburam expectant on the death of Sahodra Kuer. Bishundayal was one degree removed from Bhupnarain and was not entitled in any case to succeed to the properties of Baburam. If Bhupnarain succeeded in the action he might establish his title to the estate of Baburam; but the joint family of which he was a member would not necessarily participate in the benefit that might accrue to Bhupnarain. What then was the position of the joint family? Bhupnarain might fail to establish his case in which case his suit would be dismissed and no benefit would accrue to the joint family; but Bhupnarain might succeed. But if he succeeded the benefit would accrue to him and not to the joint

family; for it is well established that unless he chose to share the property along with the members of the joint family the fruits of his victory would belong to him and not to the joint family. How can it then be said that the mortgage transactions were for the benefit of the joint family?

It is said that Bhupnarain has actually made over the property which he gained as a result of his suit to the joint family. That may be so; but the matter rested with Bhupnarain and the joint family could never have compelled him to make over the property to it. Benefit has accrued to the joint family, not as a result of the transactions which are the subject-matter of the suit, but as a result of an act of bounty on the part of Bhupnarain. If it be contended that there was an agreement between Bhupnarain and the joint family by which the joint family agreed to finance Bhupnarain in the litigation and Bhupnarain agreed to share the property which was the subject-matter of that litigation with the joint family, I would unhesitatingly say that the agreement being of a speculative nature could not bind the joint family.

In my opinion the decision of the learned District Judge cannot be supported. I would accordingly allow the appeal, set aside the judgment and the decree passed by the Court below and restore the judgment and the decree of the Additional Subordinate Judge. The result is that the suit is dismissed with costs in this Court and in the Court below. So far as the costs in the Court of first instance are concerned, I agree with the learned Additional Subordinate Judge that each party should bear his own costs.

Adami, J.—I agree.

S. D.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 685 OF 1922.

December 12, 1924.

Present:—Mr. Justice Ramesam.
CHENNAPRAGADA NARAYANAMURTHY—PLAINTIFF—APPELLANT
versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF KISTNA—
DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 51—

Grant of land on darkhast—Improvements by grantee—Subsequent cancellation of grant, effect of—Damages, whether can be recovered.

Where a grantee of land on *darkhast* by a Tahsildar pays the assessment in respect of it and makes improvements thereon in ignorance of a pending appeal against the grant and the grant is ultimately cancelled on appeal, the grantee is entitled not only to a refund of the assessment collected but also to damages under s. 51 of the Transfer of Property Act for value of the improvements effected by him. [p. 557, col. 1.]

Devaramani Bhogappa v. Pedda Bhimaka Gowd, 28 Ind. Cas. 51; (1915) M. W. N. 148, *Muthuveera Vandayan v. Secretary of State for India*, 29 M. 461; 1 M. L. T. 278, *Mathunsa Rowthan v. Apsa Bin* 12 Ind. Cas. 444; 36 M. 194; 21 M. L. J. 969; 10 M. L. T. 373; (1911) 2 M. W. N. 425, *Narayana Aiyar v. Sankaranarayana Aiyar*, 24 Ind. Cas. 940; 1 L. W. 369 and *American Baptist Foreign Mission Society v. Amalanadhuni Pattabhiramayya*, 48 Ind. Cas. 859, relied on.

Second appeal against a decree of the Court of the Additional Sub-Judge, Ellore, in A.S.No. 123 of 1922 (A.S. No. 163 of 1921, Sub-Court, Ellore), preferred against that of the Principal District Munsif, Narasapur, in O. S. No. 772 of 1918.

Messrs. G. Lakshmanan and V. Viyanna, for the Appellant.

The Government Pleader, for the Respondent.

JUDGMENT.—The order of the Sub-Collector, Ex. E-1, was passed on the appeal of Melam Surayya and two others. The written statement of the defendant which was carelessly drafted produces the impression that the order was passed on revision. The appeal of Surayya and others was filed on 14th November 1916, and though it was more than 30 days from the date of the Tahsildar's order (10th October 1916) the appellants stated that they heard of the order on 16th October 1916 and so claimed that their appeal was within time. Mr. Lancashire called for a report on 18th April 1917. I think it must be taken that he excused the delay, or otherwise he would not have called for a report and might have rejected the appeal as out of time. The Subordinate Judge is not clear as to whether the order of the Sub-Collector was passed on appeal or on revision. I have now sent for all the originals of Exs. C, D, E, etc., and am satisfied that the order was on appeal. The second appeal fails so far as the land is concerned.

As to the claim for the assessment of Rs. 2-2-6, the Subordinate Judge is obviously in error. This does not relate to a cess nor to damages for proceedings taken under the Revenue Recovery Act. It is for money had and received. No land having been

ultimately granted to plaintiff, there was no assessment to pay. One is surprised that the Government filed a memorandum of objections in respect of this amount and wished to retain the money, as revenue relating to a grant which has been cancelled. Anyhow I hold that this portion of the claim is not barred, and allow the appeal.

The plaintiff next claims that he is entitled to damages. He says that relying on the grant by the Tahsildar on 10th October 1916, seeing that assessment was collected from him on 4th December 1916, he began to put the land to good use. He was expected to do so, and he was entitled to do so. Half the *Fasli* being nearly over, he must be diligent in putting the land to some use if his payment of assessment was not to turn out to be a mere waste of money. I cannot agree with the view of the Subordinate Judge that merely because one knows or is bound to know that the order of the Tahsildar is subject to appeal or revision, he is not entitled to damages. Ayling, J.'s judgment in *Devaramani Bhogappa v. Pedda Bhimaka Gowd* (1) shows that a grantee, if he begins to make improvements after the grant, is entitled to the value of the improvements. This is also clear from the judgment of Benson, J., in *Muthuveera Vandayan v. Secretary of State for India* (2) which prevailed and which was confirmed in Letters Patent Appeal in *Muthuveera Vandayan v. Secretary of State for India* (3). White, C. J., was for giving a higher relief and did not differ on this matter.

The amount of damages has not been found by the lower Appellate Court and I can find it here to avoid a calling for a further finding.

The plaintiff has given no particulars of loss in the plaint. Nor did the defendant insist on having the particulars. The defendant merely put the plaintiff to proof. Issues were framed and on the 2nd issue plaintiff adduced his evidence. He swore to spending Rs. 30 for casuarina plants. There is no cross-examination by the defendant. His 4th witness says he levelled the land and might have spent Rs. 25 or Rs. 30. I believe the plaintiff and this witness but I take only the lower figure. In this case there is nothing to show that the plaintiff was aware of the

(1) 28 Ind. Cas. 51; (1915) M. W. N. 148.

(2) 29 M. 461; 1 M. L. T. 278.

(3) 30 M. 270.

appeal petitions of Melam Surayya on 14th November 1916 or on 2nd March 1917 or of the order of the Sub-Collector on 18th April 1917. Up to then, he had no reason to think that his title was in jeopardy. Having got an order on 10th October 1916 and paid his assessment on 4th December 1916, he proceeded to put the land to use. The fact that the order of the Tahsildar dated 10th October 1916 was obtained by the help of the Karnam has no bearing on the question of *bona fides* in making the improvements. I, therefore, find that the plaintiff effected his improvements *bona fide* within the meaning of s. 51 of the Transfer of Property Act, i. e., in the belief that he was absolutely entitled to the land at the time. He was, as a matter of fact, so entitled and this is all that s. 51 means [*vide Mathunsa Rowthan v. Apsa Bin* (4), *Narayana Aiyar v. Sankaranarayana Aiyar* (5) and *American Baptist Foreign Mission Society v. Amalanadhuni Pattabhiramayya* (6).]

I, therefore, award a decree to the plaintiff for Rs. 25 for damages.

The appellant will receive proportionate costs on the portion he has succeeded and pay proportionate costs on the portion in respect of which he has failed throughout.

V. N. V.

Z. K.

Decree modified.

(4) 12 Ind. Cas. 444; 36 M. 194; 21 M. L. J. 969; 10 M. L. T. 373; (1911) 2 M. W. N. 425.

(5) 24 Ind. Cas. 940; 1 L. W. 369.

(6) 48 Ind. Cas. 859.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2103 OF 1922.

March 24, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Duval.

MAHAMMAD MOYENUDDIN
BASUNIA AND OTHERS—DEFENDANTS—
APPELLANTS

versus

BAHARUDDIN CHOWDHURI AND
ANOTHER—PLAINTIFFS—RESPONDENTS.

*Bengal Tenancy Act (VIII of 1885), ss. 30, 50—
Landlord and tenant—Rent, enhancement of—Burden
of proof.*

Under s. 50 of the Bengal Tenancy Act the initial onus lies upon the landlord to prove that the rent of the tenancy is liable to be enhanced on the ground of

additional area. This onus may be shifted by proving the origin of the tenancy or a contract or by other mode of proof showing the right of the landlord to enhance the rent on that ground. The onus is not shifted by merely producing *dakhilas* which mention the areas for which rent has been paid. [p. 558, col. 1.]

Manindra Chandra Nandi v. Kaulat Shuk, 79 Ind. Cas. 852; 50 C. 957; 28 C. W. N. 264; (1924) A. I. R. (C.) 374 and Gouri Patra v. Reily, 20 C. 579; 10 Ind. Dec. (N. S.) 392, relied on.

Appeal against a decree of the District Judge, Rangpur, dated the 16th of May 1922, modifying that of the Munsif, Additional Court at Karigram, dated the 3rd of March 1921.

Mr. Atul Chandra Gupta and Babu Radhika Ranjan Guha, for the Appellants.

Babu Hamendra Chandra Sen, for Babus Surendra Chandra Sen and Binoyendra Prosad Bagchi, for the Respondents.

JUDGMENT.—The only question involved in this appeal is whether the finding of the Court of Appeal below that the defendants are liable to pay additional rent for additional area is correct. The plaintiff landlord brought a suit for recovery of enhanced rent on the ground of excess area as well as under s. 30 of the Bengal Tenancy Act. The First Court decreed the suit; but on appeal the learned District Judge dismissed the plaintiff's claim under s. 30, Bengal Tenancy Act maintaining the order of the First Court for additional area. This appeal is by the defendants and it is argued that the learned Judge has erred in law in holding that the defendants are liable to pay enhanced rent for the additional area. The learned Judge has found that there has been a uniform payment of rent for more than 50 years, that the presumption raised by s. 50 has not been rebutted, that it is not known how the lands were first let out or what were their boundaries at the time, *jamias* were created, that there is no evidence to show when the *jamias* were created and what were the areas of the several plots, that there is no evidence to show that the lands were ever measured, that it is clear that the same rent is being paid for nearly half a century and that there is nothing to show that the tenants ever agreed to pay enhanced rent for increase in area. After recording all these findings in favour of the tenants the learned Judge observes that as area was mentioned in the *dakhilas*; it gave indication of the areas which were let out and that "the uniform mention of the areas all through go to indicate that area was the criterion." What the learned Judge means to say is that the

fact that area was mentioned in the *dakhilas* and had been so uniformly mentioned is sufficient indication of the fact that the original letting was with reference to the area. The appellant argues on the authority of several decisions of this Court that this view is incorrect. Reliance is placed on the case of *Manindra Chandra Nandi v. Kaulat Shaik* (1), where after reviewing almost all the cases on the point Rankin, J., came to the following conclusion: "I take it to be the settled rule of this Court that when a letting upon the basis of a measurement is proved the tenant has *prima facie* to show that the rent was a consolidated rent for all the land within specified boundaries but that in the absence of such proof the mere production of such *dakhilas* as those now in evidence does not suffice to show any onus on the tenant." He has followed the dictum of Prinsep and Bevorley, JJ., in the case of *Gouri Pattra v. Reily* (2), where it has been said that "the mere fact that on a measurement made...under the authority of Government given under Ch. X of the Bengal Tenancy Act, it is found that the tenants generally are in possession of lands in excess of the areas entered in the *zemindari* papers and their rent receipts does not necessarily prove that he is entitled to additional rent for the excess areas." The law then may be taken to be that under s. 50 of the Bengal Tenancy Act the initial onus lies upon the landlord to prove that the rent of the tenancy is liable to be enhanced on the ground of additional area. This onus may be shifted by proving the origin of the tenancy or a contract or by other mode of proof showing the right of the landlord to enhance the rent on that ground. The cases that have been cited show that the onus is not shifted by merely producing *dakhilas* which mention the areas for which rent is paid. We are asked by the respondent to differ from the case of *Manindra Chandra Nandi v. Kaulat Shaik* (1) on the ground that the finding of the learned Judge that uniform mention of areas goes to indicate that the original letting was with reference to the area is a finding of fact which cannot be disturbed in second appeal. We would have given our best consideration to this argument if the matter were *res integra*, but we are not at the present

moment prepared to differ from the decisions of this Court. In the present case the finding of the learned Judge that the plaintiff is entitled to enhancement of rent for increase in area is based upon the *dakhilas* alone. There is no other evidence on which reliance has been placed. We accordingly think that the view taken by the learned Judge is against the rulings of this Court and cannot be supported.

The result is that this appeal is allowed, the decree of the lower Appellate Court set aside and that of the Court of first instance with costs in this Court and the lower Appellate Court.

There is a cross-objection filed on behalf of the respondent against the finding of the Judge that a certain *kabuliyat* executed by the defendants in 1308 was a confirmatory lease. The contention is that that lease was the origin of the present tenancy of the defendants. Both the Courts below have concurred in finding that it was not the lease by which land was let out to the defendants but it was a confirmatory lease. It appears from the lease itself that the land was in possession of the defendant's father as a tenant and that after his death the defendants executed the lease to obtain recognition by the landlord. The concurrent finding of the Courts below cannot be disturbed either on law or on the merits. The cross-objection is accordingly dismissed but without costs.

Appeal allowed:

Z. K.

Cross-objection dismissed.

BOMBAY HIGH COURT.

CIVIL APPLICATION FOR REVISION

No. 294 OF 1924.

June 24, 1925.

Present:—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Coyajee.

VAGHA JESANG—DEFENDANT

—APPLICANT

versus

JAGJIVAN AMRITLAL DESAI—

PLAINTIFF—OPPONENT.

Landlord and tenant—Co-sharer landlords—Suit to recover rent for excess land by some co-sharers, whether maintainable.

Where a tenant has been paying a certain rent in past years for the land in his occupation, it is not open to some of the co-sharer landlords to file a suit seeking to recover from the tenant a larger amount of rent

(1) 79 Ind. Cas. 852; 50 C. 957; 28 C. W. N. 264, (1924) A. I. R. (C.) 374.

(2) 20 C. 579; 10 Ind. Dec. (N. S.) 392.

than has been paid in the past. Whether the claim made is one for enhanced rent, or a claim for rent for excess land taken in occupation by the tenant, the principle is the same, that the question must not be at the mercy of one sharer, but it must be decided between the tenant and the whole body of the sharers entitled to claim rent as landlords.

Application from an order of the Subordinate Judge, Godhra, in Small Cause Suit No. 437 of 1923.

Mr. R. W. Desai, for the Applicants.

Mr. H. M. Mehta, for the Opponents.

JUDGMENT.—These are applications entertained under s. 25 of the Provincial Small Cause Courts Act in suits filed by the Desais of the village of Vinzol. The plaintiffs were not entitled to claim the whole of the rent. They are sharers to the extent of fourteen annas and seven and a half pies. The sharer entitled to the balance is not a party to the proceedings. The plaintiffs are claiming their share of what is payable by the tenants, at a higher amount than has been paid in the previous years, on the ground that although the *bigha* in these cases may be the same, the tenants are liable to pay additional rent for certain excess land in their occupation. It would not, therefore, be, strictly speaking, a suit for enhanced rent, but merely a claim that the tenants should pay the proper rent for the lands they are cultivating, the rate itself being admitted. But since these tenants have been paying certain rents in past years for the land in their occupation, it is not open to one co-sharer to file a suit seeking to recover from the defendants a greater amount of rent than has been paid in the past. Whether the claim made is one for enhanced rent, or a claim for rent for excess land taken in occupation by the tenants, the principle is the same, that the question must not be at the mercy of one sharer, but, if at all, must be decided between the tenants and the whole body of sharers entitled to claim rent as landlords.

On these grounds we think the Judge was wrong in entertaining the claim of the plaintiffs who were entitled to only fourteen annas and seven and a half pies share of the increased rent from the defendants. The defendants would still be liable to pay the balance of the rent to the co-sharer, and again they might be harassed by a claim for more rent on some entirely different principle. If higher rents are to be asked for, then they can only be asked for by the whole body of sharers (see *Bal-*

krishna Sakharam v. Moro Krishna Dabholkar (1).

We, therefore, make the Rule absolute and amend the decree by directing that the amounts admitted by the defendants as due to the plaintiffs for rent be substituted for the amounts decreed. The applicants will be entitled to their costs of the Rule in all these applications.

Z. K.

Rule made absolute.

(1) 21 B. 154; 11 Ind. Dec. (S. S.) 105.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 62
OF 1923.

June 24, 1925.

Present:—Mr. Justice Adami
and Mr. Justice Sen.

SAHDEO SINGH AND OTHERS—PLAINTIFFS
—APPELLANTS
versus

KISHUN BEHARI PANDEY AND OTHERS
—DEFENDANTS—RESPONDENTS.

Hindu law—Daughter succeeding to estate of father, position of—Alienation—Necessity—Alienee, whether entitled to partition.

A Hindu daughter inheriting her father's estate is a limited owner and is not entitled to alienate the property absolutely without there being legal necessity therefor. She cannot bind the inheritance for her own personal debts or private purposes as against reversioners, but she can alienate the property for her own life and effect can be given to such alienation by partition sought at the instance of the alienee. [p. 560, col. 2.]

Appeal against a decision of the Additional Subordinate Judge, Muzaffarpur, dated the 22nd November 1922, reversing that of the Munsif, Samastipur, dated the 31st January 1922.

Mr. S. N. Rai, for the Appellants.

Messrs. Harnarain Prasad and Anand Prasad, for the Respondents.

JUDGMENT.

Sen, J.—The plaintiffs-appellants instituted a suit for declaration of their title to and for recovery of possession of 2 *bighas* 6 *khatas* and 19½ *dhurs* of land which they had purchased by a *kobala*, dated the 31st January 1917, but from which they alleged that they had been dispossessed by the respondents in June 1920. The *kobala* was executed by one Mahaoti Ojhain, one of the two daughters of one Sham Lal Ojha and the said vendor purported to convey the

entire half share inherited by her as heir of her father Sham Lal Ojha. The respondents, on the other hand, contended that the entire properties alleged by the plaintiffs-appellants to have been owned by Sham Lal really belonged to Sham Lal's widow Mahaoti Ojhain, who had acquired her interest therein under two *sanads*; that the said widow had by a deed of gift, dated the 30th June 1905, conveyed her interest to Damodar Ojha, grandson of Sham Lal Ojha by his other daughter Bhagawati Ojhain, who in turn purported to sell the entire interest for a sum of Rs. 1,300 by a *kobala*, dated the 5th November 1919. The Munsif gave a decree in favour of the plaintiff. He found that the *kobala* put forward by the plaintiff was genuine, that the entire property had really been Sham Lal's, having been acquired by him and that, therefore, Mahaoti Ojhain as one of his two daughters was entitled to a half share therein and had validly alienated that share in favour of the plaintiffs-appellants. The learned Subordinate Judge affirmed these findings arrived at by the Court of first instance and also found that the alleged deed of gift by Sham Lal's widow in favour of Damodar Ojha was illegal and invalid and that it had not been acted upon. He then proceeded to consider the question as to whether the alienation by Mahaoti Ojhain was under circumstances of legal necessity. He found that there was no legal necessity for the transfer and thus concluded that the *kobala* executed by her could not bind the property so conveyed.

It is urged before us by the learned Advocate appearing for the appellants that in any event the alienation in favour of the plaintiffs would be binding during the lifetime of Mahaoti Ojhain and that, therefore, the Court of Appeal below was in error in dismissing the suit altogether. On behalf of the respondents it is conceded that a daughter could alienate her share in the inheritance, such alienation being good only for her lifetime, but what is questioned is that a definite plot of land such as the one the subject-matter in this suit, could not be sold.

It is also urged by the learned Advocate for the respondents that the Court of Appeal below appears to have come to a finding that the *kobalas* in favour of the appellants as well as that in favour of the respondents are both collusive documents and that,

therefore, the proper course for the Court of Appeal below was to dismiss the suit.

With regard to the first point it is clear that Mahaoti Ojhain being a limited owner was not entitled to alienate the property absolutely without there being legal necessity therefor. She could not bind the inheritance for her own personal debts or private purposes as against reversioners, but she could do so only for her own life. It is also clear on the authorities that a daughter can alienate her own life-interest, and effect can be given to such alienation by partition sought at the instance of the alienee. In the present case Mahaoti Ojhain purported clearly to transfer the land in question as representing her half share in the inheritance. That being so, there does not appear to be any difficulty in the way of giving a declaration in favour of the plaintiffs-appellants that they are entitled to the half share of Mahaoti Ojhain in the inheritance, such interest to enure only for the lifetime of Mahaoti Ojhain. The plaintiffs-appellants must be left to such course as they may be advised to take for the purpose of getting partition of their acquired share according to law. But it is impossible in the circumstances of this case to grant the prayer for possession asked for in the plaint.

With regard to the second point it does not at all appear clear that the learned Subordinate Judge has come to a definite finding upon proper materials that the *kobala* in favour of the appellants was a collusive document. No doubt an observation to that effect appears in the last paragraph but one of the judgment. But it seems hardly to amount to a finding of fact and cannot be taken to dislodge the clear finding of fact arrived at by the Court of first instance, after a due consideration of the evidence that the plaintiffs' *kobala* was genuine and for consideration. Moreover a case of collusion does not arise under the circumstances. It has been found that the estate was of Sham Lal Ojah's, that the plaintiffs' vendor, one of the daughters of Sham Lal, was entitled to a half share thereof, and that she parted with that interest in favour of the vendor—the vendor admitting that the *kobala* was genuine and for consideration. No case of collusion between the vendor and the vendee can arise in these circumstances and no such case was put forward in the pleadings.

The appeal will, therefore, be allowed in part. It is declared that the appellants are entitled to the half share of their vendor Mahaoti Ojhain in the estate of her father Sham Lal Ojha without prejudice to the rights of the reversioner or reversioners, if any, upon the death of Mahaoti Ojhain. The appellants are entitled to their costs from the respondents.

Adami, J.—I agree.

Z. K.

Appeal allowed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 203 OF 1924.

June 24, 1925.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

PANDU JOTI KADAM—PLAINTIFF—
APPELLANT

versus

SAVLA PIRAJI KATE—DEFENDANT—
RESPONDENT.

Execution of decree—Application for execution made by person having no title—Title subsequently acquired, whether can support application.

Where a person who has no title whatever to execute a decree makes an application for execution of the decree, he cannot remedy the defect by completing his title after the date of the application, and then try to execute the decree by virtue of that title.

Second appeal from the decision of the Assistant Judge at Satara, in Appeal No. 472 of 1922, reversing that of the Second Class, Subordinate Judge at Rahimatpur, in Darkhast No. 7 of 1922.

Mr. S. R. Parulekar, for the Appellant.

Mr. S. R. Bakhale, for the Respondent.

JUDGMENT.—We think that the decision of the Subordinate Judge was right, and that the authority relied upon by the Assistant Judge has no application. The applicant at the time he presented the *darkhast* had no title to the decree which he sought to execute. He had only a right under his own decree to obtain an assignment from the decree-holder of the other decree. The applicant was given time by the Subordinate Judge to cite any authority to support his proposition. He failed to do so. There is no authority that we know of which lays down that a *darkhast-dar*, who has no title whatever to execute the decree at the time of the *darkhast*, can remedy the defect by completing the title after the date of the *darkhast*, and then try

to execute the decree by virtue of that title.

We allow the appeal and restore the decree of the Subordinate Judge with costs throughout.

Z. K.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE

No. 2210 OF 1921.

July 10, 1924.

Present:—Justice Sir Ewart Greaves, Kt., and Mr. Justice Chakravarti.

PRASANNA KUMAR DE MAHAJAN—

DEFENDANT No. 4—APPELLANT

versus

NANIGOPAL DE—PLAINTIFF—

RESPONDENT.

Land Registration Act (VII B.C. of 1876), s. 78, scope of—Unregistered proprietor—Lessee, if can sue for rent—Assignee of rent, position of—Khatian, entry in—Part acceptance.

Section 78 of the Land Registration Act is no bar to a lessee of land recovering rent from the tenants, although the person who should have been registered as the proprietor, and through whom he claims, has not been so registered. [p. 562, col. 1.]

Section 78 of the Land Registration Act is, similarly, no bar to recovery of rent by an assignee from an unregistered proprietor. [ibid.]

Syed Serapat Hossein v. Tarini Prasad Dobey, 11 C. W. N. 141, relied on.

It is open to a Court to accept a part of the entry in the *khatian* and not to accept the rest of the entry. [p. 562, col. 2.]

Appeal against a decree of the Additional Subordinate Judge, Chittagong, dated the 20th June 1921, reversing that of the Munsif, Hathazari, dated the 10th April 1920.

Babu Chandra Sekhar Sen, for the Appellant.

Babu Biraj Mohan Majumdar, for the Respondent.

JUDGMENT.—This is an appeal by the defendant against a decision of the Additional Subordinate Judge of Chittagong reversing a decision of the Munsif. The suit out of which this appeal arises was a suit for rent. The plaintiff's claim was that defendant No. 18 was the proprietor of a certain *taluk* and that defendant No. 18 had leased this out in *sadar patni* right to the plaintiff in March 1915 and that at the same time four years' arrears of rent from 1911 to 1915 had been assigned by defendant No. 18 to the plaintiff.

iff. The plaintiff further claimed that the defendants other than defendant No. 18 were tenants under him and claimed rent at the rate of Rs. 17-8 as a year. The case for the defendants, other than defendant No. 18, was that they were neither the tenants under defendant No. 18 nor under the plaintiff and they asserted that neither of these persons had any title to any of the land. They say that their landlord was some other person named Raj Chandra Sen and that they had been paying rent to him all along. The First Court dismissed the suit but the Subordinate Judge held that the provisions of s. 78 of the Land Registration Act, Act VII of 1876 were no bar to the claim by the lessor.

Four points have been urged before us on behalf of the appellant. *First*, it is said that s. 78 of the Land Registration Act is a bar to the claim. *Secondly*, it is said that the learned Subordinate Judge has relied for his decision upon the admissions of certain co-tenants of the defendants which, it is said, are not evidence against them. *Thirdly*, it is said that defendants Nos. 3 and 15 have died and that no substitution has been effected and that without the substitution the suit cannot lie. *Fourthly*, it is said that the learned Subordinate Judge must be deemed to have accepted the entry in the *khatian* and that that being so, he should have dismissed the suit.

As to the first point there are decisions of this Court that s. 78 is no bar to a person in the position of the present plaintiff recovering rent although the person who should have been registered as the proprietor and through whom he claims has not been registered. One of the rents which are claimed in the suit was claimed by virtue of the assignment and it is suggested that so far as this rent is concerned s. 78 is a bar. This Court, however, has otherwise decided [See *Syed Serapat Hossein v. Tarini Prosad Dobey* (1)] In the circumstances, we think that there is no substance in the first point.

So far as the second point is concerned, it appears that there was evidence on the record apart from the admissions upon which the learned Judge is said to have relied for it appears that the plaintiff examined the landlord's *gomasta* and that he deposed to the realization of rent of the

taluk from the defendants and proved the counterfoils showing such realisation. It, therefore, appears that the learned Judge relied on other evidence than the mere admissions of the co-tenants.

So far as the third point is concerned this was not taken in the Court below and we do not think that it is open to the appellant here.

As regards the fourth point, we think that it was open to the learned Subordinate Judge as he did to accept a part of the entry in the *khatian* and not to accept the rest of the entry. There is, accordingly, nothing in this point.

In the result, the appeal fails and must be dismissed.

The Deputy Registrar's costs as representing the minor respondents have already been paid.

N. H.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 762 OF 1923.

June 24, 1925.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

G. I. P. RAILWAY COMPANY—
PLAINTIFF—APPELLANT

versus

Haji TARMAHOMED HASAM—
DEFENDANT—RESPONDENT.

Railway Company—Goods consigned for carriage—Risk-Note Form "B"—Consignment of tins of oil—Delivery of empty tins—Loss of package—Liability of Railway Company.

Where goods are consigned to a Railway Company for carriage under Risk-Note Form "B," the Railway Company would only be liable for the loss of a complete package or of a consignment consisting of a complete package or packages, and even if a package or packages are missing the Company would only be liable if the plaintiff can prove wilful neglect etc., as mentioned in the Risk-Note. [p. 563, col. 1.]

Where in such a case all the packages in the consignment are delivered to the consignee, the fact that the contents of some of the packages are lost does not make the Railway Company liable under the terms of the Risk-Note. [p. 563, col. 2.]

In the case of a consignment of tins of oil, if all the tins are delivered, then there is no loss of a package even although the tins delivered contain no oil when delivered to the consignee. [*ibid.*]

Second appeal from the decision of the District Judge at Broach, in Appeal No. 4 of 1922, amending that of the Subordinate

Judge at Broach, in Civil Suit No. 42 of 1920.

Mr. Binning, for the Appellant.

Mr. G. N. Thakor (with him Mr. M. K. Thakore), for the Respondent.

JUDGMENT.—The plaintiff sued to recover Rs. 1,600 as the price of the contents of the plaintiff's tins of oil, with interest. The Trial Court decreed the plaintiff's claim to the extent of Rs. 957. The Appellate Judge increased the decretal amount to Rs. 1,189-12-9. The Railway Company have appealed. It is curious to note that in so many of these Risk-Note cases, the parties fail entirely to realize what are the real issues in the case, and in second appeal they endeavour to remedy the defects which have occurred in the proceedings in the Courts below. The third issue in the Trial Court was: "Is the Risk-Note set up by the defendant Railway Company duly proved?" That was found in the affirmative. Then the second part of the issue was: "If so, are the defendants absolved from any liability?" Under the terms of the Risk-Note the defendants would only be liable, in any event, for the loss of a complete package or of a consignment consisting of a complete package or packages, and if a package or packages were missing, then the defendants would only be liable, if plaintiff could prove wilful neglect as mentioned in the Risk-Note. The Trial Court held that the defendants were not absolved from liability, apparently on the ground that plaintiff had proved that the loss had occurred by wilful neglect of the defendants.

The question whether the defendants were liable at all, because they alleged that no complete package had been lost, does not appear to have been raised in the issues. The Judge really considered that the Railway Company were responsible for the oil that disappeared from the plaintiff's tins, and decreed the plaintiff's claim. There was no question also in the Trial Court, whether had there been a deviation of the route, or whether the unloading or reloading of the tins at Wari Bunder by the defendants was unjustifiable.

In appeal, the same faults of procedure also occurred. The same issues were raised while the vital points in the case do not seem to have been discussed. It is difficult then to consider them if they are questions of fact in second appeal.

The first question really is whether any of the plaintiff's packages have been lost.

We have been referred to the decision in *East Indian Railway Company v. Nilkanta Roy* (1) in which it was held that if in the case of tins of oil the tins are delivered, then there is no loss of a package even although the tins contain no oil when delivered to the consignee. The decision of Mr. Justice Fletcher to that effect depended on a decision of this Court, which has not been reported. However, we can quite understand how it came to pass that the Railway Companies asked the Legislature to sanction a form of risk-note so as to absolve them from liability, except in the case of a loss of a complete package. If a tin of oil disappears entirely, then undoubtedly it is lost. But a question would arise if the contents are partly lost and the tin is there, how much oil should be left in a tin so as to constitute delivery of the package. Other complicated questions might arise and the solution of the difficulties was found by absolving the Company from liability unless the package has disappeared entirely.

We have now got the decision of this Court in *B. B. & C. I. Railway Company v. Ambalal Sevaklal*, (Civil Application No. 198 of 1909, (unreported) which says:—

"In this case we think it is quite clear that there has been no loss of a complete package forming part of the consignment. All the tins forming separate packages in the consignment were delivered to the consignee. The fact that all the contents of some of the tins were lost does not make the Railway Company liable under the terms of the Risk-Note in Form B."

That, therefore, would dispose of the case unless it could be found that the defendants had committed a breach of their contract. It was never alleged that there was such a breach of the contract as to make the defendants liable, apart from the terms of the Risk-Note, for any loss of the goods, and, therefore, we are not in a position to say that the conduct of the defendants in unloading the goods at Wari Bunder and reloading them again, itself amounted to a breach of contract.

There is no question of deviation in this case because the goods came to Bombay as they would ordinarily come to Bombay and it would not make any difference if they were unloaded at Wari Bunder and reloaded again for being carried on to B. B. &

(1) 22 Ind. Cas. 679; 41 C. 576; 19 C. L. J. 112; 19 Q. W. N. 95.

C. I Railway line. On the question whether it would be more convenient from an administration point of view that the goods should go to Dadar instead of to Wari Bunder, there is no evidence, so that we are unable to hold that there is any foundation for saying that the Company was guilty of a breach of contract under the terms of the risk-note.

We think that the decision of the Court below was wrong and the appeal will be allowed and the suit dismissed with costs throughout.

Z. K.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES

NOS. 1326 AND 1327 OF 1922.

March 17, 1925.

Present:—Mr. Justice Suhrawardy and
Mr. Justice Duval.

IN NO. 1326.

DUKHU MIA AND OTHERS—DEFENDANTS

—APPELLANTS

IN NO. 1327.

NIAMAT SARKAR *alias* NAIMUDDIN

SARKAR AND OTHERS—DEFENDANTS—

APPELLANTS

versus

MAHARAJ JAGADISH NATH ROY

BAHADUR—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 50—Evidence Act (I of 1872), s. 32 (2)—Appeal, second—Rent, payment of, at uniform rate for 20 years, whether question of law—Jamawasilbaki papers, admissibility of—Entry of rate of rent, value of.

The question whether a tenant has held at a uniform rate for more than 20 years or back to the time of the Permanent Settlement, is generally a question of fact and not of law. [p. 564, col. 2.]

Alimuddin Mollah v. K. S. Banerjee, 86 Ind. Cas. 316; 41 C. L. J. 135; 29 C. W. N. 500; (1925) A. I. R. (C.) 632, relied on.

Jamawasilbaki and *jamabundi* papers are admissible in evidence under s. 32 (2) of the Evidence Act, but it must be clear that the persons who made them are dead and that the papers were made in the ordinary course of business. [p. 565, col. 1.]

Durga Priya Choudhury v. Hazra Gain, 62 Ind. Cas. 453; 25 C. W. N. 204 and *Umed Ali v. Habibulla*, 56 Ind. Cas. 38; 31 C. L. J. 68; 47 C. 266, referred to.

An entry as to the rate of rent as distinguished from the amount of rent cannot be separated from other entries in the *jamawasilbaki* papers as being an entry not made in the ordinary course of business. [p. 565, col. 2.]

Appeals against the decrees of the Additional District Judge, Dinajpur, dated the 27th February 1922, reversing those of the Munsif, First Court, at that place, dated the 21st of March 1921.

Dr. Sarat Chandra Basak, with him Babu Radhika Ranjan Ghua, for the Appellants.

Dr. Dwarka Nath Mitter, Mr. Girija Prasanna Sanyal, and Babu Indu Prokash Chatterjee, for the Respondent.

JUDGMENT.

Duval, J.—These two appeals are brought by two tenants against an order of the Additional District Judge of Dinajpur in appeal upholding the respondent landlords, contention that he was entitled to get enhanced rent from these tenants under s. 30, Bengal Tenancy Act, the presumption arising under s. 50 having been rebutted. The landlord's case was that rent was not fixed and that the presumption under s. 50 did not arise as the rent varied at various items since the time of the Permanent Settlement. The Munsif found that the presumption of fixity of rent had not been rebutted as there had been no change in the rate of rent anyhow since 1849 and that *jamawasilbaki* papers of an earlier date were not conclusive to show that the *jamas* did not exist back to the time of the Permanent Settlement. The Munsif, therefore, disallowed the claim for enhancement and decreed the rent at the former rent. In appeal the learned Additional District Judge has mainly relied on the *jamawasilbaki* papers of 1226 as showing that the rate of rent as shown in these papers of all the *jamas* in the village was Re. 10-5 *gandas* per *bigha* and admittedly the rate of rent in 1256 (1849) was Re. 1-9-7 per *bigha*. He, therefore, held that there had been a variation in the rent and for that reason the presumption had been rebutted. Now it has been held that the question generally whether the tenant has held at a uniform rate of rent for more than 20 years or back to the time of the Permanent Settlement is a question of fact and not a question of law. In this connection I would refer to the case of *Alimuddin Mollah v. K. S. Banerjee* (1) a decision which my learned brother was a party.

The main question, therefore, which arises in this appeal and which we have to consider is whether the learned Additional District Judge in coming to his decision that there has not been uniform rate of rent from the time of the Permanent Settlement has arrived at his finding by taking into consideration evidence which legally is not evidence at all. The main point is as to the *jamawasilbaki* papers of 1226. As I have remarked they were used in the Court of

(1) 86 Ind. Cas. 316; 41 C. L. J. 135; 29 C. W. N. 500; (1925) A. I. R. (C.) 632.

the Munsif only to show that the *jamās* at present existing were not contained in them. That, of course, is negative evidence and does not carry us very far; for as it has been remarked both by the Munsif and the Additional District Judge the present *jamās* might not have existed as they might have been carved out of larger *jamās* appearing in these papers. The learned District Judge, however, has used the entry of Re. 1-0-5 *gundas*, which is the rate of every holding in the village as evidence for holding that these *jamās*, if existing, could not have been held, back to the time of the Permanent Settlement at the rate of Re. 1-9-17 *gundas*. It is urged on behalf of the appellants, however, that these *jamawasilbaki* papers of 1226 are not admissible as they are not legally proved. Suffice it to say that they came out of the *zemindar's* record-room. They are obviously papers kept in the ordinary course of business and they are over 100 years old and the only person responsible for any entry in them must, therefore, be by this time dead. The mere fact that no formal evidence was adduced to prove that the man is dead who must if alive be over 120 years old does not appear to us to be very material. It is well-established that *jamawasilbaki* and *jama-bandi* papers can be admitted in evidence under s. 32 (2) of the Indian Evidence Act, but it must be clear that the persons who made them are dead and that the papers were made in the ordinary course of business. In this connection I would only refer to the cases of *Durga Priya Choudhury v. Hazra Gain* (2) and *Umed Ali v. Habibulla* (3). In my opinion, therefore, the learned Additional District Judge had committed no error in accepting a natural presumption that the writer of these papers of 1225 B. S. is dead.

It is urged, however, that there is no need in *jamawasilbaki* papers to set out the rate of rent. The amount of rent is what is to be entered in such papers in the ordinary course of business; the entry of the "*nirik*" is not an entry made in the ordinary course of business and so the entries are not entries which can be relevant under s. 32. I do not think that we can lay down that certain entries in what is a clear statement as to the state of collection in a certain year are made in course of business and others are not. The *zemindar*

might have had reasons a hundred years ago to have the rate entered and I cannot believe that these papers were made in anticipation of the present or other suit. I cannot hold that the entry as to the rate of rent can be distinguished from other entries in the *jamawasilbaki* papers as being entries not made in the ordinary course of business. I hold, therefore, that the *jamawasilbaki* papers have been received in evidence not illegally by the learned Additional District Judge.

It is next urged that a new case was made in appeal which should not have been allowed. I see nothing in this contention. The whole record was before the District Judge and he read the evidence for and against the presumption of fixity of rent and dealt with it as he as a judge of fact was entitled to do. The fact that the learned Judge dealt with the case in a somewhat different way from the Munsif is no reason to hold that the learned Judge acted illegally.

It is also urged that, as a matter of fact, the *jamawasilbaki* papers are not good evidence, assuming that they were received in evidence, because of the register, Ex. H, in which the rate of rent appears to have been recorded as Re 1-8 *sicca* which is more or less the sum of Re. 1-9-17 *gundas* which is the rate existing in 1256. But the learned District Judge has dealt with the facts of the case and has pointed out that this Ex. H is defective and in parts illegible and that in many cases there were two different rates of rent set out in it, one shown by the Collector and the other by another officer. Exhibit H, therefore, as he rightly points out, does not carry us very far.

The learned Advocate further raises the question as to certain remarks made by the learned District Judge as to the effect of slight variations in the rent. It is not necessary for me to discuss this point. The learned Additional District Judge himself has come to the finding of fact that the rent which was in 1226 only Re. 1-0-5 *gundas sicca*, 30 years later had advanced to Re. 1-9-17 *gundas*. This is a finding that there was a material, not a slight variation.

Lastly the learned Advocate has stated that certain of the defendants who were tenants on the land were not on the record. It appears that when the case came on for trial there was a petition by the defendants that certain co-owners in the tenancy were not before the Court and so the case could

(2) 62 Ind. Cas. 453; 25 C. W. N. 201.

(3) 56 Ind. Cas. 38; 31 C. L. J. 63; 47 C. 266.

not proceed. But at the trial this objection was waived, and we do not know if there was anything material in this objection: presumably there was not as it was not pressed, but I may only add if there were any other parties who should have been parties to the suit and who were not parties they would not be bound by the decree.

In view of what I have said above I come to the conclusion that the finding of fact at which the learned District Judge has arrived has not been vitiated by any misrepresentation or misunderstanding of the evidence. It rested with him to weigh the evidence and we cannot say that there is any evidence on the record which should not be there.

These appeals, therefore, must be dismissed with costs on the findings of fact arrived at by the Court of Appeal below.

Suhrawardy, J.—I agree.

M. B.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 236 OF 1924.

August 18, 1925.

Present:—Mr. Wazir Hasan, A. J. C.

Lala NARAIN DAS—PLAINTIFF—

APPELLANT

versus

DEBI DIN SINGH AND OTHERS—

DEFENDANTS—RESPONDENTS.

Mortgage—Redemption postponed for long term, whether clog on equity of redemption—Transaction, nature of—Appeal—Appellant, duty of.

The postponement of redemption for a long time does not by itself operate as a clog on the equity of redemption. [p. 567, col 1.]

The true test in such a case is: was the transaction in its essence an advancement of a loan on one side and furnishing of a security for the same on the other? If the answer is in the affirmative, postponing the right to redeem to an inordinate length of time may reasonably lead to the inference that the intention was to kill that right and this will not be permitted by law. If, on the other hand, the transaction is in its reality more than or different from a pure transaction of a loan or security, the equitable doctrine of relief against a clog on the right to redeem has no application. [p. 567, cols 1 & 2.]

An appellant must establish, before he can succeed, not only that the decision of the Court below might well have been different but that it ought necessarily to have been so. [p. 567, col. 2.]

Second appeal against an order of the Additional Subordinate Judge, Sultanpur,

dated the 25th February 1924, confirming that of the Munsif, Musafirkhana, dated the 4th September 1922.

Mr. Niamat Ullah, for the Appellant.

Messrs. Ali Zaheer and Bishambhar Nath for Mr. Bisheshar Nath, for the Respondents.

JUDGMENT.—This is the plaintiff's appeal from the decree of the Subordinate Judge of Sultanpur dated the 25th February 1924 confirming the decree of the Munsif of Musafirkhana dated the 4th December 1922. The suit, which has been dismissed by the Court below, was one for redemption of a mortgage dated the 21st January 1883 for a sum of Rs. 1,000 in respect of an 8 pies share situate in five villages in the District of Sultanpur. The original mortgagor was one Mendai Khan and the mortgagees were Mahabir Singh, Shamsheer Singh and Nageshar Singh. The mortgagor and the mortgagees are all dead. Mendai Khan's heirs in law are defendants Nos. 10 to 13 and the representatives of the mortgagees are defendants Nos. 1 to 9. The plaintiff, Narain Das, is the purchaser of a share in the mortgaged property at an auction-sale.

By the terms of the deed of mortgage the right to redeem was postponed till the expiration of a period of 200 years. In answer to the suit for redemption the defendants pleaded that the term of 200 years was a bar to the claim for redemption. The Courts below have accepted the defence and dismissed the suit. In second appeal it is urged on behalf of the plaintiff that the term postponing the right to redeem to a period of 200 years was on the face of it oppressive opposed to the essence of a contract of mortgage and consequently a clog on the equity of redemption. This is an argument which has been considered by the Courts below and negatived. I have to decide whether the Courts below have gone so hopelessly wrong that their decrees must be set aside. I am not prepared to so decide.

In para. 16 of the written statement the defendants said that their ancestors had, as a matter of fact, paid the full price of the property in suit and for certain reasons advantageous both to the mortgagor and the mortgagees the form of the transaction agreed upon was to be that of a mortgage. The Trial Court took this defence into consideration and on the

strength of documentary evidence showing the value of the property to be about the same as the mortgage-money came to the conclusion that the essence of the contract between the parties was one of a transaction of sale but for certain reasons it took the form of a mortgage. On that ground it held that the mere length of time fixed for redemption did not constitute a clog.

In the Court of Appeal the learned Subordinate Judge held that there was nothing else in the deed of mortgage except the long term of 200 years which could give rise to the application of the doctrine of relief against a clog on the equity of redemption, and that the long term by itself was not a sufficient basis for such a relief. For this opinion of the learned Subordinate Judge there is authority in the case of *Zulfiqar Ali v. Suraj Prasad* (1).

On the question as to whether the essence of the contract was a sale or a mortgage the learned Subordinate Judge observed :—

“There is no proof on record beyond the evidence provided by the earlier sale-deed that any such considerations in fact were made at the time of the mortgage.” But what proof can there be except a reasonable probability arising out of the circumstances of this case? The mortgagor and the mortgagees are all dead. Direct evidence was impossible. In my judgment the learned Munsif was right in drawing an inference from the view that though a mortgage was agreed upon for certain reasons as the apparent form of the transaction the mortgagees paid the full price of the property mortgaged. That being the essence of the contract no question of clog does, in my opinion, arise in the case. The true test in all cases of this nature is : was the transaction in its essence an advancement of a loan on one side and furnishing a security for the same on the other? If the answer is in the affirmative, postponing the right to redeem to an inordinate length of time may reasonably lead to the inference that the intention was to kill that right and this will not be permitted by law. If, on the other hand, the transaction is in its reality more than or different from a pure transaction of a loan and security the equitable doctrine of

relief against a clog on the right to redeem has no application.

The appellant must establish, before he can succeed, not only that the decision of the Court below might well have gone in the contrary direction but that it must have been so: *Nabakishore Mandal v. Upendra-kishore Mandal* (2). I am not satisfied that the appellant has established this. The result is that the appeal fails and is dismissed with costs.

Z. K.

Appeal dismissed.

(2) 5 Ind. Cas. 305; 20 A. L. J. 22; (1922) M. W. N. 95; 26 C. W. N. 322; 35 C. L. J. 116; 42 M. L. J. 253; 24 Bom. L. R. 316; 15 L. W. 417; 31 M. L. T. 231; 3 P. L. T. 311; (1922) A. I. R. (P. C.) 39 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 612
OF 1923.

April 28, 1925.

Present:—Mr. Justice Suhrawardy and
Mr. Justice Duval.

BEHARI LAL MANNA—DEFENDANT—
APPELLANT

versus

MURALI DHAR AND ANOTHER—PLAINTIFFS
—RESPONDENTS.

Hindu Law—Debutter property—Mohunt, powers of alienation of—Unavoidable necessity—Burden of proof—Tenant under mohunt, whether can acquire right by adverse possession.

The power of a mohunt to alienate debutter property is limited to cases of unavoidable necessity. [p. 569, col. 1.]

Abhiram Goswami Mohant v. Shyama Charan Nandi, 4 Ind. Cas. 449; 36 I. A. 148; 36 C. 1093; 10 C. L. J. 284; 6 A. L. J. 857; 11 Bom. L. R. 1234; 19 M. L. J. 530; 14 C. W. N. 1 (P. C.), relied on.

A person deriving title from the holder of a limited interest in property is bound to prove the authority of the limited owner to make the alienation and ordinarily the onus would be on him to prove the validity of the transaction. [*ibid.*]

A mohunt is incompetent to create any interest in respect of the muth property to endure beyond his lifetime. The tenant or transferee acquires a right similarly limited. [*ibid.*]

If the successor of a mohunt permits the tenant to continue in possession and receives rent from him during his life, the tenancy thus created will be a new tenancy created by himself for his lifetime [*ibid.*]

It is within the power of every successive trustee to continue the tenancy during his lifetime and consequently the possession of the tenant never becomes adverse to the successor of the last mohunt [*ibid.*]

Appeal against a decree of the Additional District Judge, 24-Parganahs, dated

(1) 68 Ind. Cas. 938; 9 O. L. J. 365; (1922) A. I. R. (O.) 221.

the 7th November 1922, affirming that of the Munsif, Second Court, Alipore, dated the 4th October 1920.

Mr. Mohendra Nath Ray, Dr. Jadunath Kanjilal and Babu Purna Chandra, for the Appellant.

Dr. Dwarka Nath Mitter and Babu Ramaprosad Mukherjee, for the Respondents.

JUDGMENT.—This is an appeal by the defendant in a suit in which the plaintiffs sued for enhancement of rent on the ground of rise in the price of staple food crops. The facts are that the land was *debutter* of certain Barals of which one Radhamadhab was the *shebait* who on the 27th September 1889 granted a *mourashi mokarrari patta* to the defendant's predecessors. There was a suit in the original side of the High Court for the better management of the property and the land now in suit was directed by the Court to be sold, presumably as a secular property for the realization of the costs of the suit. It was purchased by one Haridhon Dutt whose estate afterwards went into the hands of a Receiver from whom the plaintiff purchased the property. The defendant was in possession of the land at an annual *jama* of Rs. 6-2 and the present suit is for enhancement of the rent of that *jama*. The learned Munsif decreed the plaintiffs' claim and enhanced the *jama* to Rs. 7-15-9. That decree was confirmed on appeal by the District Judge of the 24-Parganas.

The learned Advocate for the appellant has argued three points. He argued in the first place that the defendants' *mourashi mokarrari* tenancy having been recognized by successive owners, the plaintiffs are not entitled to maintain the present suit. On this point the learned Subordinate Judge found that in 1909 the Receiver brought a suit against the defendants' predecessor for rent and in execution of the decree put up the property to sale describing the same as an occupancy holding. It was purchased by one Madhukar on the 23rd November 1909 from whom the defendants purchased the holding on 22nd November 1910. From these and other facts the learned Judge is of opinion that the defendants failed to prove that successive owners recognized his tenancy as *mourashi mokarrari*.

The second point argued is that the defendant is either a *mourashi mokarrari* tenant or a trespasser and, therefore, s. 30 (b) of the Bengal Tenancy Act does

not apply to the present case. This contention has no substance. The defendant is a tenant on the land. By virtue of long possession he has acquired at any rate a right of occupancy. The plaintiffs and their predecessors treated him as a tenant with ordinary right of occupancy. It cannot, therefore, be said that he is a trespasser and, therefore, s. 30 (b) does not apply. As to his being a *mourashi mokarrari* tenant the matter will be considered in connection with the next point.

Lastly it is argued on the merits that having regard to the facts found and the recital in the lease granted by Radhamadhab, it should have been held that the lease granted to the defendants' predecessor is a valid one and binding on the plaintiffs. It is also contended in view of these facts that the onus of proving that there was no necessity for the granting of the lease was on the plaintiffs and they having failed to discharge the onus, the suit ought to have been dismissed. It is urged that a *shebait* can transfer *debutter* property for legal necessity, and, therefore, his position is similar to that of a Hindu widow. No authority has been placed before us in support of this proposition. No doubt a *shebait* or a *mohunt* has under special circumstances the power to alienate or grant a *mokarrari* lease of the trust property and so far the similarity of his position to that of a Hindu widow is maintainable. But a Hindu widow has an estate in the property unknown to English Law and unlike any other that may be created under the general law. Though she gets a limited interest in the property, she has got powers which are not enjoyed by life-tenants; she cannot be removed from possession of the property but a *shebait* is liable to be dismissed for acts of breach of trust; she is not accountable to any one for the income of the property in her charge, whereas a *shebait* is subject to the rights of the beneficiaries to ask for accounts. The widow does not hold the estate in trust for the reversioner, but the *shebait*, though not a trustee in the strict sense of the term, is the manager or custodian of the *debutter* property. The question that arises for consideration is whether a *shebait* can grant a *mokarrari mourashi* lease like the one in the present case. It is conceded by authorities that he can do so for unavoidable necessity. In the present case there is no proof that there was any

necessity for the granting of the lease. It is held in *Abhiram Goswami Mohant v. Shyama Charan Nandi* (1) that it is well-settled law that the power of a *mohunt* to alienate *debutter* is, like the power of a manager of an infant heir, limited to cases of unavoidable necessity. It is hardly necessary to remark that a person deriving title from holder of a limited interest in the property is under necessity of proving the authority of the limited owner to make alienation and ordinarily the onus would be on him to prove the validity of the transaction. In this case, as we have observed, there is no evidence to show that there was any necessity existing at the time when the *mourashi mokarrari patta* was granted. It is also argued in this connection that the plaintiff's claim is barred by limitation or in other words the defendant has by efflux of time acquired the status of a *mourashi mokarrari* tenant in the land in suit. This question has now been put beyond the range of controversy by their Lordships of the Judicial Committee in the case of *Vidya Varuthi Tirtha v. Balusami Ayyar* (2). There their Lordships have held that according to the well-settled law in India, a *mohunt* is incompetent to create any interest in respect of the *muth* property to endure beyond his life. The tenant or transferee acquires a right similarly limited. If the successor of the *mohunt* permits the tenant to continue in possession and receives rent from him during his life, the tenancy thus created will be a new tenancy created by himself for his lifetime. It is within the power of every successive trustee to continue tenancy during his life and consequently his possession in that never becomes adverse to the successor of the last *mohunt*. In the present case, however, there is no finding that the defendants ever asserted as against the successors of Radhamadhab his *mokarrari mourashi* title. In fact the evidence, so far as it goes, shows that the holding was described as an occupancy holding and no objection was taken to such description by the tenant.

(1) 4 Ind. Cas. 449; 36 I. A. 148; 36 O. 1003; 10 C. L. J. 284; 6 A. L. J. 858; 11 Bom. L. R. 1234; 10 M. L. J. 530; 14 O. W. N. 1 (P. C.).

(2) 65 Ind. Cas. 161; 48 I. A. 302; 44 M. 831; (1921) M. W. N. 419; 41 M. L. J. 316; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 3 M. L. T. 66; 3 P. L. T. 245; 26 O. W. N. 537; 21 Bom. L. R. 629; 20 A. L. J. 497; (1922) A. L. R. (P. C.) 123 (P. C.).

All the points taken by the appellant having failed, this appeal is dismissed with costs.

M. B.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 197 OF 1924.

August 10, 1925.

Present:—Mr Wazir Hasan, A. J. C.

BHONDAI MISER—PLAINTIFF—

APPELLANT

versus

RAM PRASAD MISER AND OTHERS—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Question of title decided between parties—Redemption of property by plaintiff during pendency of previous suit—Dispossession—Suit to recover possession, whether maintainable.

Defendant obtained a decree for possession of certain property against the plaintiff as reversioner to the estate of one B. During the pendency of that suit plaintiff obtained a decree for redemption of that property from a mortgagee and obtained possession thereof. He was subsequently dispossessed by a transferee of the defendant and brought a suit to recover possession of the property:

Held, that the decision in the previous suit on the question of title operated as *res judicata* between the parties and that the plaintiffs' suit must, therefore, fail. [p. 570, col. 2.]

Appeal against a decree of the Subordinate Judge, Sultaupur, dated the 8th February 1924, upholding that of the Munsif, Musafirkhana, dated the 31st October 1923.

ORDER.

Daniels, J. C.—(April 3, 1925).—The only question in this appeal is one of *res judicata*. The plaintiff-appellant Bhondai Miser filed the present suit for possession of trees in Plots Nos. 907, 1175, 1185 and 1171 in village Madyawan on the allegation that defendant No. 1 Ram Prasad inherited a 4th share in some of the trees while the plaintiff and defendant Nos. 3 to 5 were owners of all the rest. He further alleged that five years before the suit he paid Rs. 100 in redemption of a usufructuary mortgage of these trees executed in 1909 by Baij Nath in favour of Jokhu and Beni Madho and obtained possession. He had been dispossessed by the defendant No. 2 Rajwant Singh in whose favour the 1st defendant Ram Prasad has executed the

sale-deed. Now in a previous suit between the parties to which the plaintiff made no reference in his suit, the 1st defendant Ram Prasad was given a decree for possession of all the trees in suit as reversioner to Baij Nath as against the present plaintiff Bhondai. On these pleadings a preliminary issue of *res judicata* was tried first. The learned Subordinate Judge has dismissed the suit on the ground that though the right which the plaintiff claims in virtue of having redeemed the mortgage in favour of Jokhu and Beni Madho was not litigated in the former suit yet it had arisen prior to the institution of that suit and, therefore, ought to have been put forward by the present plaintiff as a defence. From the copies of judgments in that suit which are on the record I have been unable to ascertain whether that suit was filed before or after the 17th April 1918 which would be the date five years before the institution of the present suit. The original record of that suit may be sent for to determine the point. That record will throw light on another point also. It appears from the judgment of the Munsif that the two mortgagees from whom the plaintiff claims to have redeemed were actually parties to the previous suit, but as the judgment shows that they were discharged during the course of the suit, the record may show on what ground they were discharged, and this may have a bearing on the question whether the mortgagee right claimed is concluded by the previous judgment.

Even if the alleged redemption of Baij Nath's mortgage took place after the institution of the suit of 1918 the plaintiff will still have to explain what right he had to redeem that mortgage in face of the adverse decision of title given against him in that suit. This, however, is not the point on which the case was decided in the Court below and the plaintiff did not come prepared to meet it.

Mr. S. N. Roy, for the Appellant.

Mr. K. P. Misra, for the Respondents.

JUDGMENT.

Wazir Hasan, A. J. C.—(August 10, 1925).—This appeal was first heard under O. XLI, r. 11, of the C. P. C., and the facts are stated in the order dated the 3rd April 1925 admitting the appeal for notice. It will serve no useful purpose to repeat the facts in this judgment. The only issue for decision is whether the plaintiff-appellant's case is barred by *res judicata*. I have no

doubt in my mind that it is. The respondents brought a suit to recover this property as against the appellant and other persons and the title on which the suit was founded was that the respondent, Ram Prasad, was the nearest reversioner to the estate of one Baijnath to whom the property in suit admittedly belonged. Ram Prasad's title succeeded and he obtained a decree as against the plaintiff-appellant. It appears that either during the pendency of the suit or soon afterwards the appellant redeemed a usufructuary mortgage existing on the property in suit and obtained possession. His defence as against the plea of *res judicata* is that the redemption having taken place subsequent to the institution of the previous suit the decision in that suit did not operate as *res judicata*. This is a fallacious argument. On the question of title that decision is clearly *res judicata* and the plaintiff-appellant cannot be allowed to go behind it by pleading the subsequent redemption for the simple reason that he had no title to redeem.

The appeal fails and is dismissed with costs.

Z. K.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1490 OF 1922.

March 31, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Duval.

SASHI MOHAN TARKASASTRI AND
OTHERS—PLAINTIFFS—APPELLANTS
versus

MEAJAN HAJI AND OTHERS—DEFENDANTS—
RESPONDENTS.

Landlord and tenant—Raiyati holding—Sale in execution of decree for rent—Interest, high rate of, mentioned in kabuliyat—Auction-purchaser, whether bound by rate of interest.

Where a permanent *raiya* holding is sold in execution of a decree for arrears of rent and the sale processes contain no indication of the stipulation about payment of interest on arrears of rent contained in the *kabuliyat* executed by the previous tenant, the auction-purchaser is not liable to pay interest at the rate mentioned in the *kabuliyat*, as the rate of interest is not an ordinary incident of a tenancy of which the auction-purchaser can be presumed to have had knowledge. [p. 571, col. 2.]

Appeal against a decree of the District Judge, Noakhali, dated the 9th of March

1922, affirming that of the Munsif, First Court at Lakhipur, dated the 27th of February 1920.

Babu Tarakeswar Nath Mitter for Babu Nagendra Nath Bose, for the Appellants.

Babu Mukund Behary Mallik and Mahendra Kumar Ghose, for the Respondents.

JUDGMENT.—The only question involved in this appeal is as to the rate of interest which the plaintiff is entitled to recover for arrears of rent. The *kabuliyat* creating the tenancy was executed by Aminuddi Meji in 1-73. One of the terms of the contract was that "In case of default in paying a *kist* I shall pay interest at the rate of Rs. 6-4 per cent. per mensem: If notwithstanding this I withhold the payment of rent you will be entitled to realise the arrears of rent with interest and damages by instituting a suit." The present suit was brought by the landlord for recovery of arrears of rent with interest at 75 per cent annum for overdue instalments. He also claimed damages at 75 per cent. on arrears of cesses. The learned Munsif was of opinion that the clause was penal in its character and, therefore, the plaintiff was not entitled to recover interest at such a high rate as 75 per cent. per annum. He accordingly decreed the plaintiff's claim for arrears of rent with damages at 25 per cent. The learned District Judge on appeal has observed that there can be no doubt that the clause that not only shall interest be at 75 per cent. but also that damages will be payable is a penal one and it is, therefore, in the discretion of the Court to allow reasonable compensation instead of the penalty. In this view he agreed with the First Court and dismissed the appeal.

In appeal it is argued that the construction put upon the *kabuliyat* by the Courts below is wrong and that under the law the plaintiffs are entitled to recover interest at the rate claimed. With regard to the construction of the *kabuliyat* we do not agree with the view taken by the Courts below. If any term may be called penal in it, it is the term relating to damages in default of payment of rent at the stipulated time. But it is not necessary to consider this matter further.

The more important question that arises in the present case is whether under the stipulation in the *kabuliyat* payment of interest at the rate of 75 per cent. per annum is recoverable. It appears that the *kabuliyat* creates a permanent *raiya* holding but not

a *mokarrari* holding. It also appears that the holding was sold for arrears of rent in 1899 and purchased by the defendants. The question, therefore, that arises is whether the plaintiffs are entitled to recover from the defendants who are auction-purchasers in execution of a rent-decree, the interest at the stipulated rate. In support of the appellant's contention reliance is placed upon the Full Bench decision of this Court in the case of *Lal Gopal Dutt v. Manmatha Lal Dutt* (1). There it was held that an auction-purchaser at a sale in execution of a rent-decree of a tenure is liable for interest at the rate mentioned in the *kabuliyat* and not at the rate mentioned in s. 67 of the Bengal Tenancy Act. The facts of that case were that a tenure of 500 *bighas* with a *jama* of Rs. 285 and odd was sold in execution of a rent-decree and purchased by the defendants who were co-sharer landlords. On these facts the Full Bench held that the defendants were liable to pay interest at the stipulated rate. On behalf of the respondents reliance has been placed upon the decision of this Court in the case of *Annadamoyi Debi v. Saudamini Debi* (2). In our judgment the facts of that case are similar to those in the case before us and the ratio of that decision is applicable to the present case. In that case a *raiya* holding was sold but in the sale processes no indication was given of the stipulation about interest. The learned Judges were of opinion that the defendant was not liable to pay the high rate of interest as it was not an ordinary incident of a tenancy of that character and they approved of the dictum of Banerjee, J., in *Kali Nath Sen v. Trailokhya Nath Roy*, (3): "The distinction between usual and unusual terms of a contract of tenancy is a distinction which should be taken into consideration in determining whether the incident in question continues to attach to the tenancy, notwithstanding its sale for arrears of rent". *Annadamoyi Debi's* case (2) is attempted to be distinguished on the ground that in that case it was a simple *raiya* whereas in the present case it was a permanent *raiya* holding and, therefore, the principle of the Full Bench case of *Lal Gopal Dutt v. Man-*

(1) 32 C. 258; 9 C. W. N. 175.

(2) 72 Ind. Cas. 719; 37 C. L. J. 333; 27 O. W. N. 502; (1902) A. I. R. (C.) 559.

(3) 26 C. 315; 3 O. W. N. 194; 13 Ind. Dec. (N. S.) 805.

matha Lal Dutt (1) should apply. Section 179 of the Bengal Tenancy Act admittedly does not apply to such a lease because it is not a permanent *mokarrari* lease. In the Full Bench case as I have observed the facts were that the defendant at the time of his purchase at the auction was aware of the special stipulation being one of the lessors. Maclean, C. J., referred this to this special circumstances of that case: "In the present case the purchaser certainly cannot complain, he was one of the original lessors, and must be taken to have notice of the terms of the lease, if that were necessary". After making this observation the learned Chief Justice adds: "But apart from any such consideration, the lease had not expired: and the purchase must be taken to have been made subject to the conditions of the lease". The only other judgment in the case was that of Rampini, J., who depended entirely upon the special features of the case for his decision. The learned Judge observed: "Then in that case [*Kali Nath Sen v. Trailakhya Nath Roy* (3)] the tenancy was not put up to sale subject to the terms of the *kabuliyat* executed by the former tenant. But in this case it is clear that the tenure was sold subject to the terms upon which it was held. Moreover, in this case the purchasers are some of the proprietors of the tenure held under the *kabuliyat* of the terms of which they must have been well aware". It is evident from this remark that what influenced the learned Judges in that case was that the defendant with full knowledge of the terms of the contract and the special incident of the tenancy had purchased it and should not, therefore, be allowed to turn round and deny liability under the contract. In the present case the sale certificate described the holding sold simply as a *raiyati* of 9 cottas and 5 gundas of land with Rs.19 as *jama*. It cannot, therefore, be contended that the defendants had notice of this special term of the contract. Reliance has also been placed on behalf of the appellant on the case of *Narendra Nath Sarkar v. Moniruddi Howladar* (4). There also Maclean, C. J., with the concurrence of Geidt, J., held that though the rate of interest was exorbitant it was recoverable from the defendant. That was a case of a *howladari* tenure and not a *raiyati* tenure and it does not appear

from the report that the auction-purchaser in that case was not aware of the terms of the *kabuliyat*.

In the above view, though we do not accept the reasons of the Courts below, we think that their decision is substantially correct. We accordingly dismiss this appeal with costs.

Z. K.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 66 OF 1925.

July 22, 1925.

Present:—Mr. Simpson, A. J. C.
EAST INDIAN RAILWAY Co.—
DEFENDANT—APPLICANT

versus

FIRM MOEA RAM-GAJA NAND—
PLAINTIFF—OPPOSITE PARTY.

Railways Act (IX of 1890), s. 77—Damages, suit for—Non-delivery of goods due to loss—Notice, whether necessary.

Notice under s. 77 of the Railways Act is required in all cases in which the loss of goods is alleged by the plaintiff. If the plaintiff alleges non-delivery without stating what the cause of non-delivery is, and it appears upon the trial that in fact non-delivery was due to loss, then the plaintiff fails if he has not given notice under s. 77. A case of non-delivery may or may not be a case of loss. If it is a case of loss, then notice is required. [p. 573, col. 1.]

Seth Mulchand v. Agent, G. I. P. Ry. Co., 79 Ind. Cas. 602; (1924) A. I. R. (N.) 288, *B. & N. W. Ry. Co. v. Special Manager, Court of Wards, Balrampur*, 89 Ind. Cas. 139; 12 O. L. J. 162; 2 O. W. N. 251; (1925) A. I. R. (O.) 419, *Cawnpore Cotton Mills Co., Ltd. v. Great Indian Peninsular Railway*, 71 Ind. Cas. 614; 45 A. 353; 21 A. L. J. 223; (1923) A. I. R. (A.) 301, *Nadiar Chand Shaha v. Wood*, 35 C. 194; 12 C. W. N. 450, *Assam Bengal Railway Co. Ltd. v. Radhika Mohan Nath*, 72 Ind. Cas. 714; 28 C. W. N. 438; (1923) A. I. R. (C.) 397, *Madras & Southern Marhatta Railway Co. Ltd. v. Hardoss Banmali Doss*, 49 Ind. Cas. 69; 41 M. 871; 35 M. L. J. 35; 24 M. L. T. 38; 8 L. W. 340, *East Indian Railway Co. v. Jethmull Ramanand*, 26 B. 669; 4 Bom. L. R. 495, and *East India Railway Co. v. Gopiram Gourishankar*, 73 Ind. Cas. 642; (1924) A. I. R. (Pat.) 315, referred to.

Application for revision against an order of the Munsif, Biswan Sitapur, dated the 28th February 1925.

Mr. G. N. Mukerji, for the Applicant.

ORDER.—This is an application under s. 25 of the Small Cause Courts Act. The plaintiff was consignee of a box containing bales of cloth, delivered to the E. I. Railway at Howrah, consigned to the plaintiff at Biswan on the B. & N. W. Railway. When

(4) 69 Ind. Cas. 109; 35 C. L. J. 209.

the consignment reached Biswan, the box was broken and some of the cloth was missing. The learned Munsif, sitting as a Small Cause Court, decreed the plaintiff's claim in part. He gave a decree for Rs. 34-8-9 with interest proportionate to costs. The present application raises a single point of law, namely, that the plaintiff's suit ought to have been dismissed because the Railway was entitled to notice under s. 77 of the Railways Act. This point was decided in reliance on *Seth Mulchand v. Agent, G. I. P. Ry. Co.* (1). The report I have seen is in 79 Ind. Cas. 602. That ruling had been considered and dissented from by a learned Judge of this Court in *B. & N. W. Ry. Co. v. Special Manager, Court of Wards, Balrampur* (2).

I do not propose to go through the authorities. It is sufficient to say that notice under s. 77 is required in all cases where the loss of goods is alleged. If the plaintiff alleges non-delivery, without stating what the cause of non-delivery is, and it appears upon trial that in fact non-delivery was due to loss, then the plaintiff fails if he has not given notice under s. 77. A case of non-delivery may or may not be a case of loss. If it is a case of loss, then notice is required. In the present case it is admitted that no notice was given. The case is one of loss. The issue was: "Are the defendants or any of them liable for the loss of goods and for profit as claimed." I, therefore, find that notice was necessary and that the case ought to have been dismissed because there was no notice. Although I do not propose to discuss or review the cases, I have looked at a considerable number of cases cited by the Counsel for the appellant. There are *Cawnpore Cotton Mills Co., Ltd. v. Great Indian Peninsular Railway* (3), *Nadiar Chand Shah v. Wood* (4), *Assam Bengal Railway Co. Ltd. v. Radhika Mohan Nath* (5), *Madras & Southern Marhatta Railway Co., Ltd. v. Hardoss Bawmali Doss* (6), *East Indian Railway Co., Jethmull Ram-*

nand (7) and *East Indian Railway Co. v. Gopiram Gourishankar* (8). I have also considered such cases as support the plaintiff decree-holder, but I find that they have either been overruled or dissented from by other Courts.

I set aside the judgment of the Small Cause Court and dismiss the suit.

No order as to costs.

G. H.

Order set aside.

(7) 26 B. 669; 4 Bom. L. R. 495.

(8) 73 Ind. Cas. 612; (1921) A. I. R. (Pat.) 315.

SIND JUDICIAL COMMISSIONER'S COURT.

REVISION APPLICATION No. 25 of 1924.

January 28, 1925.

Present:—Mr. Kennedy, J. C., and

Mr. Rupchand Bilaram, A. J. C.

PREMI MULJI—PLAINTIFF—APPLICANT

versus

GARLICK AND Co.—DEFENDANTS—

OPPONENTS.

Vendor and purchaser—Sale of goods—Breach by purchaser—Part purchase-money not appropriated to loss, forfeiture of.

In the case of an alleged breach of contract by a buyer, the seller cannot forfeit any amount paid by the buyer as part purchase-money, where the seller has not claimed to appropriate the amount against any loss suffered by him in consequence of the breach, but has rather expressly reserved his right to institute a suit in the proper Court for the recovery of any amount that may be due to him [p. 575, col. 1.]

Application against a decree of the Small Cause Court, Karachi.

JUDGMENT.—This is an application under s. 25 of Act IX of 1887 against the decree passed by the learned Small Cause Court Judge, Karachi, dismissing the plaintiffs' suit. The suit relates to the return of Rs. 750 and interest thereon said to have been paid by the plaintiffs (applicants) to the defendants as part purchase-money of 250 feet boring rods and 250 feet tubes which the defendants had failed to supply.

It appears that Visram Narsi and Company had negotiated with the defendants (opponents) for purchase of the boring rods and the tubes. There was some correspondence between the parties about the rates at which the order for rods and tubes of certain sizes and lengths could be placed with the home suppliers, resulting in a telegram being sent by Visram and Co. agreeing to

(1) 79 Ind. Cas. 602; (1924) A. I. R. (N.) 288.

(2) 89 Ind. Cas. 139; 12 O. L. J. 162; 2 O. W. N. 251; (1925) A. I. R. (O.) 419.

(3) 71 Ind. Cas. 614; 45 A. 353; 21 A. L. J. 223; (1923) A. I. R. (A.) 301.

(4) 35 O. 194; 12 O. W. N. 450.

(5) 72 Ind. Cas. 714; 28 C. W. N. 438; (1923) A. I. R. (C.) 397.

(6) 49 Ind. Cas. 69; 41 M. 871; 35 M. L. J. 35; 24 M. L. T. 38; 8 L. W. 340.

buy at those rates. On the 29th September 1919 the defendants wrote to Visram and Company that they were in receipt of their telegram ordering 250 feet boring rods 10 feet in length and 250 feet tubes at 10 feet length which they were ordering for them from England. They asked for a cheque of Rs. 500 as an advance against this order. Visram and Company handed over this letter to the plaintiffs as they placed this order with the defendants on behalf of the plaintiffs. On the 15th October, 1919 the plaintiffs informed defendants that they were the parties responsible for the rods and tubes and sent them a cheque for Rs. 250 only. On the 9th December 1919 the defendants wrote to plaintiffs that they had received intimation from London that the order for 250 feet of boring rods and 250 feet tubes 10 feet long had been booked at certain rates and that they expected that the rods and tubes would be shipped during that month. On the 22nd January 1920 the defendants sent a bill to the plaintiffs for Rs. 417-10-6 as the value of 250 feet boring rods and intimated to them that Rs. 250 paid in advance would be credited to the plaintiffs against the cost of the tubes. On the 4th February 1920 they again sent an amended bill claiming only Rs. 217-10-6 instead of Rs. 417-10-6 after giving credit for Rs. 200 out of Rs. 250 in their hands and stated that the balance of Rs. 50 were, being retained towards the cost of the tubes. By their letter of the 9th February 1920 the plaintiffs requested the defendants not to insist on the immediate payment of Rs. 217-10-6 and promised to pay the whole amount when the tubes had arrived. But in view of the letter of the defendants dated the 20th February 1920 insisting on immediate payment of the bill for the rods and claiming 9 per cent interest if the payment was delayed and also in view of the defendants having again submitted an amended bill for Rs. 317-10-6 claiming their right to retain Rs. 150 instead of Rs. 50 as deposit against the tubes, the plaintiffs in order to avoid payment of any interest sent a sum of Rs. 500 to the defendants towards the purchase price of rods and the tubes. It appears that in the meantime the tubes had arrived but instead of the tubes being only 25 each of 10 feet length they were 250 tubes of 10 feet length or 2500 feet of tubes. On the 30th March 1920 the defendants claimed £561-13-1 as the value of the tubes. The plaintiffs

naturally demurred to taking delivery of 2500 feet of tubes instead of 250 feet only. Some correspondence followed. The defendants contended that the contract was for 2500 feet of tubes and that their letter of the 29th September 1919 was written under a mistake. They relied on certain previous correspondence carried on by them with Visram Narsi to show that they had offered to sell to Visram 250 tubes of 10 feet length and not 250 feet of tubes. They asserted that the plaintiffs were bound to take delivery of 250 tubes of 10 feet length. Ultimately the defendants, however, offered without prejudice to their legal rights, to tender to the plaintiffs 25 tubes on payment of certain extra charges and intimated to them that rods and the tubes had been despatched to Karachi and that delivery could be had of the goods on payment of the balance of the amount due to Messrs. William Jack and Company. Unfortunately however for the parties, the rods were lost in transit and Messrs. William Jacks and Company were not in a position to deliver the rods with the result that no delivery either of the rods or the tubes was effected. Some further correspondence followed and ultimately the plaintiffs filed this suit for the recovery of Rs. 750 paid by them to the defendants with interest thereon.

The learned Judge held that the order placed with the defendants was not for 250 feet tubes but for 250 tubes each tube being 10 feet in length and that as the plaintiffs had repudiated the contract before the tubes had arrived by refusing to take delivery of the rods the defendants were absolved from proving that they were in a position to perform their part of the contract by delivering the rods and that the plaintiffs having committed the breach of the contract were not entitled to recover the amount. The learned Judge has evidently treated the whole sum of Rs. 750 as deposit or earnest-money liable to be forfeited on failure of the plaintiffs to perform their part of the contract.

With regard to the first point, whether the contract was for 250 feet tubes or for 250 tubes of 10 feet each, taking into consideration the whole correspondence coupled with the uncontradicted evidence of Visram that he had personally explained to the defendants his wants, the fact that for 250 feet boring rods one would expect to buy only 250 feet tubes and not 2500 feet tubes, the fact that only a small sum

of Rs. 250 was, in the first instance, expected as an advance against the price and also the fact that when the rods arrived, the defendants were prepared to retain only a sum of Rs. 50 as a deposit against the price of the tubes, we think that the learned Judge was in error in holding that the letter of the 29th September 1919 which confirmed the terms of the contract between the parties was written under a mistake, and did not correctly express the contract between the parties. We think that the learned Judge was also in error in treating the whole sum of Rs. 750 as a deposit liable to forfeiture on failure of plaintiffs to perform their contract. Rupees 500 were admittedly paid as part purchase-money. The defendants had not claimed to appropriate this amount against any loss which they had or could have suffered in consequence of the alleged breach of contract. They expressly reserved their right to institute a suit in a proper Court for the recovery of any amount that may be due to them. Under the circumstances the claim of Rs. 500 at least could not be dismissed.

We also cannot understand the finding of the learned Judge that the plaintiffs had refused to take delivery of the rods at the proper time and the defendants were, therefore, absolved from proving that they were in a position to perform their part of the contract in respect of the rods. There is nothing in the correspondence to show that the plaintiffs declined to take delivery of the rods. All that they asked was that they should be permitted to pay the purchase-money when the tubes arrived. The defendants never treated this as repudiation of the contract, but asked for payment of interest, and in order to avoid payment of interest, the plaintiffs at once sent them a sum of Rs. 500 which was in excess of the sum demanded. The plaintiffs were in no way to blame for not taking delivery either of the rods which were lost in transit or of the tubes which were tendered to them subject to the payment of certain extra charges for which they were not liable and are entitled to the return of their money.

We set aside the decree of the lower Court and pass a decree in favour of the plaintiffs for Rs. 836-6-0 with interest at 6 per cent. per annum on Rs. 750 from date of suit to payment and costs throughout.

N. H.

Decree set aside.

CALCUTTA HIGH COURT.

APPEAL FROM ORDERS Nos. 56 TO 58 OF 1924.

April 6, 1925.

Present:—Mr. Justice Sulhawardy and Mr. Justice Duval.

AMBIKA CHARAN BHAKTA—

DEFENDANT—APPELLANT

versus

RAM PROSAD CHATTERJEE AND OTHERS

—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 11-A—Civ. Procedure Code (Act V of 1908), O. XXI, rr. 100, 101, 103—Landlord and tenant—Decree for arrears of rent—Sale of holding—Purchase by landlord—Order under r. 101 restoring person dispossessed to possession—Suit by landlord to recover possession of holding on ground of abandonment—Limitation.

The suit contemplated in r. 103 of O. XXI of the C. P. C. is a suit by a person who is kept out of possession of property purchased in execution of a decree and claims possession under his auction-purchase. The rule does not concern itself with any other cause of action which such person, apart from his character as auction-purchaser, may have against the defendant. If a suit is brought under r. 103 within the statutory period, the right to bring a suit to establish the claim of the plaintiff as auction-purchaser for possession of the property is lost. But if he has any other cause of action against the defendant it cannot be said that the rule bars his suit based on such cause of action. [p. 576, cols. 1 & 2.]

Plaintiff obtained a rent-decree against a tenant and in execution of that decree purchased and obtained possession of the holding of the judgment-debtor. Defendant thereupon made an application under r. 100 of O. XXI of the C. P. C. alleging dispossession in execution of the decree and praying for restoration of possession. This application was allowed and more than a year after the date of the order allowing the application plaintiff brought a suit for possession of the holding on the allegation that his tenant having parted with the holding wrongfully, the plaintiff was entitled to re-enter.

Held, that plaintiff's suit was not one under the provisions of r. 103 of O. XXI of the C. P. C. but was based on an entirely different cause of action and that, therefore, it was not governed by Art. 11-A of Sch. I to the Limitation Act and was consequently not barred by time. [p. 577, col. 1.]

Appeal against the orders of the Subordinate Judge, Howrah, dated the 5th of July 1923, reversing those of the Munsif, First Court, Uluberia, dated the 23th of June 1921.

Dr. Bijan Kumar Mukherjee, for the Appellant.

Dr. Sarat Chandra Basak and Babu Radhika Ranjan Guha, for the Respondent.

JUDGMENT.—This case raises an interesting question which does not seem to have come up for consideration before. The facts are that the plaintiff-respondents obtained a rent decree against the heirs of the tenant Gaganeswar Mondal and in execution of that decree purchased and

took possession of the holding in suit. The defendants thereupon alleging dispossession made an application under O. XXI, r. 100, C. P. C., for restoration of possession. On the 26th June 1917 order was passed in their favour under O. XXI, r. 101. The plaintiffs instituted the present suit in May 1920. It is accordingly maintained by the appellants that the suit is barred under Art. 11-A of the Limitation Act, having been brought more than a year after the order under O. XXI, r. 101 was passed. The Trial Court gave effect to this contention but the learned District Judge held that the plaintiffs' suit is not barred under the above Article of the Limitation Act. In this appeal the appellants argue on the same line as adopted by the learned Munsif. What happened was this: The plaintiffs as decree-holder auction-purchasers took possession of the holding which they purchased in execution of the decree but were dispossessed therefrom by order of Court by the defendants claiming to possess the property on their own account and not on behalf of the judgment-debtor. The plaintiffs thereupon became aware that their tenant had parted with the holding wrongfully and brought the present suit for ejectment. The question raised in the suit is whether the tenants had a transferable or a non-transferable interest in the holding.

Order XXI r. 100, contemplates a case where a person has been dispossessed by an auction-purchaser taking possession of the property through the help of the Court. He then complains to the Court of such dispossession and the Court after making a summary investigation if it holds that the applicant was in possession of the property on his own account and not on account of the judgment-debtor, directs under r. 101 that possession be given back to the applicant. The party against whom this order is passed may then institute a suit under O. XXI, r. 103 to establish the right which he claims to the present possession of the property. Reading these sections together it cannot be questioned that the suit contemplated by r. 103 is a suit by a person who is kept out of possession of the property purchased in execution of the decree and claims possession under his auction-purchase. It does not concern itself with any other cause of action which such person apart from his character as auction-purchaser may have against the

defendant. If a suit is not brought under r. 103 within the statutory period the right to bring a suit to establish the claim of the plaintiff as auction-purchaser for possession of the property is lost. But if he has any other cause of action against the opposite party, it cannot be said that this provision in the Chapter relating to execution of decrees bars his suit based on such cause of action. In the present case the suit is brought by the plaintiffs not in their character as auction-purchasers but as landlords. In the plaint, the cause of action in the suit is based not on the adverse decision against them in proceedings under r. 100, but on the transfer by the tenants of their non-transferable occupancy holding the information of which he got during the course of the execution proceedings. The causes of action of the two suits one under r. 103 and another as brought by the plaintiffs must, therefore, be different. In a suit under r. 103, the cause of action must be the adverse decision passed under r. 101. But the present suit is based upon a different state of facts. The cause of action is not the loss of possession by the defendants from the plaintiffs in connection with the execution proceedings but the fact that the tenants had unlawfully transferred a non-transferable occupancy holding to the defendants and hence the holding is treated as abandoned under the Bengal Tenancy Act and the landlords are, therefore, entitled to possession of the holding which the defendants are in possession of as trespassers. But it is argued by the learned Vakil for the appellant that under s. 22, Bengal Tenancy Act, the landlords having purchased the holding in execution of the rent decree the tenancy got merged in the landlord's superior interest and, therefore, the only remedy the landlords now have is to proceed as auction-purchasers under O. XXI, r. 103 their character as landlords having been lost by virtue of the purchase of the holding. We do not think that this contention is right. It is the case of the defendants that the tenant had a transferable occupancy holding. It further appears that the defendants are in possession of the land for more than 12 years. He accordingly contends that the plaintiffs are not entitled to possession because the tenants had a transferable interest in the holding and that the defendants have acquired the rights of

the tenant in it. The present suit as brought by the plaintiffs is totally unconnected with the execution proceedings. It seems that the plaintiffs have abandoned all their right in the execution sale, it having been found against them that the defendants are entitled to immediate possession. In these circumstances we do not think that the present suit is barred under Art. 11-A of the Limitation Act.

The appeals accordingly fail and are dismissed with costs two gold mohurs in each case.

N. H.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 30 OF 1924.

August 17, 1925.

Present:—Mr. Simpson, A. J. C.

Babu GOBIND PRASAD AND OTHERS—

—DEPENDANTS—APPELLANTS

versus

NARBHIR SINGH AND OTHERS—PLAINTIFFS

AND BIJA SINGH AND OTHERS—DEFENDANTS

—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 35—Costs—Discretion of Court—Interference by Appellate Court.

The matter of costs is discretionary with the Court of Trial and the High Court will not interfere in appeal with an order as to costs unless it is plainly irregular and contrary to principle.

Appeal against a decree of the Subordinate Judge, Hardoi, dated the 29th February 1924.

Mr. H. K. Ghose, for the Appellants.

Messrs. Ram Bharose Lal and Raj Narain Shukla, for the Respondents. 31:118

JUDGMENT.—This is a first appeal. Plaintiffs are appellants. It relates to costs only. The plaintiffs sued for possession of certain lands alienated by their father and grandfather, etc., and for a declaration that certain decrees were not binding on them. The following issues were framed:—

1. Were the deeds in suit executed for immoral purposes?

2. Or were they executed for legal necessity and the payment of antecedent debts?

3. To what relief are the plaintiffs entitled?

3. Were the terms of interest and compound interest in the deeds in suit also justified by legal necessity? *See this issue be tried in this suit?*

Issue No. 1 was decided against the plaintiffs. The Court said that they produced an unnecessarily large number of witnesses, but that they spoke to general bad character and not to the facts of the debts in suit having been contracted for immoral purposes. On issue No. 2, the burden lay upon the defendants and they produced evidence. Plaintiffs produced eighteen witnesses on this point. The decision was in favour of the defendants. On issue No. 4, I do not think that any evidence was produced, but the point was argued on behalf of the plaintiffs. The decision was in favour of the defendants.

On the 3rd issue, it was decided that two out of the four deeds were binding on the plaintiffs, and a declaration was refused. As regards the other two deeds, in respect of which decrees had been passed, it was decided that the plaintiffs must be given an opportunity to save the family property. Accordingly, a decree for redemption was passed, under which the plaintiffs could get possession if they paid a large sum to the defendants. As regards costs, the order was "There having been partial success on both sides I order that the parties bear their own costs."

The matter of costs is discretionary with the Court of Trial, and I should not be ready to interfere with an order of costs, unless it was plainly irregular and contrary to principle. In the present case, the order as regards costs appears to be eminently reasonable. I dismiss the appeal with costs.

Z. K.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 173 OF 1923.

February 20, 1925.

Present:—Mr. Justice Devadoss.

BATHOOR GRAMATHIL VALIA
MANAYILPARKAM OKKILIKARA

SIDDAYYA AND ANOTHER—DEFENDANTS

—PETITIONERS

versus

MUNNAMBETH AMBANAIR—

PLAINTIFF—RESPONDENT.

Oaths Act (X of 1878), s. 11—Agreement to be bound by oath—Failure to take oath, effect of—Procedure.

Under s. 11 of the Oaths Act, the evidence given on oath is as against a person who offered to be bound conclusive proof of the matters stated. But if the party who agrees to take an oath declines afterwards or fails to take the oath, the Court may only take that circumstance into consideration in deciding the case. The absence of an oath or refusal to take the oath would not import into the case evidence which was not otherwise adduced before it. [p. 578, col. 2.]

Ulagappa Chettiar v. Periakaruppan Chetty, 15 Ind. Cas. 195; (1912) M. W. N. 361, followed.

On an application by the defendant in a suit, to set aside an order refusing to set aside an *ex parte* decree, the plaintiff agreed to abide by the oath of the defendant that he was not aware of the institution of the suit. The oath, however, was not taken on account of plaintiff's default to be present to hear the oath. The Court, thereupon, dismissed the application:

Held, that the Court ought to have called upon the defendant to prove his allegations by oral evidence, that on his declining to do so, it should have dismissed the application for want of evidence, and that it was improper to dismiss the application without affording the defendant such opportunity. [*ibid.*]

Umayammai v. Muthiah Nadar, 17 M. L. J. 99, distinguished.

Petition, under s. 25 of Act IX of 1887, praying the High Court to revise an order of the Court of the Subordinate Judge, Tellicherry, dated the 25th September 1922, in S. E. A. No. 268 of 1922, in S. C. S. No. 343 of 1921.

Mr V. P. Karunakara Nambiar, for the Petitioner.

Mr. O. T. Govindan Nambiar, for the Respondent.

JUDGMENT.—This is an application to revise the order of the Subordinate Judge of Tellicherry passed on a petition by the defendants to set aside an *ex parte* decree passed against them. The defendants filed an application to set aside the *ex parte* decree which was dismissed by the Subordinate Judge on 16th August 1922. The present application is to set aside the order passed on the previous application and also to set aside the *ex parte* decree. After the application was filed both parties filed a joint affidavit in which the defendants consented to take oath and the plaintiff agreed to abide by the oath of the defendants. On the date when the oath was to be taken by them, the plaintiff and the defendants appeared and they were asked to go and bathe before taking the oath. The defendants came back after the bath but the plaintiff did not return in consequence of which the oath was not taken and the Commissioner made a return to that effect. The Subordinate Judge heard the parties and dismissed the application of the petitioners.

It is contended by Mr. Karunakaran Nambiar for the petitioners that the Subordinate Judge should have set aside the *ex parte* decree as the plaintiff failed to be present to hear the oath taken and he relied upon a case in *Umayammai v. Muthiah Nadar* (1). In that case it was held that if a party who has agreed to be bound prevents the oath being taken the other party is entitled to a decree. On the strength of this ruling the petitioners want an order in their favour. That case has no application to the present, for in that case it was the plaintiff who ought to have adduced evidence of certain facts to prove his case and in the absence of evidence the Court was justified in dismissing the suit. Under the Oaths Act, s. 11, the evidence so given shall as against a person who offered to be bound as aforesaid be conclusive proof of the matters stated; if a party attacks them as regards any fact, the oath is proof of that fact and the Court is bound to accept that as proof of that fact. But if the party who agrees to take an oath declines afterwards or fails to take the oath the Court may only take that circumstance into consideration in deciding the case. The absence of an oath or refusal to take an oath would not import into the case evidence which was not otherwise adduced before it. This view was held by a Bench of this Court in a case reported as *Ulagappa Chettiar v. Periakaruppan Chetty* (2). In the present case the defendants failed to take the oath that they were not aware of the institution of the suit and that they were not liable to the plaintiff. The failure to take the oath would not and could not be treated as evidence that they were not aware of the institution of the suit and they were not liable to the plaintiff for the amount claimed by him. The failure to take the oath was due to the plaintiff's conduct in not appearing before the temple to hear the oath taken. In the circumstances, the lower Court ought to have called upon the defendants to prove their allegations by oral evidence and if they declined to do so, the Court should have dismissed the application, for want of evidence on their part. Such a course was not pursued in this case. The learned Sub-Judge heard the parties and dismissed the application. I think this

(1) 17 M. L. J. 99.

(2) 15 Ind. Cas. 195; (1912) M. W. N. 361.

course was not a proper course to adopt in a case of this kind. I, therefore, set aside the order dismissing the petition and directing the Subordinate Judge to restore the petition to file and dispose of it according to law. In so doing the Subordinate Judge would direct the petitioners to pay the costs of the plaintiff incurred by their negligence without reference to the ultimate result of the case. The costs of this petition will be provided for in the order that the Subordinate Judge may pass on the petition.

V. N. V.

S. D.

Petition allowed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 1249 OF 1921.

June 27, 1923.

Present:—Mr. Justice Kulwant Sahay.

BHAGWAN SINGH AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

LACHUMAN PRASAD SAHU AND

ANOTHER—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 35—Landlord and tenant—Occupancy tenancy—Custom of transferability—Village note, entry in, admissibility of—Presumption of correctness—Appeal, second—Finding of fact, interference with.

An entry in a village note prepared by the Settlement Officer relating to the custom of transferability of occupancy rights is admissible in evidence under s. 35 of the Evidence Act, but it is only a piece of evidence and there is no presumption of correctness attached to it. [p. 579, col. 2; p. 580, col. 1.]

A finding of fact based upon evidence on the record cannot be disturbed in second appeal. [p. 580, col. 1.]

Second appeal from a decision of the Subordinate Judge, Patna, dated the 20th June 1921, reversing that of the Munsif, Patna, dated the 11th September 1920.

Messrs. L. N. Singh and S. N. Rai, for the Appellants.

Messrs. S. M. Mullick and N. K. Prasad, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-respondents for ejectment of the defendants on the ground of their having purchased certain occupancy holding which were not transferable by custom. The holdings originally belonged to the defendant No. 4. He sold them to the defendants Nos. 1 to 3 under three sale-deeds one dated the 13th

July 1915 and the other two dated the 3rd August 1915. The plaintiffs' case is that there was no custom of transferability of occupancy holdings without the consent of the landlord and, therefore, their old tenant having abandoned the holdings, the purchasers had no right to remain in possession and that the plaintiffs, were entitled to eject them.

The defence taken was that there was a custom of transferability in the village and that the purchasers had been recognised by the plaintiffs as their tenants.

The Trial Court came to the conclusion that the evidence adduced by the defendants established a custom of transferability in the village. As regards the question of recognition he did not come to a direct finding that the transferees had been recognised by the landlords, but he observed that having come to the finding that there was a custom of transferability of occupancy holdings it was not open to the landlords to refuse recognition.

There was an appeal against this decree to the Subordinate Judge and he on a consideration of the evidence in the case has come to the conclusion that the defendants have failed to prove custom of transferability of occupancy holdings in the village and also that they have failed to prove that the transferees were recognised by the plaintiffs. He accordingly decreed the suit.

The defendants come in second appeal to this Court and it has been argued on their behalf that the learned Subordinate Judge has not considered the cumulative effect of all the documents and the oral evidence on the question of custom. The learned Subordinate Judge has considered each one of the documents produced by the defendants to prove custom. There were nine instances of transfer upon which the defendants relied. The learned Subordinate Judge has considered each one of these instances and has held that they did not prove custom. He has also considered the oral evidence and he has come to the finding that the witnesses examined by the defendants did not prove the custom alleged by the defendants. It cannot be said that he has not taken the effect of the entire evidence into consideration. It has been argued that the village note prepared by the Settlement Officer and admitted in evidence in this case under s. 35 of the Evidence Act has not been given proper effect to by the learned Sub-

ordinate Judge. The village note says that "the custom of transfer of occupancy rights is admitted by the landlords. The landlord does not realise any *salami* from the transferee but he realises the arrears due from the holding from the transferee." This entry in the village note is only a piece of evidence. There is no presumption of correctness attached to it and as a piece of evidence it was considered by the learned Subordinate Judge who came to the conclusion that standing alone this village note was sufficient to establish the plea of the defendants. The learned Subordinate Judge was entitled to give such weight to this piece of evidence as in the circumstances of the case he considered proper and this is not a ground in second appeal for disturbing the judgment of the learned Subordinate Judge. Having regard to the finding arrived at by the learned Subordinate Judge, in my opinion, it is not open to the appellants to say that he has come to a wrong conclusion. His findings are based upon evidence on the record and cannot be disturbed. The appeal is dismissed with costs.

Z. K.

Appeal dismissed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL

No. 3 OF 1924.

July 21, 1924.

Present:—Sir Lallubhai Shah, Kt.,
Acting Chief Justice, and Mr. Justice
Fawcett.

PARSHURAM DATTARAM
SHAMDASANI—PLAINTIFF—
APPELLANT

versus

THE TATA INDUSTRIAL BANK,
LIMITED—DEFENDANT—RESPONDENT.

Companies Act (VII of 1913), ss. 79, 81, 213—Extraordinary general meeting of share-holders—Notice, form of—Proceedings, when liable to be upset—Special resolution—Amendment, whether may be moved—Chairman, power of—Proper amendment disallowed, effect of—Right of speech—Irregularity in proceedings—Court, whether can interfere—Fraud.

Where there is any secret agreement or any interest of the Directors in the agreement not disclosed in the circular, or in the notice, of a meeting of the Company, the Court will view with strictness any omission to refer to it in the notice or in the circular accompanying the notice; and the omission to mention any secret arrangement would constitute a serious defect in the notice. But where no such agreement is proved or suggested and where

there is no indication that there was anything to conceal, the Court will as far as possible take a liberal view of the terms of the notice and will not upset the proceedings taken on a notice for some defect, which might have been avoided, but which was not avoided on account of some honest mistake. [p. 584, col. 2.]

Henderson v. Bank of Australasia, (1890) 45 Ch. D. 330 at p. 343; 59 L. J. Ch. 794; 2 Meg. 301, followed.

Where the general nature of the business to be transacted at the meeting of the share-holders is clearly indicated and sufficient details are given such as are necessary for the purpose of enabling the share-holders to consider the question, the notice is a valid and proper notice. [*ibid.*]

Alexander v. Simpson, (1889) 43 Ch. D. 139 at pp. 147, 149; 59 L. J. Ch. 137; 61 L. T. 708; 38 W. R. 161; 1 Meg. 457, *Kaye v. Croydon Tramways Co. Ltd.*, (1898) 1 Ch. 358; 67 L. J. Ch. 222; 78 L. T. 237; 14 T. L. R. 244; 46 W. R. 405 and *Tiessen v. Henderson*, (1899) 1 Ch. 861; 48 L. J. Ch. 353; 47 W. R. 458; 80 L. T. 483; 6 Manson 340, referred to.

A clause for winding up the Company or for the appointment of liquidators may form part of a special resolution and be passed along with it. [p. 586, col. 1.]

An amendment to a special resolution may be allowed to be moved at the first meeting, but no alteration whatever of the special resolution can be allowed at the confirmatory meeting. [p. 586, col. 2.]

Torbock v. Lord Westbury, (1902) 2 Ch. 871; 71 L. J. Ch. 845; 87 L. T. 165; 57 W. R. 133, followed.

It must necessarily depend upon the nature of the resolution and the nature of the amendment whether it could be or should be allowed by the Chairman. [p. 587, col. 1.]

Any proper amendment which is moved by any member at a meeting should be put to the meeting for consideration, and if the Chairman rules out any such amendment, the resolution is liable to be set aside. [p. 587, col. 2.]

Henderson v. Bank of Australasia, (1890) 45 Ch. D. 330 at p. 343; 59 L. J. Ch. 794; 2 Meg. 301, followed.

The majority must not refuse to listen to the speech of a member in reasonable terms for a reasonable time. [p. 588, col. 1.]

It is difficult to lay down any general rule as to what should be the result where the right of speech is denied to a member in a general meeting of the share-holders. [*ibid.*]

The proper test to lay down is to consider the facts and circumstances of each case and to determine whether the denial of the right of speech is sufficient to vitiate the resolution under the circumstances of that case. [p. 588, cols. 1 & 2.]

Those who refuse unnecessarily out of sheer impatience to listen for any reasonable length of time, to any arguments in support of the opposite views incur a grave risk in adopting this attitude of exposing the very resolution, which they may be anxious to adopt, to the scrutiny of the Court and to render it liable to be set aside. The very purpose which they may have in view may be defeated on account of such conduct. [p. 588, col. 2.]

The Court should incline more in favour of the validity of the proceedings than in favour of their invalidity, if the fact which would go to invalidate the proceedings is not established beyond reasonable doubt. [p. 589, col. 2.]

It is futile for any member to raise a general objection to the validity of notes, without indicating the

nature of the objection, and without any attempt to particularise the votes objected to. It can only be interpreted as a sort of invitation on the part of the member to adjourn the proceedings of the meeting to examine the votes over again. [p. 590, col. 1.]

Per Fawcett, J.—Where a special resolution for the voluntary winding up of a Company has been passed, the proposed liquidators may be changed at the confirmatory meeting. [p. 590, col. 2; p. 591, col. 1.]

In re Trench Tubeless Tyre Co. Ltd., Bethell v. Trench Tubeless Tyre Co. Ltd., (1900) 1 Ch. 408; 69 L. J. Ch. 213; 48 W. R. 310; 82 L. T. 247; 16 T. L. R. 207, followed.

It is a well recognised rule that an amendment should be affirmative in form, and not merely negative of something already proposed, and be in such a form that a definite decision can be arrived at. [591, col. 1.]

The Court should not interfere on the ground of an irregularity in the case of acts which are valid if done with the approval of the majority of shareholders, unless the acts complained of are of a fraudulent character or are *ultra vires*. [p. 592, col. 1.]

A case of fraud or over-bearing influence is necessary to justify interference by the Court. [p. 593, col. 1.]

In re Irrigation Co. of France, Ex parte Fox, (1871) 6 Ch. App. 176 at p. 186; 40 L. J. Ch. 433; 24 L. T. 336, followed.

Appeal against the judgment of Mr. Justice Pratt, dated the 14th December 1923.

FACTS.—In 1923, a joint stock concern known as the Tata Industrial Bank, Limited, being in a financially unsatisfactory condition negotiated with the Central Bank of India for amalgamation of its assets and liabilities with the latter, and the scheme which was agreed upon between the two concerns was laid before a general meeting of the share-holders of the Tata Bank, called specially for that very purpose, for final approval and sanction. The plaintiff-appellant, who was one of the share-holders present in the meeting, raised some points of order which were overruled, and also proposed amendments to the resolution, and was prevented from speaking on them by the members of the meeting. He then brought a suit on those very grounds for a declaration that the proceedings of that meeting be declared invalid and for an injunction. His suit was dismissed by the Trial Court.

Sir Chimanlal Setalvad (with him Mr. Kanga, Advocate-General), for the Appellant.

Mr. B. J. Desai (with him Mr. Engineer), for the Respondent.

JUDGMENT.

Shah, Actg. C. J.—[After stating the facts the judgment proceeded:] I shall first take up the points relating to the notice convening the extraordinary general meeting on July 19. In order to appreciate

them, it is material to state here that the capital of the Tata Bank was seven and a half crores of rupees, consisting of ten lakhs shares of Rs. 75 each. In respect of each share at the material time Rs. 22-8-0 were called in with the result that at that date its paid up capital was two and a quarter crores. The balance sheet of this Bank published before these negotiations commenced relates to the year ending with March 31, 1923. It appears from the evidence that about the end of June 1923, the condition of the Bank was not satisfactory. The deposits in the Bank at the end of March 1923 amounted to about Rs. 5,95,00,000 while at the end of June 1923 they had gone down to 3,37,00,000 of rupees. It is also in evidence that the Manager of the Bank had found it difficult to carry on the business of the Bank. At this time the Central Bank had a capital of one crore of rupees consisting of 2,00,000 shares of Rs. 50 each. In respect of each share Rs. 25 were paid. Thus, in June 1923, the condition of that Bank was fifty lacs of rupees paid up capital and thirty lacs reserve fund, with deposits amounting nearly to thirteen crores of rupees. It is also in evidence that the market value of the Central Bank shares was Rs. 30 and a little over, and the market value of the Tata Bank shares was Rs. 14-8-0 per share. It may be remembered that in respect of the Central Bank shares the share-holders were liable to pay Rs. 25 per share and in respect of the Tata Bank shares the share-holders were liable to pay Rs. 52-8-0 per share. This was the state of the Banks when the negotiations commenced. The result of the negotiations is to be found in the agreement which came to be signed on July 5, 1923, by Mr. Commissariat and the Central Bank of India, Limited. According to that agreement the Central Bank was to take over all the assets and liabilities of the Tata Bank, was to increase its capital so as to be able to give one share of Rs. 50 with Rs. 25 paid up in respect of two shares of the Tata Bank to the share-holders of that Bank. It was also a part of the agreement that if a number of share-holders not exceeding one-third of the share-holders did not wish to take shares in the Central Bank they were to be paid at the rate of Rs. 15 per share or such amount as may be fixed under the scheme of arbitration which was provided for in the agreement in accordance with

the requirements of s. 213 of the Indian Companies Act. There were other provisions with regard to the payment of the officers and other employees of the Tata Bank, but in substance the effect of the agreement was as I have just stated.

After this provisional agreement was discussed by the Directors the notice in question was issued. I have already referred to the terms of that notice, and along with that notice a circular was issued. It is pointed out in that circular which was issued by the orders of the Board of Directors, that there was an offer from the Central Bank of India, Limited, to take over the Tata Bank as a going concern on terms of allotting one share of the Central Bank of India, Limited, of the nominal value of Rs. 50 credited as paid up to the extent of Rs. 25 for every two shares in the Tata Industrial Bank, Limited, of the nominal value of Rs. 75 on which the sum of Rs. 22-8-0 per share was paid up. The Directors had called for the opinion of the auditors of both the Banks to examine the financial position of the two Banks and it was stated in the circular that the auditors were satisfied that the offer made was fair and equitable and that two shares of the Tata Bank were worth one share of the Central Bank. The result of the amalgamation was stated in the circular to be that the uncalled liability of Rs. 105 which then existed on two shares in the Tata Industrial Bank, Limited, would be exchanged for an uncalled or contingent liability of Rs. 25 per share in the Central Bank of India, Limited.

A reference to the agreement was made in the circular in the following terms:—

“An agreement for carrying the proposed amalgamation into effect has been entered into between Mr. Hormasji Framji Commissariat a share-holder of your Company on behalf of your Company and the Central Bank of India Limited, which agreement is conditional upon your sanction of the scheme of amalgamation and a copy of the conditional agreement which bears date July 5, 1923, is open for inspection by any member of your Company at the registered office.”

The attention was drawn in the circular to s. 213 of the Indian Companies Act and to the rights of the share-holders under that section and it was pointed out that those dissentient share-holders, who would not like to take up the shares of the Central

Bank of India, Limited, would be paid as provided, i.e., Rs. 15 per share or such amount as may be fixed by arbitration in the manner prescribed under s. 213. It also mentioned that the Central Bank was not bound to proceed with the scheme of amalgamation if more than one-third of the share-holders dissented.

These were the materials circulated to the members and they had an opportunity under the terms of the circular to inspect the agreement if they were minded to do so.

With reference to this notice it is urged:—

(1) That the interest of the Directors in this arrangement has not been disclosed;

(2) that the difference of opinion among the Directors with reference to this scheme, as indicated in the minutes of the Directors' meeting, was not communicated to the share-holders;

(3) that the basis of the calculation adopted by the two Banks in arriving at this result, or rather in fixing the price of the Tata Bank concern, has not been disclosed; and

(4) that it was defective because a copy of the agreement was not sent with the circular to the share-holders.

As regards the point relating to the interest of the Directors, it has been suggested vaguely that the Directors themselves were to benefit under this arrangement, and that there was some kind of secret understanding which was not disclosed. Beyond a suspicion on the part of the plaintiffs that there was some secret arrangement between the Directors of the Tata Bank and the Managing Director or Directors of the Central Bank, there is nothing to show any secret arrangement. So far as the record is concerned it is clear that there is no evidence of it, and Mr. Pochkhanawalla, the Managing Director of the Central Bank, stated definitely as follows:—“There are no terms of the amalgamation not contained in the agreement of July 5, 1923.” It is true that if there was any kind of secret arrangement between the Directors of the two Banks; it must be disclosed in the notice and, if it has not been disclosed, the notice would be bad. Such an arrangement cannot be assumed and, if that suggestion is to be made with any effect, it must be proved. It is material to note on this point that in the plaint there is no

allegation in the sense that the Directors were going to make any secret profit or to get any secret benefit out of this transaction.

The second thing suggested against the Directors relates to their liability in respect of certain debts due to the Tata Bank. The liability of the Directors is indicated in the balance sheet of March 31, 1923, and is stated thus:—

"Debts due by Directors of the Bank jointly with other persons or against securities and considered good including debts due by the Joint Stock Companies guaranteed by their agents, a Director of the Bank being a member of the firm of agents."

In respect of this liability it is clear that the effect of the agreement is merely to substitute the Central Bank as a creditor instead of the Tata Bank, and there is no suggestion and certainly there is no evidence to show that the Directors were in any way placed more favourably with reference to their liability for these debts under the agreement than they were before the agreement with reference to the Tata Bank. Therefore, so far as the suggestion that the notice is bad because the Directors' interest or any secret arrangement with regard to the Directors' interest has not been disclosed in the notice is concerned, it seems to me that the contention of the appellants must fail for the simple reason that there is no evidence whatever on the point in favour of the plaintiffs. On the contrary there is clear and reliable evidence to the effect that there was no arrangement between the two Banks except that disclosed and stated in the terms of the agreement of July 5, 1923.

I have so far dealt with the question of the Directors' interest which is said not to have been disclosed and also incidentally with the point that there was an undisclosed agreement which should have been stated in the notice.

The next point is that the difference of opinion among the Directors should have been referred to in the notice. I am quite unable to accept this contention. It is true that apparently there was some difference of opinion among the Directors up to a certain stage, but they all unanimously resolved on June 27 to refer this matter for the consideration of the share-holders. It may be that there was some difference of opinion among the Directors; but I do

not see how the omission to mention that circumstance can be said to constitute a defect in the notice. There is no rule of law or prudence which compels a reference in the notice to such differences of opinion among the Directors.

The next point is that the basis of the calculation, upon which, broadly speaking, the terms of this arrangement were settled, is not disclosed in the notice. On this point I do not consider it necessary to go into the details of the figures. They have been explained by Mr. Pochkhanawalla in his evidence and the learned Trial Judge has referred to that evidence as follows:—

"266 lakhs as assets as per the balance sheet as at March 31, 1923, plus two lakhs by way of profits, and four lakhs by way of appreciation of Government securities, to be added. That would make a total of 272 lakhs, and making allowance for depreciation in industrial investments prior to March 31, 1923, balance 252 lakhs net assets. Less depreciation made for the purpose of amalgamation, 22 lakhs depreciation in buildings, 15 lakhs depreciation in industrial investments since March, 1923, ten lakhs for loss of interest on capital locked up in buildings not let and to meet the claims for compensation by employees, and five lakhs for contingencies. This would make a total of 52 lakhs leaving a balance of 200 lakhs and the assets which form the basis of the calculation for the purposes of the amalgamation scheme."

The learned Judge has referred to these different items in detail, and has expressed his opinion thus:—

"It is clear they refer to details which there was no obligation to set forth in the notice, and which would have been elicited by any intelligent share-holder at the meeting."

I agree with this view of the learned Judge. Apart from that I am of opinion that there is no proviso which compels any reference to the statement of these details in a notice convening the meeting. It seems to me that what was stated in the circular and notice was sufficient. I do not say that the basis of this calculation could not have been referred to in the circular. If the Directors of the Tata Bank thought it proper to do so, they could have done so. But the fact that they have not done so does not, in my opinion, constitute any defect in the notice, much less such a defect as would invalidate it. The information given in

the circular was broadly speaking what the share holders would require as to how they would stand under the proposed agreement with reference to their interest in the Bank. It was made clear to them in the circular that so far as they were concerned they were getting the equivalent of their shares with this added difference that the outstanding liability of Rs. 105 on every two shares would be reduced to Rs. 25. It cannot be said that anything more was necessary. It seems to me that the basis which has been disclosed by Pochkhanawalla in his evidence is merely a sort of rough calculation for the guidance of the Banks. But there is nothing on the record to show that that basis was accepted in writing on any occasion. Broadly speaking the basis so far as the Tata Bank was concerned was that all the assets such as they were at the date of this agreement were to be taken over by the Central Bank, subject to their liability to give one share of the Central Bank for every two shares of the Tata Bank with Rs. 25 paid up in respect of that share, and in the case of those share-holders, who were not prepared to accept the shares in the Central Bank they were to get at the rate of Rs. 15 or such further sum as may be determined by arbitration in accordance with the provisions of s. 213 of the Indian Companies Act. It clearly gave notice to the share-holders as to what was proposed to be done. The assets of the Bank were disclosed in the last balance-sheet; and it was made clear that these were to be taken over by the Central Bank subject to their getting this return. If any further information was needed, as pointed out by the learned Judge, it could have been elicited at the meeting; but if the share-holders were satisfied that no further information was required, that this was a good scheme as regards their interests, it was open to them to accept it without any further information as to the basis of the calculation. I think that the omission to refer to this basis in the notice does not in any sense constitute a defect in the notice.

The last point with reference to the notice is that the copy of the agreement was not circulated along with the notice to the members. The agreement is referred to in the special resolution which is proposed for consideration; and it is also stated that the agreement will be available for inspection at any time to the share-holders, when they would care

to have inspection of it. It is also in evidence that this agreement was on the table at the meeting of July 19, though it has been contended on behalf of the appellants that this agreement was not available for reference at the meeting. It seems to me that on the evidence of Mr. Pochkhanawalla it must be held that the agreement was kept on the table for reference at the meeting. Apart from that, I am unable to hold that the omission to send a copy of the agreement to each share-holder with the notice constitutes a defect in the notice.

I have so far dealt with the specific points urged as regards the notice. It may be stated generally that under s. 79 of the Indian Companies Act read with Article 68 of the Articles of Association of the Tata Bank, all that was required by law to be stated in the notice was the general nature of the business. The general nature of the business was clearly indicated in the notice and sufficient details were given, which were necessary for the purpose of enabling the share-holders to consider the question. I may state that several cases have been cited with reference to the point of defective notice. I shall mention only *Alexander v. Simpson* (1), *Kaye v. Croydon Tramways Co. Ltd.* (2) and *Tiessen v. Henderson* (3).

The net result is that where there is any secret agreement or any interest of the Directors in the agreement not disclosed in the circular, or in the notice, the Court will view with strictness any omission to refer to it in the notice or in the circular accompanying the notice; and the omission to mention any secret arrangement would constitute a serious defect in the notice. But where no secret agreement is proved or suggested and where there is no indication that there was anything to conceal the Court will as far as possible take a liberal view of the terms of the notice and will not upset the proceedings taken on a notice for some defect, which might have been avoided, but which was not avoided on account of some honest mistake. On this point, I think the following observation of

(1) (1889) 43 Ch. D. 139 at pp. 147, 149; 59 L. J. Ch. 127; 61 L. T. 708; 38 W. R. 161; 1 Meg. 457.

(2) (1898) 1 Ch. 358; 57 L. J. Ch. 222; 78 L. T. 237; 14 T. L. R. 244; 46 W. R. 405.

(3) (1899) 1 Ch. 861; 68 L. J. Ch. 353; 47 W. R. 458; 60 L. T. 483; 6 Manson 340.

Cotton, L. J. in *Henderson v. Bank of Australasia* (4) is important :—

"I do not think that a notice calling a meeting ought to be treated very critically in order to see whether we cannot pick out some defect in it."

In the present case looking at the notice and the accompanying circular broadly with reference to the facts of the case, I am satisfied that there is no such defect in this notice such as could invalidate it. I concede that more could have been stated in the circular: but there is no essential matter, which can be said to have been omitted in the present case.

I shall now deal with the objections which have been raised with reference to the special resolution. It has been urged that there is no express power in the Memorandum of Association of the Tata Bank to effect amalgamation, that there is no amalgamation between the two Banks in the legal sense of the word and as the special resolution purports to effect amalgamation between the two Banks, it is illegal and invalid. It is urged that the resolution does not satisfy the requirements of s. 203 (2) of the Indian Companies Act, in so far as the resolution as to the voluntary winding up of the Company, is mixed up with other matters. The argument is that there should have been separate resolutions for the voluntary winding up and other matters relating to the agreement. Lastly, it is urged that as the special resolution does not in terms comply with the provisions of s. 213 in so far as it does not expressly authorise the liquidators to receive compensation for disposal among the share-holders it is an illegal resolution.

As regards the first objection, it is enough to say that this action is taken under the statutory right, which every limited Company has under s. 213 of effecting such an arrangement, and not under any special power conferred upon the Company by the Memorandum of Association. Though a reference has been made to the express power of this kind contained in the Memorandum of Association of the Central Bank of India, Ltd., I do not think that it is necessary to say more on this point, beyond this that if the Tata Bank and the other Bank were both inclined to give effect to such an arrangement, it was perfectly open to the Tata Bank under s. 213 of the Indian Com-

(4) (1830) 45 Ch. D. 330 at p. 343; 59 L. J. Ch. 794; 2 Meg. 301.

panies Act to sanction a scheme of this nature.

The next point about the amalgamation is also based upon an incorrect appreciation of the meaning of the word. As regards the meaning of this word it is enough to refer to two cases. In *Wall v. London and Northern Assets Corporation* (5), the observations of Lindley, M. R., are as follows :—

"No very precise meaning can be given to the word 'amalgamate' when we talk about amalgamating a Company with any persons, Companies, or firms, and I confess that I am not prepared to put any sharp definition upon the word. I have no doubt that it includes the case put by Lord Hatherley in *Higg's case, In re Bank of Hindustan, China and Japan* (6) and more recently by Lord Davey in *New Zealand Gold Co. v. Peacock* (7). I do not think it involves the formation of a new Company to carry on the business of an old Company. I have no doubt it includes that; but I do not think it is confined, or understood to be confined, to that. I do not see how a Company as a business transaction can practically amalgamate with persons or Companies carrying on business unless the Company in some way or other sells its assets as a whole—not for money, for that would be a simple sale—but for shares in the purchasing Company."

According to these observations, an arrangement like the one we have in this case can be included within the meaning of the word 'amalgamation.'

In *In re South African Supply and Cold Storage Co., Ltd.* (8), Buckley, J., says as follows (page 287*) :—

"An amalgamation may take place, it seems to me, either by the transfer of undertakings A and B to a new Corporation, C, or by the continuance of A and B by B upon terms that the share-holders of A shall become share-holders in B. It is not necessary that you should have a new company."

It is clear to my mind, therefore, that the use of the word 'amalgamation' in the

(5) (1898) 2 Ch. 469 at p. 478; 79 L. T. 249; 14 T. L. R. 547.

(6) (1865) 2 H. & M. 657; 13 W. R. 937; 71 E. R. 619; 12 L. T. (N. S.) 669; 144 R. R. 297.

(7) (1894) 1 Q. B. 622; 63 L. J. Q. B. 227; 9 R. 609; 70 L. T. 110.

(8) (1904) 2 Ch. 268; 73 L. J. Ch. 657; 52 W. R. 649; 91 L. T. 447; 12 Manson 76.

*Page of (1904) 2 Ch. —[Ed.]

resolution is not inaccurate and cannot possibly constitute any illegality.

As regards the objection based upon s. 203 (2), unders. 213 (5) it is provided that a special resolution shall not be invalid for the purpose of this section by reason that it is passed before or concurrently with a resolution for winding up the Company, or for the appointment of liquidators. It has been urged before us that this clause really means that it may be passed at the same meeting, but it cannot be put up in the same resolution. I am unable to accept the contention. I have no doubt that the resolution as framed was a perfectly legal resolution which it was open to the Company to accept if it was disposed to do so.

The last point is that the terms of the resolution are not in accordance with the requirements of s. 213 of the Indian Companies Act. Here again it seems to me that the objection is purely technical. It is conceded that the agreement as drawn up is proper in form, and it is clearly within the scope of s. 213. In fact it was said that it was so cleverly drawn up that appellant No. 1 could not point out any defect in the form of the agreement, so far as the requirements of s. 213 were concerned. Looking to the substance of the resolution it is clear that it was within the authority of the Company to pass it under s. 213. On this point I may refer to the following observations in *Imperial Bank of China, India and Japan v. Bank of Hindustan* (9) (page 100*):—

"I believe it would have been sufficient if the first notice had gone on and said, 'This is to be carried out under the Act;' or, even short of that, if it had given notice to the parties that it was intended to pass a resolution giving authority to the liquidators to carry out the arrangement."

In the present case we find resolution both in substance and form fulfilling the requirements of s. 213. It is true that in terms there are no words authorising the liquidators to receive compensation and distribute it amongst the share-holders; but the fact is clear, and to my mind the point is without any substance.

The next set of points relate to the meeting of July 19. Four points have been urged with reference to the proceedings at this meeting. First, it is urged

that the point of order, Ex. I, was wrongly ruled out of order; secondly, that the amendment moved by the appellant No. 1 (Ex. O) was wrongly disallowed; thirdly, that the appellant No. 1 wanted to speak on the resolution after his amendment was disallowed, but in fact he was prevented by a majority of the share holders from speaking to this resolution, and that as his right of speech is denied to him, the resolution passed at the meeting is vitiated; and, lastly, that the point of order, which he had raised with reference to the validity of the votes, was wrongly disallowed.

As regards the first point, I may mention that the point of order is long enough to puzzle any Chairman. It was a request to the Chairman to hold that the meeting was not competent to consider and confirm the said arrangement, which was *ultra vires* of the Company. I am not surprised that the Chairman simply ruled it out of order, and, in my opinion, that was the only course which the Chairman could reasonably adopt in dealing with it. It was for the share-holders to consider whether to accept or reject the resolution, and looking at this point of order it might have well formed a speech of decent length against the resolution; but as a point of order it was properly ruled out, and I agree with the learned Trial Judge on this point.

The second point is not so easy. With regard to the amendment which he proposed (Ex. O) the learned Trial Judge has upheld the decision of the Chairman on two grounds: First, according to him on a proper interpretation of s. 81 no amendment could be allowed, if a resolution proposed comes under that section. Secondly, having regard to the nature of the amendment, as it was practically a negative of the resolution, it was properly disallowed. The correctness of both these conclusions is questioned before us. As regards the first point it depends upon the interpretation of s. 81 of the Indian Companies Act. According to the decision in *Torbock v. Lord Westbury* (10), an amendment may be allowed at the first meeting, and in the case of a special resolution no alteration whatever will be allowed at the confirmatory meeting. The learned Trial Judge has doubted the correctness of this decision; but it seems to me that it is going too far

(9) (1868) 6 Eq. 91; 16 W. R. 1107.

*Page of (1868) 6 Eq.—[Ed.]

(10) (1902) 2 Ch. 871; 71 L. J. Ch. 845; 87 L. T. 165; 57 W. R. 133.

to hold that at the first meeting, when the resolution is to be considered, no amendments could be allowed. It is no doubt a possible view on a strict reading of s. 81 of the Indian Companies Act, which provides that it must be a resolution of which notice specifying the intention to propose the resolution has been duly given. It may be urged that when an amendment is moved, it ceases to be the resolution of which notice is given, and becomes some other proposal than the one contained in the resolution of which the absent share-holders would not have any notice. In spite of this consideration an amendment at the first meeting is allowed under the English Statute. In the absence of any decision to the contrary, I am not prepared to go so far as to say that no amendments could be allowed. It must necessarily depend upon the nature of the resolution and the nature of the amendment, whether it could be or should be allowed by the Chairman. Therefore I proceed to consider the second objection with reference to this point. I have already referred to this amendment. It really asks the share-holders to consider that the proposed amalgamation may be modified so as to require the entire values of the properties and assets and capital and liabilities of this Company as determined on June 30, 1923, by the Managers and Auditors of this Company and the Central Bank of India for the purposes of amalgamation be credited to the capital of the Central Bank of India without any deduction whatsoever and with the further proviso that nothing out of the said values be allowed to be carried by way of premium or otherwise to the reserve fund of the Central Bank of India. This amendment goes beyond the proper scope of an amendment which could be considered with reference to the subject-matter before the meeting. The subject-matter for consideration before the meeting was whether the particular offer made by the Central Bank of India on the conditions contained in the agreement was to be accepted by the Tata Bank or not, and they could either accept that offer or reject it. It was perfectly open to them to adjourn the consideration of this question with a view to further negotiate with the Central Bank and to see whether any counter-offer to be made by the Tata Bank would be accepted by the Central Bank. The amendment though in form

an amendment was really a counter-proposal of a different nature and in effect it involved either the adjournment of the consideration of the resolution or the rejection of the resolution proposed before the meeting. Further this amendment required that when the transfer was effected the Central Bank was to act in a particular manner with reference to the assets of the Tata Bank, so that nothing out of the said values be allowed to be carried by way of premium or otherwise to the reserve fund of the Central Bank of India. The amendment required something to be done by the Central Bank when the transfer was effected, and when the whole property of the Tata Bank became the property of the Central Bank. That would be in a sense beyond the powers of the Tata Bank to control. Having regard to the wording of the amendment it is clear that it went so far beyond the scope of the subject-matter of the resolution before the meeting, that it was clearly open to the Chairman to rule it out of order. It could not affect the position of the appellant No. 1 in any way; it was perfectly open to him if the amendment was rejected to point out that the resolution as it was framed should not be passed or that the consideration of it should be adjourned in order that further negotiations on the lines which he desired should take place. That was not rendered impossible to him by this amendment being ruled out and on a consideration of the arguments on both sides of the question, I am satisfied that the amendment was rightly ruled out. It is true that any proper amendment, which is moved by any member at a meeting, should be put to the meeting for consideration and if the Chairman rules out any such amendment, the resolution is liable to be set aside as was decided in *Henderson v. Bank of Australasia* (4).

The next point relates to the right of speech. The learned Trial Judge has found that after the plaintiff No. 1 was disappointed in his attempt to speak on two occasions, first, as regards the point of order, and, secondly, on the amendment which he moved, he really elected not to speak on the resolution and, therefore, there was no denial of the right of speech. On this point it has been urged before us on behalf of the appellants that the finding that the appellant No. 1 elected not to speak on the resolution is not justifi-

ed on the evidence in the case. It is urged that having regard to the temper disclosed at the meeting towards him, whether he was in fact prevented forcibly from speaking to the resolution though he attempted to do so, or whether under the circumstances he made a feeble and courteous attempt, which may be interpreted as an election not to speak, in substance he was prevented from speaking on the resolution. On the evidence bearing on this point, which it is not necessary to discuss in detail, I am satisfied that appellant No. 1 was practically prevented from speaking to the resolution. Even if we accept the evidence of the witness for the defendants on this point that plaintiff No. 1 just appealed to the shareholders 'Brother share-holders, will you care to listen to me,' that when they said 'no' he elected not to speak, in substance he was prevented from speaking. Having regard to the incidents that had happened already at the meeting, and to the persistent manner in which the share-holders showed their unwillingness to hear him, it may be inferred that if the appellant No. 1 had thought of speaking he would have been prevented from speaking. I should say that he was practically prevented from speaking to the resolution. On this finding the question arises whether that is sufficient to vitiate the resolution. As regards the right of speech, I may refer to the case of *Wall v. London and Northern Assets Corporation, Ltd.* (5) to which I have already referred with reference to another point. There the Court of Appeal had to consider the effect of a closure applied by the Chairman of a meeting. With reference to that the observations of the Master of the Rolls and of Chitty, L. J. are practically to the same effect. It is pointed out that the majority must not refuse to listen to the speech of a member in reasonable terms for a reasonable time, and having regard to the circumstances of that case the Court was satisfied that the closure was properly applied and that even if it resulted in negating the right of speech to a particular member, it did not vitiate the resolution. It is difficult to lay down any general rule as to what should be the result where the right of speech is denied to a member in a general meeting of the share-holders. It seems to me that the proper test to lay down is to consider the facts and circumstances of each case and to determine whether the denial of the right of

speech is sufficient to vitiate the resolution under the circumstances of that case. I may here pause to point out that those who refuse unnecessarily out of sheer impatience to listen for any reasonable length of time, to any arguments in support of the opposite views incur a grave risk in adopting this attitude of exposing the very resolution, which they may be anxious to adopt, to the scrutiny of the Court and to render it liable to be set aside. The very purpose which they may have in view may be defeated on account of such conduct. It is important that the risk involved in such conduct should be realised by those who resort to it. Apart from that question, however, we have to consider on the circumstances of this case whether the fact that appellant No. 1 was not allowed to speak to this resolution is sufficient to justify our setting aside the resolution. On that point after a consideration of the circumstances I have come to the conclusion that it is not sufficient to justify our setting aside the resolution, and I have been influenced by the following considerations.

In the case of *Parshuram Dattaram v. The Tala Industrial Bank Ltd.* (11), the question of the right of speech was considered and Mr. Justice Pratt, referring to the English case to which I have referred, held that a share-holder is not entitled to speak at a meeting as much as he pleases, but has a right to be heard in reasonable terms for a reasonable time. In that particular case that view apparently did not help the plaintiff, and the decision was against him. It is to be noted that the plaintiff No. 1 in this case is the same as the plaintiff in that case. It is material to remember that his general attitude with reference to this Bank was known to the share-holders. They were entitled to form their own opinion about his attitude. I am not concerned with the justice of that opinion: but the share-holders knew him as being ready to go against the Bank. At the meeting of July 19, with which we are directly concerned, the first thing that happened was that, after the Chairman delivered his speech and after the resolution was moved, the point of order Ex. L was handed by the appellant No. 1. This point of order, which is referred to in the minutes as extending over seven typed pages, was read at the meeting. Thus the view of the ap-

(11) 80 Ind. Cas. 75; 47 B. 915; 25 Bom. L. R. 1083 (1924) A. I. R. (B.) 102.

pellant was known to the members and the reasons for his conclusions also were known. Then we have the fact that he moved an amendment, which indicated his attitude with reference to the resolution under consideration at the meeting. That amendment was ruled out. Already one member had spoken in fact against the resolution; and it may be said that having regard to the importance of this subject, it is not unlikely that the share-holders may have informed themselves previously and formed certain opinion of their own with reference to the merits of this resolution. At the time appellant No. 1 rose to speak to the resolution they had ample means of knowing what his views were and what his side thought. Under the circumstances if the share-holders or some of them practically refused to listen to appellant No. 1, I am not prepared to hold that that by itself is sufficient to invalidate the resolution. So far as the circumstances are disclosed on this record I do not think that any speech from the appellant No. 1 could have made any difference in the resolution. No doubt it is a difficult thing to say whether a particular speech will impress the audience in the direction desired by the speaker; but having regard to the definite attitude which the majority of the share-holders maintained at the meeting with reference to appellant No. 1, as also to the fact that all that he could have said, was really said in the first point of order, which was already read to the meeting, I am satisfied that though the right of speech was denied to him at that stage the circumstance could not be accepted as affording a sufficient basis for setting aside a resolution, which represents the ascertained views and wishes of an overwhelming majority of the share-holders.

The next objection with regard to the incidents at this meeting relates to the point of order which he handed in to the Chairman regarding the validity of the votes. That point of order was in these terms:—

"Pursuant to Article 93 of the Articles of Association of the Company I challenge the validity of all the votes tendered for the resolution declared by the Chairman as having been carried and under the circumstances the Chairman do appoint the day and the time for receiving objections as to the validity of every vote tendered." The initial difficulty about this point in

the story of the appellants is that it does not appear on the record as to when it was handed in. The minutes of the meeting, which must be taken as *prima facie* evidence of what happened at the meeting, contain the following statement—

"After the close of the poll the business of the meeting was resumed and the Chairman, before declaring the result of the poll read out to the meeting a further point of order handed to him by Mr. P. D. Samdasani challenging the validity of all the votes tendered for the resolution, etc., and ruled it out of order."

Though I concede in favour of the appellants that this objection was sufficiently referred to in the plaint, I do not think there is any evidence to show that this was handed in before the poll was commenced. It is significant that we have not been referred to any evidence on the point, and it may well be that the point of order was not handed in time, at least not before the Chairman commenced to take the poll. In any case the point is left in ambiguity and assuming that the handing in of such a point of order at the proper time should have prevented the Chairman from declaring the result of the poll, it seems to me that the Court should incline more in favour of the validity of the proceedings than in favour of their invalidity, if the fact which would go to invalidate the proceedings is not established beyond reasonable doubt. I am not satisfied that it was handed in before the Chairman commenced to take the poll, and if it was handed in after that work was nearly finished it would be too late. But there is a fundamental objection to this point of order and I am satisfied that the Chairman was right in disallowing it. The amendment simply says that he objects to all the votes, it does not enable the Chairman to consider the validity of any particular vote. It is too general to be of any effect and no authority has been cited in support of the proposition which the appellant No. 1 has contended for, that the objection in this general form must be investigated and the proceedings of the meeting adjourned. I am quite unable to accept such a view having regard to Article 93 of the Articles of Association of the Bank, which runs as follows:—

"No objection shall be made to the validity of any vote, except at the meeting or poll at which such vote shall be tendered, and every vote, whether given personally

or by proxy, not disallowed at such meeting or poll, shall be deemed valid for all purposes of such meeting or poll whatsoever."

If this objection was to be raised, it should have been directed to particular votes. It seems to me that it is futile for any member to raise a general objection, without indicating the nature of the objection, and without any attempt to particularise the votes objected to. It can only be interpreted as a sort of invitation on the part of the member to adjourn the proceedings of the meeting to examine the votes over again. Under the circumstances I am satisfied that this general objection was properly disallowed.

I now come to the confirmatory meeting of August 6. The minutes of this meeting are marked Ex. Q in the case. The resolution which was adopted at the meeting of July 19 was confirmed and there is no objection so far as this confirmation is concerned. But it is urged that the appointment of the liquidators at the meeting is not valid, because there was an irregularity in accepting the final amendment to the proposal. I have already stated that the proposal to appoint two liquidators was subject to two amendments, which were duly proposed and seconded. The second amendment was lost on a show of hands. A poll was demanded. The poll was taken, but before the result of the poll was declared a new amendment was allowed to be proposed, the demand for poll and the other amendments being withdrawn. It seems to me that it was perfectly open to the meeting to adopt that course; and I doubt whether there has been any irregularity in doing so. Even if there was any irregularity it was a matter for the meeting or the Chairman to control and that irregularity has not the slightest effect, in my opinion, upon the validity of the appointment of the liquidators named at that meeting.

It is further urged that even if the appointment of the liquidators be valid the final agreement signed on August 7 is not valid because the Directors of the Central Bank had no authority to enter into such an agreement. The contention in effect is that as there was no resolution of that Company accepting this agreement the Directors would have no authority to enter into such an agreement. It is, in my opinion, an utterly futile objection. From the Memorandum of Association of the

Central Bank it is clear that the Bank had authority "to acquire and undertake the whole or any part of the banking and discount business of any person or Company carrying on any business which this Company is authorised to carry on or to amalgamate the Company's business with that of any such person or Company"; and Article 115 of the Articles of Association gives general powers to the Directors, under which it seems to me that it was perfectly open to the Directors to act on behalf of the company.

* * * * *

I would, therefore, confirm the decree of the Trial Court and dismiss the appeal with costs.

Fawcett, J.—I agree entirely with the judgment just delivered, and I shall only add a few remarks on some of the most important of the numerous objections that have been taken by the appellant to the validity of the proceedings. First of all, as regards the use of the word 'amalgamate' in the resolution and the circular, I may refer to Palmer's Company Precedents, 12th Edition, Part I, at pages 1413 to 1415 as showing that this is a popular term which has been used for many years, and which can properly be used to cover a scheme such as the present one under s. 213 of the Indian Companies Act. Secondly, as regards the form of the resolution I may point out that it follows almost word for word, with a few necessary modifications, the form No. 794 laid down in the same work for such a scheme, and, therefore, it is difficult to hold that this particular form is one that is contrary to the provisions of s. 213, or is otherwise a form open to objection. In fact the only real departure from Palmer's form is that the resolution omits saying that such and such persons are hereby appointed liquidators for the purpose of the winding up, and instead of this the notice says that the confirmatory meeting would among other matters consider the question of appointing liquidators. It seems to me that that is quite a correct change to make because, as is pointed out by the Court of Appeal in *In re Trench Tubeless Tyre Co. Ltd.*, *Bethell v. Trench Tubeless Tyre Co. Ltd.* (12), the proposed liquidators may be changed at the confirmatory meeting. That is because the appointment of liquidators

(12) (1903) 1 Ch. 403; 69 L. J. Ch. 213; 48 W. R. 310; 82 L. T. 247; 16 T. L. R. 207.

is not required to be by "special resolution," the latter being necessary only in regard to the proposed voluntary winding up of the Company and amalgamation under s. 213.

I next come to the Chairman's ruling as to the amendment proposed by the appellant No. 1. I think that amendment was rightly ruled out of order, because in effect it merely negatived the proposal before the meeting, viz., that the conditional agreement submitted to the meeting should be approved. It is a well recognised rule that an amendment should be affirmative in form, and not merely negative of something already proposed, and be in such a form that a definite decision can be arrived at: cf. *Crew's Procedure at Meetings*, 3rd Edition, page 111. Thus in the rules laid down for the conduct of business of the Bombay Legislative Council, r. 37 (2), says: "An amendment may not be moved which has merely the effect of a negative vote." See *Bombay Legislative Manual*, 1920, at page 204. The proviso proposed to be added to the resolution would necessarily involve a rejection of the conditional agreement submitted to the meeting, because the consent of the Central Bank of India would be necessary to the alterations that were suggested in this proviso, and unless and until that consent were obtained the amendment would have no effective operation. It was not a practical proposition that the agreement should be approved subject to this particular proviso, and there would, therefore, be no definite decision on the matter before the meeting. I may in this connection refer to the case of *Wall v. London and Northern Assets Corporation, Ltd.* (5). It will be seen from the report at page 472* that a somewhat similar amendment was proposed at a confirmatory meeting in that case, viz., that the following be added to the resolution 'subject to the purchaser agreeing to allow any individual or any body of dissentient share-holders to have their share of the assets agreed to be sold in lieu of the London and Northern Debentures shares due to them.' That amendment involved that the purchaser, as here, should agree to a certain change but the Chairman ruled the amendment out of order and moved that the resolution should be confirmed. This was objected to in the arguments before the Court of Appeal. Lindley, M. R. (at page 480*) summarily dismissed the objection as being a point with which the Court had nothing to do.

Chitty, L. J. (at page 483*) mentions this refusal of the Chairman to put the amendment at the meeting, and says:—"His refusal, in my opinion, was right, because that meeting was called for one purpose only, and that was to confirm or reject the original resolution which had been passed, and any amendment would be wholly irrelevant, because the single purpose of the meeting was to say Aye or Nay, is the original resolution to stand or fall?" I quite recognise that this relates to an amendment proposed at a confirmatory meeting, and not to one proposed at the first meeting, but I think that logically the same reasoning applies to the latter case with some slight alterations, viz., that the one purpose for which this meeting was called was to confirm or reject the particular agreement submitted to the meeting, and an amendment of the kind proposed was inadmissible in view of that particular object. I think that at the most all that could be moved was to adjourn the meeting in order to enable the Directors to enter into further negotiations with a view to the suggested alteration of the conditional arrangement between the two Companies. No doubt in *Palmer's Company Precedents*, Part I, at pages 668-9 a reference is made to *Wright's case, In re London and Mediterranean Bank* (13) These remarks at first sight seem to support the propriety of an amendment of this kind, suggesting modifications in the conditional agreement, provided such modifications were not more onerous on the Company; but if the report of this particular case be referred to, it will be clearly seen from pages 338, 339 and 340 that the modifications there referred to were not modifications of the actual agreement that was put to the meeting, but modifications, connected with the agreement but in regard to matters which were entirely independent of the consent of the other party to the agreement, for they referred to the second and third resolutions mentioned in that report, which dealt with certain arrangements dependent merely on the approval of the share-holders of the Company. It seems clear, therefore, that this is not a case, which really supports the contention of the appellants that the amendment was improperly ruled out of order.

The next serious objection taken in this appeal is the alleged denial of appellant

(13) (1871) 12 Eq. 331 at p. 341.

No. 1's right of speech at the first extraordinary general meeting. On this point I agree entirely with what has been said by my learned brother. The Court has a discretion as to whether it should, or should not, grant a declaration or an injunction of the kind sought in this suit under ss. 42 and 54 of the Specific Relief Act of 1877, and the plaintiffs are not entitled to such a declaration or injunction merely because of an irregularity of the kind that is under consideration. Of course that discretion must be exercised on accepted judicial principles, but it is a case where we have English decisions to guide us, and these show that the Court should not interfere on the ground of an irregularity in the case of acts which are valid if done with the approval of the majority of share-holders, unless the acts complained of are of a fraudulent character or are *ultra vires*. In the present case, I think it is important to bear in mind that there are special circumstances, which at any rate give an insight into the point of view of the majority of the share-holders, who refused to hear appellant No. 1. We have his admission, that he used to be in the employ of the Tata Bank and was dismissed by them in 1922. Then we have the case to which appellant No. 1 himself drew our attention, *viz.*, *Parshuram Dattaram v. The Tata Industrial Bank, Ltd.* (11) from the report of which it appears that the appellant No. 1 brought a suit against the Company in regard to a general meeting held on May 1, 1923, at which he objected to the accounts and the Directors' report submitted to that meeting and wanted to have a committee of inspection appointed to examine them. Then the point of order that he drew up clearly shows that he was objecting to the whole meeting on the ground that it was illegal. It certainly shows a spirit of obstruction and non-co-operation rather than a *bona fide* effort to help towards a satisfactory solution of the difficulties that confronted the Company; and in these circumstances, the majority of the share-holders may have thought his action was not *bona fide* and he would thereby waste their time in bringing reckless charges against the Directors and arguing in support of the views contained in his point of order. I think these facts should be taken into consideration in determining whether we should or should not interfere with the resolution on this particular ground. Another point to be borne in mind is that appellant No. 1 might

have persisted in trying to speak, and if he had done so might possibly have succeeded. Such a result is not unknown in political meetings. Finally we have the fact that he had a further opportunity of putting forward his objections to this agreement at the confirmatory meeting held in August, but he did not attempt to avail himself of that opportunity. I, therefore, agree with my learned brother that this is not a case where we should hold the resolution invalid because the appellant was prevented from speaking.

As regards the objections to the appointment of the liquidators at the meeting in August, the learned Judge below has held that there was an irregularity on the reasoning of the judgment in *Reg. v. Roberts* (14) but, if that case is looked at, it will be seen that it contemplates a succession of amendments before the result of the poll is known, so that there would be no finality to the meeting. That is an argument *ab inconvenienti* which does not apply to the present case, because there was a settlement of the dispute about the persons who should be appointed liquidators, and hence it resulted in finality. The argument based on inconvenience thus falls to the ground, and, in my opinion, there is nothing in law which makes such a compromise illegal or invalid, even at the stage at which it was arrived at in this particular case. The case is analogous to one where the Court is about to deliver judgment, or even in the act of delivering judgment where it is still open to the parties to come to a compromise, at any rate before the judgment is finally delivered. I have already referred to the case of *In re Trench Tubeless Tyre Co. Ltd., Bethell v. French Tubeless Tyre Co. Ltd.* (12) which is ample authority for the view that the liquidators proposed at the special meeting could be changed or added to, as was done in this case. Under sub-s. (3) of s. 83 of the Indian Companies Act, 1913, the appointment of these liquidators is deemed to be valid, until the contrary has been proved. This has not been done, and this objection, therefore, fails.

In conclusion, I would only say that I agree entirely with my learned brother in regard to the objection taken about the poll. As to the objections based on the

(14) (1863) 3 B. & S. 495; 32 L. J. M. C. 153; 7 L. T. 822; 11 W. R. 362; 129 R. R. 429; 122 R. R. 186.

alleged misconduct of the Directors, I may refer to *In re Irrigation Company of France; Ex parte, Fox* (15), where it is pointed out that a case of fraud or over-bearing influence is necessary to justify interference by the Court. Here it is quite clear that there is no indication of the Directors getting any secret profit, and the conditional agreement provided for their not getting any compensation for loss of office. I think there is no substance in the objections which the two appellants have raised to the validity of the resolution, and that, therefore, the appeal should be dismissed with costs.

Shah, Actg. C. J.—As regards costs, we confirm the order of the lower Court, but we order that there will be only one set of costs in appeal.

K. S. D. *Appeal dismissed.*
(15) (1871) 6 Ch. App. 176 at p. 186; 40 L. J. Ch. 433;
24 L. T. 336.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 401 OF 1922.

February 12, 1925.

Present:—Mr. Justice Odgers.

SIVASWAMI IYER—PLAINTIFF—
APPELLANT

versus

TIRUMUDI CHETTIAR AND OTHERS—

DEFENDANTS NOS. 1 TO 4—RESPONDENTS.

Hindu Law—Will—Construction—Brahmins to be fed from income of property—Dedication of corpus—Trust.

Where a Will provided that the testator's nephew "shall enjoy permanently" certain property and with its income shall feed not less than 10 *brahmins* and that after him his younger brother shall conduct the charity:

Held, that as the word "enjoy" was not restricted to a life-estate, the words "shall permanently enjoy" gave the nephew a fee simple, that there was no dedication of the corpus and that consequently the property was not constituted as trust for the purpose of the charity. [p. 591, col. 1.]

Second appeal against a decree of the Court of the Additional Subordinate Judge, East Tanjore at Mayavaram, in A. S. No. 30 of 1921, preferred against that of the Court of the Additional District Munsif, Tiruvalur, in O. S. No. 136 of 1919.

Mr. K. Bashyam Iyengar, for the Appellant.

Mr. C. A. Seshagiri Sastri, for the Respondents.

JUDGMENT.—This was a suit for a declaration that a certain mortgage dated 14th December 1903 executed by one Venkatarama Iyer deceased in favour of one Satayyappa Chetti, and the decree in O. S. No. 472 of 1916 on the file of the District Munsif's Court of Mayavaram obtained thereon were not binding on the trust properties and for an injunction restraining the defendants Nos. 1 to 3 from executing the said decree against the trust. It is contended that the plaint properties originally belonged to the plaintiff's maternal uncle Panchanadha Iyer and that by his Will dated 8th January 1898 he created a trust. This Will is Ex. A in the case and its construction is the first point raised.

The first defendant contended *inter alia* that Venkatarama Iyer got the properties as heir and not as trustee under the Will, i.e., that he took the properties as the beneficial owner burdened with a trust to perform the charity therein mentioned. The District Munsif gave the plaintiff the declaration that he asked for. On appeal the Subordinate Judge has held that the suit was barred by limitation, under Art. 134 of the Limitation Act. In this he is clearly wrong and it is argued by both sides that the matter is concluded by the ruling in *Mulla Vittil Seeti Kutti v. Kunhi Pathumma* (1). On the construction of the Will, both Courts held that the Will is genuine and that the suit properties were not dedicated to charity but only the income thereof. Turning to Ex. A the words are: "Deducting these, the balance of 7 *mahs* and 25 *kuzhis* of *nanja* and *punja* lands my nephew Venkataraman shall permanently enjoy and with the income derived out of those lands and with the income of the interest of Rs. 500, the capital I have reserved for the purpose the said Venkataraman is to be feeding at least 10 *brahmins* on each *dwadasi* in his house at Mayavaram * * * For ever, the said Venkataraman shall by himself get all these done, and after him, Sivaswami, his younger brother should conduct them." This is the important portion of Ex. A and I have had it re-translated by the Chief Interpreter and his translation is as follows:—"Barring these, the remaining wet and dry lands measuring 7 *mahs* and 45 *kulis*, my sister's son Venkataraman shall enjoy permanently, and, with the income of the said land and with the interest derivable from the capital

(1) 43 Ind. Cas. 31; 40 M. 1040; 33 M. L. J. 320; (1917) M. W. N. 609; 22 M. L. T. 236; 6 L. W. 464.

amount of Rs. 500 kept by me therefor, the said Venkatarama Iyer shall, on every *dwadesi* day, feed not less than 10 *brahmins*, in Mayavaram, at his own house according to his pleasure." In the last sentence the more accurate translation is "For ever the said Venkataramier having by himself get all these done, after him Sivaswami, his younger brother should conduct them."

Mr. Bhashyam Iyengar for the appellant points out that as there is no disposition of the surplus income in this case, that is a strong indication that the whole property was devoted to the trust and that the trust is not merely a charge. He quoted a number of cases, but they really all come down to this that each case must stand on its own footing and on the construction of its own document. He relied among other cases of *Vaithinatha Aiyar v. Theyagaraja Aiyar* (2) which laid down that a gift of the whole income was equivalent to a gift of the corpus. But I am not satisfied that the whole income is necessarily to be devoted to the charity in this case. He has to feed not less than 10 *brahmins* at Mayavaram at his own house according to his pleasure supposing the income were sufficient to feed 20 or 30 *brahmins* the trust would be adequately carried out by his feeding only 10. There would then be a surplus income which I construe Ex. A, would be to do as he likes with as it is said that he shall permanently enjoy the *nanja* and *punja* lands. This is a Will; and in *Raja Manicka Chettiar v. Manikam Chettiar* (3), I had occasion to examine the meaning of the word "enjoy" in a Hindu Will. Of course, as I have already said, each case must stand on its own facts. But it seems to me that there is nothing in the document before me at present to restrict the word "enjoy" to either a life-estate in the lands or to the income thereof. I, therefore, think that the words "shall permanently enjoy" gave what in the English Law we would call a fee simple to Venkatarama Iyer. It is also to be observed that there is no disposition of the corpus after Venkataraman's death and after him Sivaswami, his younger brother, is only to conduct the charities. There is, to my mind, nothing to show, as I have pointed out above, that the whole income of the land is

necessarily to be devoted to this feeding and even if this were so, I think the words do not mean a dedication of the corpus. Taking these points into consideration, I am of opinion, that the Subordinate Judge was right in coming to the conclusion that the properties were not constituted as trust for the purpose of the charity. No further question arises in this view of the case. I am, therefore, of opinion that the second appeal must fail and is accordingly dismissed with costs.

V. N. V.

S. D.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2323 OF 1922.

March 31, 1925.

Present:—Justice Sir Ewart Greaves, Kt., and Mr. Justice Cuming.

JOGESH CHANDRA GHOSE

AND ANOTHER—DEFENDANTS NOS. 1 AND 2
—APPELLANTS

versus

Sreemutty CHAPALA SUNDARI

BASU AND ANOTHER—PLAINTIFFS—
RESPONDENTS.

Hindu Law—Alienation—Necessity, proof of—Extent of money required for necessity—Knowledge of lender—Money spent on building house required for education of children, whether spent on necessary purpose.

Where money is borrowed on the security of family property for a necessary purpose it is difficult for the lender to know the exact extent of the legal necessity in respect of which he advances the money, and where it is found that all the facts were not within the lender's knowledge the test to be applied to his case must necessarily be less strict than that which would be applicable if all the facts surrounding the alienation and of the necessity therefor were within his knowledge. [p. 596, col. 1.]

Money spent on erecting a house, the building of which is necessitated by the educational requirements of the children of the alienor, cannot be said to have been spent for legal necessity. [*ibid.*]

Appeal against a decree of the Second Additional District Judge, Dacca, dated the 7th of June 1922, reversing that of the Subordinate Judge, Fifth Court of that District, dated the 26th of February 1920.

Mr. Sarat Chandra Ray Chaudhry and Babu Rajendra Chandra Guha, for the Appellants.

Babus Brojolal Chakraborty, Suresh Chandra Taluqdar and Mohendra Kumar Ghose, for the Respondents.

(2) 68 Ind. Cas. 631; 41 M. L. J. 20 at p. 29.

(3) 84 Ind. Cas. 902; 20 L. W. 672; 47 M. L. J. 723; (1925) M. W. N. 120; (1925) A. I. R. (M.) 254.

JUDGMENT.

Greaves, J.—This is an appeal by defendants Nos. 1 and 2 against a decision of the Second Additional District Judge of Dacca, reversing a decision of the Subordinate Judge of the Fifth Court. The suit was brought to enforce a mortgage executed by one Sarat Kamini Ghose. At the time the suit was brought Sarat Kamini had died and the defendants-appellants are her sons who inherited the estate as reversioners. The mortgage was dated the 29th *Sraban* 1316, and the principal mortgage sued upon was one for Rs. 857 and 8 annas the claim in the suit with interest amounting to Rs. 1,747. The interest of the mortgagor Sarat Kamini was derived from her mother Barada Sundari. Barada Sundari's husband Brojo Kishore Raha died leaving a Will whereby he provided that his wife Sreemutty Barada Sundari should be the sole proprietor having power of gift and sale of the properties he left behind him after his death and the Will further provides that so long as she would be living no one would have any right but that his daughter and his son-in-law Kedareshwar Ghose, who is described in the Will as *ghar-jamai* should be maintained in the family. The Will goes on to give a life-interest after the death of Barada Sundari to Sarat Kamini. But the construction put upon the Will by the Courts below is that Barada Sundari got an absolute interest in the properties and consequently the subsequent gifts were of no avail. I am not prepared to say that this construction is wrong though I think that something may be said looking at the Will as a whole for holding that Barada Sundari's interest in the properties was merely for life and that after her death her interest devolved upon Sarat Kamini. Be that as it may, I am not prepared to quarrel with the finding of the Courts below that Barada Sundari's interest was an absolute interest and that consequently, the estate of Sarat Kamini was the estate of a Hindu daughter. The First Court decreed the suit but did not decide the question of legal necessity. The case was remanded for this purpose by the lower Appellate Court and that Court decided that there was no legal necessity and refused, therefore, to pass a mortgage decree and passed a decree only in respect of the money advanced. On appeal to the District Judge, he has passed a mortgage decree holding that there was legal necessity. He

says 'I am of opinion, that defence witness No 2 proves beyond question that the money was borrowed for legal necessity and that in fact the respondents profited by the loan. As I have already stated the children of Sarat Kamini were reversioners entitled after her decease.

Three points have been urged before us in this appeal. The first is, that the plaint does not disclose that the estate which Sarat Kamini had was that of a Hindu daughter and, therefore, as the case is based on a mortgage by an absolute owner the suit should fail entirely. Secondly, it is stated that as the learned Judge disbelieved the plaintiffs' evidence as to legal necessity, namely, that the money was advanced to pay arrears of rent and for expenses of the estate he should not have held that legal necessity was established from the evidence of one of the defendants' witnesses and consequently, the suit should have been dismissed on the ground that legal necessity had not been established by the plaintiffs' witnesses. The third point urged is that the money was not in fact advanced for legal necessity. It is stated that on the evidence Rs. 259 was advanced to build a house for Sarat Kamini's husband at Mawa and that that cannot be deemed to be a legal necessity. Then it is stated that a further sum of Rs. 200 was advanced for expenses of the family at Dacca and it is stated that this is not legal necessity....the test being whether there was any obligation on the last absolute owner Barada Sundari to maintain the children of Sarat Kamini and it is stated that as there was no such obligation the advance of Rs. 200 which was expended in maintaining the family does not fall within the doctrine of legal necessity. Thirdly, it is stated that as to Rs. 146 out of the advance this money was used to pay the *shradh* expenses of the husband of Sarat Kamini. We do not think that this is correct and this money seems to have been expended like the Rs. 200 for the expenses of the family at Dacca.

So far as the first point is concerned, we do not think that the plaintiffs are precluded from succeeding by reason of the fact that they did not state that Sarat Kamini was a limited owner. After all, this was a question to be raised by the defendants in their defence and I cannot say that they have been prejudiced in any way by the plaintiffs' pleading and there does not seem to me any substance in this point.

Then as regards the second point as the learned Judge in the Court below points out it is somewhat difficult for a lender to know the exact extent of the legal necessity in respect of which he advanced the money and different considerations apply in a case of this kind than would be applied in a suit when everything is within the plaintiffs' knowledge. We agree with this view of the learned Judge and we do not think that in this case it is possible to apply the strict test that would be applied if all the facts were necessarily within the plaintiffs' knowledge.

The third point is really the crux of the suit. It appears that out of the advance of Rs. 857 for which the mortgage was executed after several prior mortgages, and which must have included the interest as well, Rs. 346 was expended as expenses of the family at Decca. I am not prepared to say that the expenditure of this amount, provided, as has been found, it was necessary for the maintenance of the children does not come within the doctrine of legal necessity. The learned Advocate who appeared for the defendants set up an extreme position that the children should be allowed to starve because it was not within the doctrine of legal necessity that their mother should maintain them if there was no obligation on the last owner to do so. I do not think that this doctrine is correct. In my opinion, having regard to the findings of the learned Judge and the facts I have already stated the money expended for the family at Dacca and elsewhere comes within the doctrine of legal necessity. But I am not prepared to so hold with regard to the house. It seems to me that it would be a considerable extension of the doctrine to hold even if it was necessary for the purposes of education of the children, that the money advanced for building the house at Mawa falls within the doctrine of legal necessity. It is not necessary to decide and we do not decide whether any educational expenses for the children or money expended for placing them in life come within the doctrine of legal necessity. But we do not think that the money expended for building the house at Mawa, assuming that at the time it was built it was necessitated by educational reasons, comes within the doctrine of legal necessity. We do not think that this portion of the mortgage-decree can stand.

For the reasons, therefore, which we have

indicated the appeal succeeds in part and fails in part. We disallow the sum of Rs. 259 expended for building the house at Mawa and the rest of the money advanced on the mortgage will stand. The matter must, therefore, go back to the lower Appellate Court in order that that Court may calculate what portion of the decretal amount represents to interest on Rs. 259 which we have disallowed and when this is done the decree will stand for the balance, that is to say, for the balance less the sum of Rs. 259 and the decretal amount which represents the interest thereon...and so far as Rs. 259 is concerned, the only decree will be a decree against the defendants in respect of any assets of their mother in their hands. I mean by the word 'Assets' assets apart from the money in respect of which she had the interest of a Hindu daughter.

We make no order as to costs in this appeal.

Cuming, J.—I agree.

Z. K.

*Appeal allowed;
Case remanded.*

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

June 29, 1925.

Present:—Lord Phillimore, Lord Carson and Sir John Edge.

HOMESHWAR SINGH AND OTHERS—
APPELLANTS

versus

JUGAL KISHORE MARWARI AND
ANOTHER—RESPONDENTS.

*Contract, construction of—Non-performance—
Termination of contract.*

The material portion of a contract to cut sleepers by the second party from the jungle of the first party was as follows:—"We, the second party, shall during the term each year from the month of Kartik up to the end of Asarh, get 15,000 sleepers of every measurement prepared every month, and shall, after they are counted according to the contract, pay to the first party the price thereof according to the rates mentioned above, without any objection. To this neither we, the second party, nor our representatives shall raise any objection. If we do so the first party shall be competent to cancel this deed and stop the cutting of the trees in the lands specified below without waiting for the expiry of the term of this agreement.... Let it be known that we, the second party, will have to prepare 1,35,000 (one lakh and thirty-five thousand sleepers of different measurements every year during the nine months from Kartik to Asarh, in accord-

ance with the terms specified above. If, through negligence on the part of us, the second party, we fail to prepare so many sleepers no plea regarding deficiency in the number of sleepers, put forward by us, shall be entertained and we, the second party, shall be held liable to pay on demand, the price of the entire number of one lakh and thirty-five thousand sleepers to the first party. Without paying in full the price of the sleepers that will be got ready every month and obtaining receipt therefor, the second party will not be entitled to cut trees or prepare sleepers in the succeeding month. In that case, on the expiry of the said succeeding month, I, the first party, shall be competent to bring the trees mentioned in the schedule given below in my direct possession and to stop the cutting of the trees, without waiting for the expiry of the term of this agreement." The second party failed to cut 15,000 sleepers during the first month or to pay for them, and the first party terminated the contract. The second party sued for damages:

Held, that the claim must fail, as upon a consideration of all the terms of the contract, the first party was, under the circumstances, within his rights to determine the contract. [p. 600, col. 1.]

Messrs. *L. De Gruyther* and *S. Hyam*, for the Appellants.

Messrs. *A. M. Dunne*, *K. Brown* and *L. D. McNair*, for the Respondents.

JUDGMENT.

Lord Phillimore.—This case turns upon the construction of a contract made between a land-owner in the District of Bhagulpore, the deceased father of the appellants in the main appeal, and two persons interested in the purchase of timber whom it will be convenient to call the contractors.

By this contract, made on the 23rd May 1915, the land-owner sold to the contractors the right of cutting 5 lakhs sleepers to be cut from Sakhua trees in the land-owner's jungle. The sleepers were to be in defined quantities of six different dimensions—the longest 12 feet in length and the shortest 3 feet—with varying differences in breadth and thickness, and valued at separate prices.

The whole were to be cut before June 1919, so that there was a period of four years for performing the contract. But it was in contemplation, as the contract shows, that 15,000 sleepers would be cut each month during the nine dry months of the year and 1,35,000 at least a year, the contractors also undertaking to do their best to cut some sleepers during the three wet months.

The contractors made a deposit of Rs. 6,000 which was about the equivalent of the average cost of 30,000 sleepers or two months' production.

The nine dry months began in the month of *Kartik* which runs from the 23rd October

to the 21st November. Before this month the contractors had cut 187 sleepers, but in the first month instead of cutting 15,000, they only cut 1,055. In the second month they cut 3,432, and the whole number they cut before they were finally stopped was less than 9,000.

The contractors put forward for an excuse for their delay that land-owner had promised to provide a sawing machine, but both Courts decided that this excuse was not established.

On the 22nd December the second month had elapsed, and on the 23rd the land-owner gave notice to determine the contract and stop further cutting.

On the same day the lawyer for the contractors wrote that they were willing to pay the price of 30,000 sleepers, and they followed it up by a letter of the 31st which purported to be a reply to the land-owners' notice of the 23rd.

This attempt of the contractors to put forward their letter of the 24th as containing an offer made before the letter of cancellation reached them, failed in the view which both Courts took of the evidence, and it stands that upon the failure to produce 15,000 sleepers in the course of the first month, the land-owner determined the contract; and the sole question is whether in doing so, he was within his rights.

The contractors insisting that the contract had been improperly determined, brought this action on the 30th April 1916, claiming Rs. 6,17,876 as damages.

The Subordinate Judge dismissed the action, but intimated that if the action had lain, the damages in his view would have been Rs. 6,00,000.

The High Court at Patna reversed this judgment and declared that there had been a breach of contract, but considered the damages claimed excessive and awarded Rs. 2,00,000 only. Both parties have appealed from this decision.

The matter turns upon three paragraphs in the contract, Nos. 3, 5 and 6 and the translation of them is as follows:—

"3 We the second party, shall during the term each year from the month of *Kartik* up to the end of *Asarh*, get 15,000 sleepers of every measurement prepared every month, and shall, after they are counted according to the contract, pay to the first party the price thereof according to the rates mentioned above, without any objection. To this neither we, the second party,

nor our representatives shall raise any objection. If we do so the first party shall be competent to cancel this deed and stop the cutting of the trees in the lands specified below without waiting for the expiry of the term of this agreement. Be it noted that during the term (of the lease) every year from the month of *Sravan* to the end of *Aswin*, we, the second party, shall try our best to cause as many sleepers of different measurements prepared as possible and after getting them counted according to the contract pay the price thereof in accordance with the rates mentioned above, to the first party on taking receipt therefor. The second party shall, on no account without sufficient reason willingly stop the preparation of sleepers during these three months. Let it be known that we, the second party, will have to prepare 1,35,000 (one lakh and thirty-five thousand) sleepers of different measurements every year during the nine months from *Kartik* to *Asarh*, in accordance with the terms specified above. If, through negligence on the part of us, the second party, we fail to prepare so many sleepers no plea regarding deficiency in the number of sleepers, put forward by us, shall be entertained and we, the second party, shall be held liable to pay on demand, the price of the entire number of one lakh and thirty-five thousand sleepers to the first party.

"5. The sleepers, which we the second party, shall get ready shall be counted every week on behalf of the first party and seals and numbers shall be put on behalf of the first party. If this work cannot be managed to be done every week it should be done every month. But the second party shall, on no account, be entitled to take away the sleepers after they have been counted sealed and numbered, unless they have paid the price thereof. The second party shall obtain receipt for whatever money they pay for the sleepers from the manager of the first party. No plea of payment without receipt shall be entertained. If, through negligence the sleepers may not be counted, sealed and numbered on behalf of the first party the second party shall be at liberty to serve a formal notice on the first party giving two weeks' time, and it shall be incumbent on the first party to get the sleepers counted, sealed and numbered within the period of the notice issued by the second party and the second party

shall have to wait till then, but such delay shall not exceed more than two weeks after the expiry of the period fixed under the notice. If this be not done the second party shall then have the power to enter the measurement and number of sleepers in their own papers and take away the same and I, the first party, shall be entitled to get the price of the sleepers according to the entries made in the papers of the second party.

"6. Without paying in full the price of the sleepers that will be got ready every month and obtaining receipt therefor the second party will not be entitled to cut trees or prepare sleepers in the succeeding month. In that case, on the expiry of the said succeeding month, I, the first party, shall be competent to bring the trees mentioned in the schedule given below in my direct possession and to stop the cutting of the trees, without waiting for the expiry of the term of this agreement, and if in such circumstances, I, the first party, be put to any loss through some act on the part of the second party, the second party shall be liable to pay compensation for the loss to me, the first party, and the sum of Rs. 6,000 in deposit will be forfeited."

The early part of cl. 3 would appear at first blush to contain a definite contract by the contractors to cut 15,000 sleepers during each month of the nine obligatory months. Indeed, the contractors in their plaint use the words "the stipulated number of 15,000 sleepers", and again "the stipulated minimum number of sleepers". But it is suggested on behalf of the contractors either that the latter part of the clause shows that there was no such obligation, and that these figures are to be considered as directory only or hortatory only and not compelling or that a breach of this particular covenant would not go to the root of the contract.

It is not quite clear upon which ground the High Court relied in deciding for the contractors. Perhaps the learned Judges relied upon both. The view which they seem to have taken is that the latter part of the clause supersedes the earlier, inasmuch as it substitutes a duty to prepare nine times 15,000 by the end of the year (or at least to pay for them if not prepared) for the duty in the earlier part of the clause to provide 15,000 per month.

The clause is not well drawn, but in

their Lordships' view the right way to read it is that the two provisions are cumulative and not mutually exclusive. If for some reason which the land-owner is willing to accept, a month passes without the stipulated tale of sleepers having been cut, he has, though he waives his right for that month, not lost the right to insist that by the end of the nine months the deficiency should be made up.

If then there is a positive obligation on the contractors to cut, to tender for counting, and when counted to pay for 15,000 sleepers a month, what is the land-owner's remedy for a breach of this obligation? To sue for the price of 15,000 sleepers, though they have not been cut? That remedy is reserved for cases where there has been a failure in the nine months total.

Their Lordships have been invited by Counsel for the respondents to put a reasonable construction on the contract, and it would be unreasonable if there were no remedy for the failure to make periodic payments. It would be reasonable if the land-owner could treat such a breach as going to the root of the contract, and this seems to be provided for by cls. 3 and 6 combined.

Reliance was placed by Counsel for the respondents upon the use of the word "objection". It was said that this word conveyed the idea that the contractors must positively refuse to discharge their duty before the land-owner's right to cancel arose. But it had to be admitted that if the contractors refused to pay for cut and counted sleepers, at any rate after a demand for payment, that would be an "objection" which would entitle the land-owner to cancel.

Under cl. 3, therefore, there is a right to cancel for non-payment for the monthly tale of sleepers; but the time within which payment is to be made is not specified. This is provided for by cl. 6, which follows upon the provisions as to counting contained in cl. 5. Each payment is to be made in the "succeeding month". So strict is this provision that the contractors have no permission to cut in the succeeding month till the sleepers of the preceding month have been counted (an operation which need not take long) and paid for.

If in that succeeding month the sleepers of the preceding month have not been paid for, the right to cancel arises.

All this cannot be denied. But it is said that the contractors can avoid all their obligations and keep the contract alive for four years by merely cutting a nominal amount of sleepers every month, tendering them for counting and paying for them when counted.

As to this the Subordinate Judge well observes:—

"The document cannot be construed as meaning that the plaintiffs might prepare 1 lac and odd in the course of the year and pay for the same at the end of it. If this construction were valid, then the words in cl. 6 that the plaintiffs would not be entitled to cut trees and prepare sleepers in a succeeding month without paying for the sleepers of the previous month become meaningless."

Some observations were made by the Judges in the High Court upon the failure of land-owner to respond to the various applications which were made to him to have a count of the sleepers already prepared; but, as each of these applications admitted that the proper number of sleepers had not been prepared, there was no obligation on the land-owner to have a count. The duty of the contractors was to tender the full tale of sleepers due from them, and no count could be required till they were ready with this.

No doubt the land-owner must count before he requires payment; but the first duty lies with the contractors to supply sleepers for counting.

Counsel for the respondents contended that the land-owner was really claiming to treat the failure to cut as the cause of cancellation. To this the land-owner's answer would be that it was immaterial to him whether the sleepers were cut or not, as long as the sleepers were paid for, but that it does not lie in the mouth of the contractors to say that they have not cut the sleepers, inasmuch as they were bound to have cut them.

The sleepers "that will be got ready every month" are the covenanted 15,000. Unless they are tendered for counting and paid for when counted the land-owner can use his remedies under cl. 6; and this is what he did.

Counsel for the respondents boldly said that if the contractors failed to cut, the land-owner had no remedy under cl. 6. This was the necessary result of his argument, but their Lordships cannot accept it.

Upon the whole their Lordships would humbly recommend His Majesty that this appeal should be allowed, and the cross-appeals dismissed, and that the judgment of the Subordinate Judge should be restored with costs here and below. The costs of a petition presented on behalf of the respondents should be costs in the appeal.

N. H.

Appeal allowed.

Solicitors for the Appellants:—Messrs. Borrow, Rogers and Nevill.

Solicitors for the Respondents:—Messrs. Morgan, Price and Co.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION

No. 304 OF 1923.

June 23, 1925.

Present:—Sir Norman Macleod,
Kt., Chief Justice, and Mr. Justice
Coyajee.

N. H. MOOS—PETITIONER

versus

ABDUL HUSAIN MULLA TYEBALLI—
OPPONENT.

Receiver—Suit against legal representatives of deceased to recover money—Receiver, whether necessary party—Decree, whether can be granted against Receiver—Procedure.

Where a money suit is filed against the heirs of a deceased person, whose estate is in the hands of a Receiver, the Receiver has nothing to do with the satisfaction of the claim, and all that the Court can do is to pass a decree in favour of the plaintiff against the defendants, as the legal representatives of the deceased. The fact that the plaintiff has obtained an order from the Court which appointed the Receiver granting him leave to add the Receiver as a party to the suit does in no way affect the question whether the Court which hears the suit can grant relief against the Receiver. If the decree obtained by the plaintiff against the heirs of the deceased is not satisfied and the plaintiff wishes to execute it against the estate of the deceased, he must go to the Court which appointed the Receiver for permission to attach the estate of the deceased in the hands of the Receiver. The Receiver is not a necessary party in a suit to decide whether the plaintiff is entitled against the legal representatives of the deceased to recover money which he had advanced to the deceased in his lifetime. [p. 600, col. 2; p. 601, col. 1.]

Application against a decision of the Chief Judge and Judge of the Presidency Court of Small Causes, at Bombay, in Suit No. 3860 of 1923.

Mr. G. N. Thakor, for the Petitioner.

JUDGMENT.—This is an application in revision by Mr. Moos, who was appointed

Receiver by an order of the High Court for administering the estate of one Kadarbhai Issaji now deceased. The plaintiff filed a suit in the Small Causes Court, Bombay, against the heirs and legal representatives of the deceased owner of the estate. He added the Receiver as a party to the suit and obtained *ex parte* leave from the High Court to sue the Receiver. It should have been obvious that no relief could have been granted against the Receiver in a suit filed in the Small Causes Court. When the suit came up for hearing the Judge passed a decree against defendants Nos. 2 to 8, who were the heirs of the deceased, and dismissed the suit against the Receiver. The plaintiff then appealed to the Full Court, praying that the dismissal of the suit as against the petitioner might be set aside, and a decree for the amount claimed passed against him. The Full Court delivered judgment setting aside the order of dismissal and passing a decree against the Receiver as prayed.

That would appear at first sight to be a very strange decision on the part of the Full Court. The grounds for passing a decree against the Receiver are as follows:—

“The Receiver was sued with the leave of the Court which appointed him. He was a necessary party as plaintiff wanted the property in his possession, *i.e.*, the assets in his hands to be made available for the satisfaction of his claim. The High Court in granting leave must have considered this aspect of the case, and if he is a necessary party, the suit as against him cannot be dismissed. The two cases of *Jatindra Nath v. Sarfraz Miah* (1) and *Banku Behary Dey v. Harendra Nath Mukherjee* (2) are explicit authorities on the point, and they decide that when the Receiver is made a party after leave to sue him has been obtained, the suit as against him cannot be dismissed; the property in his charge is directly sought to be affected.”

Where a money suit is filed against the heirs of a deceased party, whose estate is in the hands of a Receiver, the Receiver has nothing to do with the satisfaction of the claim, and all that the Small Causes Court could do would be to pass a decree in favour of the plaintiff against the defendants, as the legal representatives of the deceased. The fact that the plaintiff ob-

(1) 6 Ind. Cas. 214; 14 C. W. N. 653.

(2) 8 Ind. Cas. 1; 15 C. W. N. 54.

tained an *ex parte* order from the High Court granting him leave to add the Receiver as a party does not in any way affect the question whether the Court which hears the suit can grant relief against the Receiver. That question would have to be decided on the merits and clearly no decree could be passed against the Receiver. If the decree against the other defendants was not satisfied, and the plaintiff wished to execute against the estate, he would have to go to the High Court for permission to attach the estate of the deceased in the hands of the Receiver.

It is further remarked in the judgment of the Third Judge that—

“the Receiver is the representative for the persons who may ultimately be found legally entitled to the property and as such is a necessary party to the suit. In any event no injustice could be caused to the estate as any decree passed herein would have to be executed against the Receiver only with the leave of the Court that appointed the Receiver.”

That, with all due respect, is an argument vitiated by a very patent fallacy. If a party makes a claim for money due by a person who is dead against his representatives, then he can only get a decree against the representatives, to the extent of the assets in their hands, and if the estate is not in their hands, but in the hands of a Receiver, the plaintiff will have to go to the Court that appointed the Receiver, in order to attach the property in his hands. But by no possible conception could the Receiver be a necessary party in a suit to decide whether the plaintiff was entitled against the legal representatives of the deceased to recover money which he had advanced to the deceased in his lifetime.

The rule, therefore, must be made absolute, and the decree of the Full Court set aside and that of the Trial Court restored with costs throughout. If the Receiver can not recover his costs, then he can apply to have them included in his account.

Z. K.

Rule made absolute.

MADRAS HIGH COURT.

STAMP REGISTER NOS. 1226 TO 1228 AND 1231 OF 1925.

April 16, 1925.

Present :—Mr. Justice Devadoss and Mr. Justice Wallace.

In re THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF CHINGLEPUT—
PETITIONER.

Limitation Act (IX of 1908), s. 12—Application for leave to appeal to His Majesty in Council—Time taken in obtaining copy of judgment to be appealed against, whether may be excluded.

In the case of an application for leave to appeal to the Privy Council, the time requisite for obtaining a copy of the judgment appealed against is excluded in calculating limitation.

In the case of an application for leave to appeal sub-s. (3) of s. 12 of the Limitation Act really means “when a decree is sought to be appealed from”.

Mahabir Prasad Tewari v. Jamuna Singh, 66 Ind. Cas. 88; 1 Pat. 429; 3 P. L. T. 289; (1922) Pat. 193; 4 U. P. L. R. (Pat.) 33; (1922) A. L. R. (Pat.) 255, relied on.

Petitions under O. XLV, r. 2 and under s. 109, cls. (b) and (c) and s. 110, C. P. C., sought to be presented to the High Court, the High Court will be pleased to grant certificates enabling the petitioner herein to appeal to His Majesty in Council against the judgment of the High Court in S. As. Nos. 1356, 1355, 1354, and 1357 of 1921, preferred against the decrees of the District Court, Chingleput, in A. S. Nos. 400, 399, 398, and 401 of 1919, O. S. No. 504, 503, 470 and 505 of 1918, on the file of the Court of the District Munsif, Poonamalle.

Mr. K. S. Sankara Iyer, for the Petitioner.
Mr. K. Gopalratnam, for the Respondent.

ORDER.—The question for decision is whether in the case of an application for leave to appeal to the Privy Council time requisite for obtaining a copy of the judgment appealed against may be excluded in calculating limitation.

Section 12 of the Indian Limitation Act is now made applicable by the Privy Council Rules to such applications, but the difficulty is that while sub-s. (2) applies in terms to “an application for leave to appeal,” sub-s. (3) does not. But we think that, though sub-s. (3) does not in terms apply the language used in it really covers the present case. Under sub-s. (2) when an application for leave to appeal is put in, the time requisite for obtaining “a copy of the decree appealed from” may be deducted. Here the phrase quoted really implies “a

copy of the decree sought to be appealed from" as the decree cannot strictly be "appealed from" until leave to appeal has been given. There is no reason why the phrase "decree appealed from" when used in sub-s. (3) should be given any different interpretation. Sub-section (3), therefore, in the case of an application for leave to appeal really means "when a decree is sought to be appealed from....." That is the present case and time requisite for obtaining a copy of the judgment may, therefore, be excluded.

That position is also very reasonable, since a proper application for leave to appeal cannot be drawn up unless the party or his Pleader has before him a copy of the judgment.

Authority on the point is scant. *Mahabir Prasad Tewari v. Jamina Singh* (1) is direct authority, though the reasons given are not those we have given. The case of *Anderson v. Periasami* (2) was under the old s. 12 in which applications were limited to applications to appeal in *forma pauperis*, and, therefore, s. 12 could not be then called in aid at all.

We rule that time requisite for obtaining copy of judgment should be excluded.

V. N. V.

Petition allowed.

S. D.

(1) 66 Ind. Cas. 88; 1 Pat. 429; 3 P. L. T. 289; (1922) Pat. 193; 4 U. P. L. R. (Pat.) 33; (1922) A. I. R. (Pat.) 255.

(2) 15 M. 169; 5 Ind. Dec. (N. S.) 467.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1980 OF 1922 AND 872 TO 874 OF 1923.

May 12, 1925.

Present :—Mr. Justice Cuming and
Mr. Justice Chakravarty.

NRISINHA CHARAN NANDI
CHOUDHURI—PLAINTIFF—APPELLANT
versus

BATASI DASHI—DEFENDANT—
RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XIII, rr. 1, 2—Document not produced at first hearing, rejected by Trial Court—Appeal, second—Interference by High Court—Bengal Tenancy Act (VIII of 1885), s. 50—Landlord and tenant—Rent, enhancement of, suit for—Variation in rent, explanation of—Burden of proof—Presumption, rebuttal of.

The High Court will not in second appeal interfere with the order of a Trial Court refusing to admit a

document in evidence which was not produced at the first hearing of the suit in accordance with the provisions of r. 1 of O. XIII of the C. P. C., where no reason is shown for the non-production of the document at such hearing. [p. 602, col. 2.]

Where in a suit for enhancement of rent it appears that there has been a variation in the amount of rent paid by the tenant the burden is on the tenant to explain why there has been such variation and if he cannot give any satisfactory explanation the inference would be that there has been a change in the rate of rent and the presumption arising under s. 50 of the Bengal Tenancy Act would be rebutted. [p. 603, col. 1.]

Appeals against the decrees of the Additional District Judge, Dinajpur, dated the 13th February 1922, affirming that of the Munsif, Raigunj, dated the 15th January 1921.

Dr. D. N. Mitter (with him Babu Satindra Nath Mukerjee), for the Appellant.

Babu Bimal Chandra Das Gupta, for the Respondent.

JUDGMENT.—These four appeals arise out of four suits for enhancement of rent of an occupancy holding. The Trial Court held that there was no ground for enhancement and refused the enhancement and this finding was upheld in appeal.

In the appeals before us one point has been taken namely that the plaintiff was not allowed to put in evidence certain collection papers. Admittedly these papers were not filed in the First Court at the first hearing. Order XIII, r. 1 of the C. P. C., provides. "The parties or their Pleaders shall produce at the first hearing of the suit all documentary evidence, etc." As already stated these documents were not produced at the first hearing of the suit. Order XIII, r. 2 of the C. P. C., provides that, "no documentary evidence in the possession or power of any party which should have been but has not been produced in accordance with the requirements of r. 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof; and the Court receiving any such evidence shall record the reasons for so doing."

In this case the Court was not satisfied that there was good reason why these documents were not produced at the first hearing of the suit; and it is impossible for us in second appeal to interfere with the order of the Court rejecting those documents; because, no reason has been shown for their non-production at the time. With regard to this point which is common to all the appeals, therefore, I decide against the plaintiff. The learned Ad-

ditional District Judge in dealing with the Appeal No. 1980 states as follows:—"Note in the name of Batashu, jama Rs. 6-11-11 $\frac{1}{2}$.

Defendant proves rent at a uniform rate from 1305 to 1319. The plaintiff proves a *karcha* Ex. 5 showing jama of Rs. 3-4-9 $\frac{1}{2}$ in 1298 and a counterfoil Ex. A-4 for 1302 showing jama of Rs. 6-9-7 $\frac{1}{2}$. The learned Munsif has rejected these. I see no reason to do so. The *karchas* are, it is true, loose papers tied together but I have examined them carefully I do not think that this alone is sufficient, he should show more definitely how this large change came about."

It seems to us that the learned Judge has wrongly placed the onus on the plaintiff to explain the variations of rents. The onus on the contrary is on the tenants to explain why there had been this large variation of rent and if they could not give any satisfactory explanation the inference would be that there had been a change in the rate of rent. As far as I understand the learned Judge's judgment he does not suggest that this rent of Rs. 3-4-0 odd was for any other jama than the jama the rent of which was allowed to be enhanced.

We must, therefore, set aside the order of the learned Judge in so far as this appeal is concerned. The result is that we allow this appeal and send back the case to the lower Appellate Court in order that the learned Judge may re-hear the appeal considering the case from the point of view indicated, viz., that the onus lies upon the tenants to explain why there has been a variation in the rent. They may explain by showing that there has been a change in the area; but the onus is on the tenants; and if they cannot explain it, the inference will be that there has been a change in the rate of rent and, therefore, the presumption has been rebutted.

APPEALS Nos. 872, 873 AND 874 OF 1923.

With regard to these appeals nothing has been seriously pressed in support of them and, therefore, they are dismissed.

Appeal No. 873 is dismissed without costs as the respondent in this appeal does not appear and Appeals Nos. 872 and 874 are dismissed with costs.

In Appeal No. 1980 costs abide the result.

Second Appeal No. 1980 allowed;

z. k. Case remanded.

Appeals Nos. 872, 873 and 874 dismissed.

LAHORE HIGH COURT.

CIVIL REVISION No. 135 OF 1925.

May 14, 1925.

Present:—Mr. Justice Abdul Raof.

GHULAM SARWAR AND OTHERS—

DEFENDANTS—PETITIONERS

versus

GHULAM MUSTAFA—PLAINTIFF

—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115—Return of appeal for presentation to proper Court—Refusal to exercise jurisdiction—Revision—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 35—Joint trees, sale of—Suit for recovery of share—Small Cause Court, jurisdiction of.

An application for revision lies against an order of a Court returning an appeal for presentation to the proper Court, and thus refusing to exercise jurisdiction. [p. 601, col. 1.]

A suit for recovery of his share of the sale-price of trees by one joint owner against the other is cognizable by a Small Cause Court. Article 35 of Sch. II to the Provincial Small Cause Courts Act has no application to such a suit. [ibid.]

Revision against an order of the Senior Sub-Judge, Sialkot, dated the 6th December 1924.

Dr. Nand Lal, for the Petitioners.

Choudhry Zafarulla Khan, for the Respondent.

JUDGMENT.—The plaintiff and defendants Nos. 1—4 being the sons of the same father owned certain land jointly. On a partition $\frac{1}{4}$ th share was allotted to the plaintiff and $\frac{3}{4}$ ths to defendants Nos. 1—4. As regards the trees standing on the *shamilat* land the following provision was made in the partition deed:—

"*Aur drakhtan har qism waqf arazi shamilat wa milkiyat mushtarikh rahenge.*"

Defendant No. 1 sold certain trees to defendant No. 5 and some other purchasers. The present suit was instituted by the plaintiff on the allegation that Rs. 800 had been realized by defendant No. 1 by the sale of the trees and that the plaintiff was entitled to Rs. 200 being the $\frac{1}{4}$ th share of the money realized. The suit was resisted on various grounds, but eventually a decree was passed in favour of the plaintiff for the amount claimed, the decree being *ex parte* against defendants other than defendant No. 1 and Gulam Hussain. Defendant No. 5 was released from liability.

Defendants Nos. 1—4 appealed against the decree of the Trial Court which came up for hearing before Mr. Sita Ram, Senior Subordinate Judge, Sialkot. A preliminary objection was taken before him to the effect that the suit not being of the nature of the suits cognizable by a Court of Small Causes

the Senior Subordinate Judge had no jurisdiction to entertain and decide the appeal. This objection was accepted by the learned Senior Subordinate Judge and the memorandum of appeal was returned on the 6th December, 1924, to be presented to the District Judge. It was in fact presented to him on the same date, i. e., the 6th of December, 1924, and the appeal was decided on the 5th of March 1925.

The present petition for revision was made against the order of the Senior Subordinate Judge returning the memorandum of appeal. At the hearing a preliminary objection is taken by Mr. Zafarulla Khan that the order returning the memorandum of appeal to be presented to the District Judge being an interlocutory order a petition for revision cannot be entertained and that inasmuch as the petitioners can appeal against the decision of the District Judge and can raise the question of jurisdiction in that appeal this Court ought not to entertain the present petition for revision. In support of his first contention Mr. Zafarulla Khan has relied upon various rulings in which an order assuming jurisdiction had been treated as an interlocutory order and a petition for revision had been held to be incompetent. Not a single case has been cited wherein an application for revision against an order returning a plaint and thus refusing to exercise jurisdiction has been held not to be revisable. I accordingly disallow the preliminary objection.

As regards the merits the examination of the plaint clearly shows that the suit was of the nature cognizable by a Court of Small Causes. Defendant No. 1 having sold certain trees belonging jointly to him and the plaintiff this suit was instituted for the recovery of plaintiffs' share. Article 35 of the Second Schedule to the Small Cause Courts Act has no application to such a suit. The learned Senior Subordinate Judge had jurisdiction to try the appeal and the memorandum of appeal was wrongly returned by him.

I accordingly accept this petition for revision and setting aside the order of the Senior Subordinate Judge returning the memorandum of appeal, direct that it be now received and the appeal be decided according to law. Costs will abide the result.

N. H.

*Revision accepted.***BOMBAY HIGH COURT.**

CIVIL EXTRAORDINARY APPLICATION

No. 32 of 1924.

July 2, 1925.

Present:—Sir Norman Macleod, Kt.,
Chief Justice, and Mr Justice Coyajee.

MOTILAL GOPALDAS SHET—

APPLICANT

versus

KRISHNABAI GOPALRAO GARUD

—OPPONENT.

*Bombay Pleaders Act (XVII of 1920), ss. 17, 19—
Pleader and client—Death of Pleader pending proceeding—Fees, apportionment of.*

By virtue of the provisions of sub-ss. (2) and (3) of s. 19 of the Bombay Pleaders Act, in the absence of any special agreement, a Pleader is not entitled to receive fees allowed on taxation between himself and his clients for his services until the final decree or order in the proceeding is passed. If a Pleader dies before such final decree or order is passed or for any reason the engagement of his services by his clients is put an end to then the Pleader will only be entitled to ask the Court to award him proportionate fees on the basis of a *quantum meruit*. The Court in assessing the *quantum meruit* might be guided by the percentages laid down by law for the regulation of costs between party and party but is not bound to adopt that guide where the circumstances of the case would render it unjust to do so. [p. 605, cols. 1 & 2.]

Application against a decree of the
First Class Subordinate Judge at Dhulia,
in Small Cause Suit No. 749 of 1922.

Mr. M. V. Bhat, for the Applicant.

Mr. P. B. Shingne, for the Opponent.

JUDGMENT.—This suit was filed by the adopted son of the late Mr. Gopal Balvant Garud to recover certain fees due to his father, who carried on the profession of a Pleader. The original plaintiff having died, the suit was continued by his mother. In the present application we are only concerned with an item of Rs. 109 debited in Mr. Garud's account on June 16, 1920, for his fees in Appeal No. 103 of 1920. The defendant admitted that he had engaged Mr. Garud in that appeal to appear for him, and that he had put in his *vakil-patra* in that appeal, but defendant denies his liability to pay Rs. 109 as Mr. Garud died before conducting the appeal. The Judge said:—

"This contention is obviously not tenable. Having made his appearance for the defendant in the appeal, Mr. Garud was entitled to get his legal fees. It was no fault of his that he died before the appeal was heard, and the defendant cannot escape from that liability simply because he had to incur further expense by engaging another Pleader."

That finding could only be correct if it could be said that a Pleader as soon as he has been retained, and has filed his *cakilpatra*, becomes thereby entitled to recover the whole of his fees which are payable for his services until the final decree is passed. There is no support for such a proposition in the Bombay Pleaders Act.

Under s. 17 of the Act:

"Any party employing a Pleader may settle with him by private agreement the terms of his engagement and the fee to be paid to him for his professional services."

It is not suggested in this case that the defendant entered into any private agreement with Mr. Garud.

By s. 19, sub-s. (2):

"Where no fee has been settled under s. 17, the Pleader shall be entitled to receive from his client a fee computed in accordance with the rules in Sch. III, and any further fees which may be allowed on taxation between Pleader and client in pursuance of any rules made in this behalf by the High Court."

Under sub-s. (3):

"The fee which a Pleader is entitled to receive from his client when computed in accordance with the rules in Sch. III, and except when otherwise agreed between the Pleader and the client, the fee which a Pleader is entitled to receive under sub-s. (1), is payable in respect of the Pleader's services until the final decree or order in the proceeding is passed."

In the absence then of any special agreement, a Pleader shall not be entitled to receive fees allowed on taxation between himself and his client for his services until the final decree or order in the proceeding is passed. If a Pleader dies before such final decree or order is passed, or for any reason the engagement of his services by his client is put an end to, then the Pleader will only be entitled to ask the Court to award him certain proportionate fees on the basis of a *quantum meruit*.

In *Keshav Govind Joshi v. Jamsetji Cursetti* (1), the plaintiff was a Pleader who had appeared for the defendant in certain proceedings up to a certain stage. Not being paid any fees for his services, he sued the defendant. It was held by the High Court that the Pleader, in the absence of an agreement, was entitled to a *quantum meruit*. The Court in assessing the *quan-*

tum meruit might be guided by the percentages laid down by law for the regulation of costs between party and party, but was not bound to adopt that guide where circumstances of the case would render it unjust to do so.

The question is then what is the proper remuneration in the circumstances of the case, which would have been paid to Mr. Garud, if the engagement of his services had terminated without his doing anything further than what was done in this case, namely, the filing of the *cakilpatra* and entering the appearance of his client in the appeal. It is not suggested that Mr. Garud did anything more than that, as the appeal was not ready for hearing and did not come on for hearing till four months later. We think that on a *quantum meruit* the sum of Rs. 10 would be sufficient remuneration for such services. The order of the Subordinate Judge then must be amended by allowing the plaintiff with regard to that item of Rs. 109, Rs. 10 only. The applicant will be entitled now to the costs of the Rule.

Z. K.

Rule made absolute.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 750 OF 1922.
CIVIL REVISION PETITION No. 442 OF 1923

AND

CIVIL MISCELLANEOUS PETITION No. 258
OF 1923.

February 14, 1925.

Present:—Mr. Justice Phillips.

IN S. A. No. 750 OF 1922.

METTA RAMBHATLU—DEFENDANT No. 3—
APPELLANT

versus

METTA ANNIAHBHATLU AND OTHERS
—PLAINTIFFS AND DEFENDANTS NOS. 1 AND 2
—RESPONDENTS

IN C. R. P. No. 442 OF 1923 AND

IN C. M. P. No. 258 OF 1923.

METTA ANNIAH BHATLU AND OTHERS—
PLAINTIFFS—PETITIONERS

versus

METTA JOGI BHATLU AND OTHERS—
DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 21—Contract for sale of immovable property, breach of—Provision for damages on default, effect of—Specific performance,

(1) 12 B. 557; 6 Ind. Dec. (N. S.) 855.

right to—Extension of time for payment—Power of Court.

Where a contract for the sale of immoveable property provided for payment of damages in default of performance, whether by the vendor or the vendee, but it appeared that the provision for payment of damages could not be treated otherwise than as one for furnishing security for performance of the contract :

Held, that the breach of contract to sell could not be adequately relieved by compensation in money and a decree for specific performance was the appropriate relief. [p. 606, col. 2.]

The Court which actually passes a decree for specific performance, whether it is the Trial Court or the Court of Appeal, has power to make any stipulations it thinks fit with reference to the performance including the power to extend the time fixed for payment of the purchase-money by a party. [p. 607, col. 1.]

In considering whether extension of time should be granted, the delay need not be explained so minutely in a case of this sort as under the Limitation Act where it is sought to excuse a bar of limitation, but must be looked at more leniently. [p. 607, col. 1.]

Where it appeared that the plaintiff was not aware of the provisions of the decree until the time for payment had passed, and that the main cause of the delay was the inordinate time taken by the Court in granting a copy of its decree:

Held, that the delay should be excused and the time for payment extended. [p. 607, col. 2.]

IN S. A. No. 750 OF 1922.

Second appeal against a decree of the Court of the Additional Subordinate Judge, Vizagapatam, in A. S. No. 380 of 1921 (A. S. No. 250 of 1920, on the file of the District Court), preferred against that of the Court of the District Munsif, Rajam, in Original Suit No. 253 of 1919.

IN C. R. P. No. 442 OF 1923.

Petition, under s. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Additional Subordinate Judge, Vizagapatam, in I. A. Nos. 34 and 56 of 1922, in A. S. No. 380 of 1921 (O. S. No. 253 of 1919 on the file of the Court of the District Munsif, Rajam).

IN C. M. P. No. 258 OF 1923.

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to direct that the time for payment of the balance of the purchase-money may be extended till three months after the disposal of this petition in Second Appeal No. 750 of 1922 (A. S. No. 380 of 1921 on the file of the Court of the Additional Subordinate Judge, Vizagapatam).

Mr. B. Satyanarayana, for the Appellant.
Mr. Y. Suryanarayana, for the Respondents.

JUDGMENT.

IN S. A. No. 750 OF 1922.

This is an appeal by the 3rd defendant against the decree for specific performance of a contract of sale entered into by defendants Nos. 1 and 2 in favour of the plaintiffs. It has been found that the contract was a valid contract and that the 3rd defendant (appellant) purchased property from defendants Nos. 1 and 2 with notice of the contract. The only question argued in the appeal is that the contract is not one of which performance can be enforced by virtue of s. 21 of the Specific Relief Act I of 1877, because it is a contract for the non-performance of which compensation in money is an adequate relief. Under s. 12 of the Act "unless and until the contrary is proved, the Court shall presume that a breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money." This rule would *prima facie* apply here, but it is argued that, as there is a condition in the contract for the payment of damages in default of performance whether by the vendor or by the vendee, it must be held that the parties considered that the enforcement of these damages would be adequate in case the contract is not performed. So far as the default on the purchaser's side is concerned, it is not suggested that the provisions for default can be treated otherwise than as furnishing security for performance. There is really nothing to show that the clause with reference to the default on the part of the vendor was for any other purpose. It is suggested that as the amount fixed as damages was high, such damages must be deemed to be adequate relief, but as the amount is only Rs. 37-8-0 it does not seem to me a tenable contention. There are no other circumstances to prove that in this case money compensation is adequate. Consequently this plea must be rejected. The second appeal is dismissed with costs.

IN C. R. P. No. 442 OF 1923 AND C. M. P. No. 258 OF 1923.

Before the appeal was filed, the plaintiff failed to deposit money in accordance with the decree of the lower Appellate Court, and it has been held by that Court that it had no power to alter its order giving three months' time for the payment and it dismissed the petition, put in by the plaintiff for extension of time and also

the petition put in for amendment of the decree. The plaintiff has filed a civil revision petition against this order and has also put in a petition in this Court asking for extension of time to be granted in case the second appeal is dismissed. So far as the revision petition is concerned it appears to me that in accordance with the principles laid down in *Abdul Shaker Sahib v. Abdul Rahiman Sahib* (1), the lower Court had power to extend the time. It is argued that that decision relates only to the order of an original Court, but as it is based on the fact that an order for specific performance of this nature is in the nature of a preliminary decree and that the Court does retain power to make any stipulation it thinks fit with reference to the performance, I think that the power must rest in the Court which actually passes the order for specific performance and the language of the judgments in the case support this view—both the judgments of the late learned Chief Justice and Wallace, J. From the fact that the Subordinate Judge dismissed the plaintiff's petition without making any order as to costs, it would appear that he thought that there was ground for extending time, but that because it was not competent to review its own order, the request could not be granted. In considering whether time should be granted, it has to be remembered that the delay need not be explained so minutely in a case of this sort as in a case for instance, under the Limitation Act where it is sought to excuse a bar of limitation. In the latter the applicant is seeking to revive a right which he has lost and it is necessary for him to show that he has not lost it by his negligence. Here it is a question of destroying a right which plaintiff had to enforce under a contract and it does not necessarily follow that because he has been guilty of some delay in enforcing the contract, that that fact alone should deprive him of a right which undoubtedly is his. Consequently I think that the delay in such a case should be looked at more leniently than in a case of limitation. In the present case the plaintiff states that he was not aware of the provisions in the decree until the time for payment had passed, and if that is so, there were very good reasons for his not

making the payment in time. The main cause for the delay appears to be the inordinate time taken by the lower Appellate Court in granting a copy of its decree. The copy was applied for on the 14th October 1921 and the copy was not ready until the 5th January 1922; and for other reasons the plaintiff did not receive the copy till the 17th January. It is this delay by the officers of the Court that has been mainly responsible for the delay. I think that it should be excused, and consequently I order that the time for payment be extended till the date on which the plaintiff deposited money, or if the deposit has been withdrawn till one month from this date.

I pass no order as to costs of the revision petition.

V. N. V.
Z. K.

*Appeal dismissed.
Petition allowed.*

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.
July 7, 1925.

Present:—Lord Phillimore, Lord Carson
and Sir John Edge.

Rajah BHUPENDRA NARAYAN
SINGH—APPELLANT

versus

NARAPAT SINGH—RESPONDENT.

*Bengal Village Chaudidari Act (VI of 1870), s. 51—
Putni lease—Resumption and transfer of chaudidari
chakran lands to zemindar—Putnidar, whether en-
titled to possession—Additional rent, whether payable.*

A putni grant by a zemindar of his interest in lands includes his interest in chaudidari chakran lands within the boundaries of the grant, and upon these being resumed and transferred to the zemindar under Bengal Village Chaudidari Act, the putnidar holding from him is entitled under s. 51 of that Act to obtain their possession. But the zemindar is entitled to obtain additional rent from the putnidar in respect of such lands. [p. 609, col. 1.]

Hari Narain Majumdar v. Mukand Lal Mundal, 4 C. W. N. 814 and *Ranjit Singh v. Maharaj Bahadur Singh*, 48 Ind. Cas. 262; 46 C. 173; 45 I. A. 162; 16 A. L. J. 964; 25 M. L. T. 8; 29 C. L. J. 193; 21 Bom. L. R. 506; 10 L. W. 83; 35 M. L. J. 728; 23 C. W. N. 198; 1 U. P. L. R. (P. C.) 23 (P. C.), approved.

Bejoy Chand v. Krishna Chandra, 66 Ind. Cas. 357; 34 C. L. J. 275; (1922) A. I. R. (C.) 281 and *Ranjit Singh v. Kali Dasi Debi*, 40 Ind. Cas. 981; 44 C. 841; 44 I. A. 117; 21 C. W. N. 609; 32 M. L. J. 535; 15 A. L. J. 390; 25 C. L. J. 499; 19 Bom. L. R. 462; (1917) M. W. N. 459; 6 L. W. 101; 2 P. L. W. 1; 22 M. L. T. 289 (P. C.), distinguished.

Appeal against a judgment and decrees of the High Court at Calcutta (Greaves and Ghose, JJ.), dated the 27th February 1922, and printed in 67 Ind. Cas. 440, revers-

(1) 72 Ind. Cas. 868; 44 M. L. J. 107; (1923) M. W. N. 1; 17 L. W. 216; (1923) A. I. R. (M.) 284; 46 M. 448.

ing those of the District Judge, Birbhum, dated the 13th September 1919, which confirmed those of the Munsif, First Court, at Rampushat, dated the 30th September 1910.

Messrs. G. R. Lowndes and B. Dube, for the Appellant.

Messrs. L. De Gruyther and R. H. Hodge, for the Respondent.

JUDGMENT.

Lord Carson.—This is a consolidated appeal by special leave from one judgment and 18 decrees dated the 27th February, 1922, of the High Court of Judicature at Fort William in Bengal. Each of the 18 decrees though relating to a distinct subject-matter, raises the same question for decision. Each suit was a suit to recover possession from the defendant (who is the present appellant) the *zemindar* of certain villages in *putni* settlement of *chaukidari chakran* lands which had been resumed by the Government under the provisions of Bengal Act VI of 1870, and were transferred to the *zemindar* subject to the payment of rent assessed on the lands in accordance with s. 51 of the Act. The plaintiffs (respondents) alleged that by a *pottah* dated 13th November, 1853, the predecessors-in-title of the appellant *zemindar* granted five villages in *putni* settlement at the annual rent of Rs. 4,589 to one Krishna Chandra, from whom the plaintiffs derived title. It was further alleged by the plaintiffs, and it is not now in dispute that at the time of the *putni* settlement there were certain lands in every village which were *chaukidari chakaran* lands, and were held and enjoyed by the *chaukidars* in lieu of their salaries, and that such lands which had been transferred as aforesaid by the Collector form part of the lands of the *putnidar* under the said *pottah* of 13th November, 1853. The appellant, on the other hand, denied that under the terms of the said *pottah* the plaintiffs had any title to the *chaukidari chakran* lands released by the Government, and that in any event the plaintiffs were not entitled to get possession thereof without paying some rent in addition to the annual rent of Rs. 4,589 fixed in the *pottah*.

All the suits were tried by the Munsif of Rampurhat, who by his judgment dated 30th September 1910, held that the disputed property was included in *putni* settlement, and that the plaintiffs were entitled to obtain *khas* or actual possession of the lands in suit, but that they could not do

so without paying an additional rent to the *zemindar* and he concluded his judgment in the following terms:—

“The plaintiffs’ *putni* lease appears to cover all the lands within the boundaries of the *mahals*, but the profits of the *choukidari* lands were not taken into account in determining the rent payable by the *putnidar*. The plaintiffs must be held to pay a higher amount for the resumed lands than that which has been assessed for *chaukidari* purposes on these lands by the Collector as by the resumption the lands were enfranchised and the *putnidars* would get the land free from the burden of the public service. The principle has been laid down in *Hari Narain Majumdar v. Mukand Lal Mandal* (1), the *putnidar* is bound to pay to the *zemindar* such a rent for these lands as corresponds to the proportion between the gross collection and the *putni* rent formerly payable by him.”

On an appeal and cross-appeal to the District Judge of Birbhum the decree and order of the Munsif was by a judgment of 13th September 1919, affirmed. The plaintiff, now respondent, appealed to the High Court of Judicature against so much of the order as adjudged that the plaintiff should pay to the defendant No. 1 such increased *putni* rent over the *doul jumma* as may be proportionate to the increase of the present collection over what it had been at the time at which the *putni mahal* was created. The learned Judges of the High Court allowed the appeals of the plaintiff and made decrees setting aside that part of the decision of the District Judge which declared the *zemindar* entitled to obtain additional rents from the plaintiff, and the only question to be considered on the present appeal by the appellant *zemindar* against the said order is as to whether such increased rent is or is not payable. It has not been disputed, and indeed it was so stated by the judgment of the High Court that by a long series of decisions the *zemindar's* right to a share of the rents and profits in addition to the amount payable to the *chaukidari* fund under the provisions of Act VI of 1870 was established:—

“These decisions”, say the learned Judges, “have recently been considered and followed in the case of *Bejoy Chand v. Krishna Chandra* (2) which was decided in Decem-

(1) 4 C. W. N. 814.

(2) 66 Ind. Cas. 357; 31 C. L. J. 275; (1922) A. I. R. (C.) 281.

ber, 1920, and no useful purpose would, we think, be served by going through them again. They undoubtedly do support the contention urged before us on behalf of the *zemindar* respondent and it is useless to suggest that they are in the main distinguishable from the cases before us."

The learned Judges, however, held that the series of decisions laying down this principle could no longer be supported having regard to the decisions of this Board in two cases, viz., *Ranjit Singh v. Kali Dasi Debi* (3) and *Ranjit Singh v. Maharaj Bahadur Singh* (4). Their Lordships cannot agree with the Appellate Court that either of the cases referred to has the effect attributed to it by the learned Judges. In the first of these cases where it is to be observed the order was in substantially the same form as in the present case, all that this Board decided was that a *putni* grant by a *zemindar* of his interest in lands includes his interest in *chaukidari chakran* lands within the boundaries of the grant, and that upon their being resumed and transferred to the *zemindar* under the Bengal Act VI of 1870, the *putnidar* or *darputnidar* holding from him is entitled under s. 51 of that Act to possession. The *putnidar* did not in that case challenge the validity of so much of the order appealed from as rendered the decrees for possession subject to the fixing of a fair and reasonable assessment. In giving the judgment of the Board, Lord Parker of Waddington added: "It is a satisfaction to find that the view above expressed is that hitherto universally adopted in the Indian Courts."

In the second of the above-mentioned cases referred to by the Judges of the Appellate Court, the only point decided was that upon the transfer of *chaukidari chakran* lands situated within the villages to the *zemindar* an action by the *putnidars* for declarations that such lands formed parcel of the *putni mahal*, and that they were entitled to a settlement and *khas* possession was not an action for specific performance of contract within Art. 113 of Sch. II of the Indian Limitation Act, 1877, but a suit for possession of immoveable

property within Art. 114. Their Lordships can find nothing in the judgment in any wise affecting the point raised upon the present appeal. The Board has examined the record in that case, and it is to be observed that the order appealed from as in the former case, recognised the right of the *zemindar* to have a rent fixed for the *chaukidari chakran* lands in question, and that this part of the order was not questioned or appealed from in the case before the Board, and the judgment appealed from was in their Lordships' opinion correct.

In a case decided by the High Court of Calcutta in 1924 *Pryambada Debi v. Monohar Mukhopadhyaya* (5), the learned Judges refused to follow the decision appealed from in the present case, holding that the Appellate Court had misread or had not appreciated the two judgments of the Privy Council on which they had based their decisions. Their Lordships agree with this view, and are of opinion that the Court below was in error in holding that the cases referred to before the Privy Council made any change in the law as to the right of the *zemindar* to have a rent fixed under the circumstances existing in present case. It was, however, argued in the present case before the Board that under s. 51 of Act VI of 1870 the *putnidar* is entitled to hold the lands rent free, or without paying additional rent for them. Their Lordships cannot accept this view. The peculiar character of *chaukidari chakran* lands, and how they came to be included, without paying rent, in the various *putni pottas*, as is found in the present case, has been frequently discussed before the Board as in the cases referred to and others and as Lord Buckmaster says in *Ranjit Singh v. Maharaj Bahadur Singh* (4):—

"It does not follow that because the rights originally arose by virtue of a grant declared to be a contract within the meaning of s. 51 they are, therefore, rights, contractual in the sense that contract by its terms creates and regulates the personal obligations and duties of the grantor in the circumstances that have arisen. At the time when the *putni* grants were made the resumption of the *chaukidari chakran* lands was not even contemplated and the grant necessarily contains no reference whatever to the circumstances that would arise and the relationships that would exist

(3) 40 Ind. Cas. 981; 44 C. 841; 44 I. A. 117; 21 C. W. N. 609; 32 M. L. J. 565; 15 A. L. J. 390; 25 C. L. J. 499; 19 Bom. L. R. 462; (1917) M. W. N. 459; 6 L. W. 101; 2 P. L. W. 1; 22 M. L. T. 489 (P. C.).

(4) 48 Ind. Cas. 262; 46 C. 173; 45 I. A. 162; 18 A. L. J. 961; 25 M. L. T. 8; 29 C. L. J. 193; 21 Bom. L. R. 506; 10 L. W. 83; 35 M. L. J. 728; 23 C. W. N. 198; 1 U. P. L. R. (P. C.) 23 (P. C.).

(5) 86 Ind. Cas. 781; 29 C. W. N. 328; (1925) A. I. R. (C.) 651; 52 C. 576.

in the event of the Government resuming possession."

Their Lordships, therefore, see no reason for interfering with the long series of authorities commencing as far back as the year 1900 which have established the right of the *zemindar* to have an additional rent fixed for such lands, nor can their Lordships overlook the fact that in the cases already referred to before this Board no exception was taken by the *putnidar* to the fixing of such rents as a condition of being put into possession.

Their Lordships are, therefore, of opinion that this appeal should be allowed, that the decrees appealed from should be set aside, except so far as they confirm the decrees of the lower Appellate Court, and that such last mentioned decrees should be restored. The respondent should pay the costs of this appeal and of the appeals in the High Court. Their Lordships will humbly advise His Majesty accordingly.

N. H. *Appeal allowed.*

Solicitors for the Appellant:—Messrs. Box & Co.

Solicitors for the Respondent:—Messrs. Gush, Phillips & Co.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION
No. 229 OF 1924.

June 26, 1925.

Present:—Sir Norman Macleod,
Kt., Chief Justice, and Mr. Justice Coyajee.
MAHADEO GOVIND WADKAR—
PETITIONER

versus

LAKSHMINARAYAN RAMNATH
MARWADI—OPPONENT.

Civil Procedure Code (Act V of 1908), O. IX, rr. 8, 9, O. XLVII, r. 1—Limitation Act (IX of 1908), s. 5, Sch. I, Art. 163—Dismissal of suit for default—Review, whether lies—Application for restoration—Limitation—Delay, whether can be excused.

The only remedy open to a party whose suit has been dismissed for default under O. IX, r. 8, of the C. P. C., is to apply under r. 9 of the Order to set aside the order of dismissal. It is not open to him to apply under r. 1, O. XLVII of the Code for a review of the order dismissing his suit. [p. 611, col. 1.]

Section 5 of the Limitation Act is not applicable to an application under O. IX, r. 9 of the C. P. C. to set aside an order dismissing a suit for default and a Court has therefore, no jurisdiction to admit an

application under r. 9 on the ground that the applicant had sufficient cause for not preferring his application within the time prescribed. [p. 610, col. 2.]

Application against a decision of the Subordinate Judge at Mahad, in Miscellaneous Application No. 62 of 1922.

Mr. V. B. Virkar, for the Petitioner.

JUDGMENT.—This is an application under s. 115, C. P. C. The opponent having filed Suit No. 139 of 1921, in the Court of the Second Class Subordinate Judge at Mahad, the suit was dismissed for default under O. IX, r. 8, C. P. C., on October 30, 1922. He was then entitled under r. 9 to apply for an order to set the dismissal aside, and if he could satisfy the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court could make an order setting aside the dismissal. But under Art. 163 of the Indian Limitation Act, the period of limitation for making such an application under r. 9 is thirty days. The opponent made his application on the 31st day, and was, therefore, clearly out of time. Section 5 of the Indian Limitation Act has not been made applicable by any enactment or rule to an application under O. IX, r. 9, and, therefore, the Court had no jurisdiction to admit the application on the ground that the opponent had sufficient cause for not preferring his application within the time prescribed. The Judge, however, said:—

"The question is whether the delay can be excused within the Court's discretion. The applicant is not to be blamed for sending the papers duly signed to his friend who was in business here. There is no negligence attributable to him on that score. If the mistake arose it arose with the mistaken view of that friend and hence I think the delay of one day should be excused properly in this case. Justice requires the exercise of discretion in that direction. To do otherwise would be clearly technical. Further, if I were not to excuse the delay there is nothing to prevent me from treating these two applications as for review and in that case they are clearly in time. When a case is dismissed purely for a default the plaintiff has two remedies generally, *viz.*, one to apply to have the suit restored to file and the other is by way of review. The second course is clearly open to the plaintiff and the Court, and hence I do not think that in the present

application the delay of one day should not be excused. I excuse the delay and I hold the application to be in time."

The argument discloses an unfortunate confusion of thought. If the Judge had said "I treat this application as one for review, and, therefore, pass an order setting aside the order of dismissal," then it is possible he might have been justified in making such an order. But he treated the application as one made under O. IX, r. 9, and excused the delay which he had no power to do. If, as a matter of fact, the opponent was entitled to apply for a review, we might not have been inclined to interfere with the decision of the Judge. But since the decision of the Privy Council in *Chajju Ram v. Neki* (1), we must take it that a plaintiff whose suit has been dismissed for want of appearance under O. IX, r. 8, has no remedy by way of review, because the grounds on which a review can be granted are specified in O. XLVII, r. 1. The words "any other sufficient reason" in sub-s. (1) mean a reason sufficient on grounds at least analogous to those specified in the rule. Now, the grounds specified in the rule are as follows:—The discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within the party's knowledge, or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record. The fact that the opponent was absent when the suit was called on, would not be a ground for review specified in O. XLVII, r. 1, sub-r. (1), nor could it be a ground analogous to any of those specified in the rule.

It seems to us, therefore, that the only remedy open to a party whose suit has been dismissed for default under O. IX, r. 8, is to apply under r. 9 to set aside the order of dismissal, and it is no longer open to him to apply for a review of the order under O. XLVII, r. 1. That being our opinion, it was not open to the Subordinate Judge to entertain an application for review from the opponent, and as he had no power under the Indian Limitation Act to excuse the delay he ought to have dismissed the appli-

cation. We must, therefore, make the Rule absolute with costs.

Z K.

Rule made absolute.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 283 OF 1925.

May 12, 1925.

*Present:—*Mr. Justice Abdul Raoof.

Musammât CHANDRA WATI—DEFENDANT
—APPELLANT

versus

JAGAN NATH SINGH AND

OTHERS—PETITIONERS—RESPONDENTS.

*Guardians and Wards Act (VIII of 1890), s. 12—
Civil Procedure Code (Act V of 1908), O. XLI, r. 1—
Application for temporary custody of minor's property
—Receiver, appointment of—Appeal, whether com-
petent.*

Where an application is made to a Court for temporary custody of the property of a minor under s. 12 of the Guardians and Wards Act, it may appoint a guardian temporarily. Another course open to the Court is to appoint a Receiver under the provisions of the C. P. C. When the Court adopts the latter course and appoints a Receiver the order is appealable. [p. 612, col. 2.]

Miscellaneous first appeal against an order of the Senior Sub-Judge, Ambala, dated the 9th January 1925.

Mr. Sardha Ram, for the Appellant.

Messrs. Shamair Chand and Badri Dass, for the Respondents.

JUDGMENT.—This is an appeal against an order appointing a Receiver temporarily. The facts giving rise to these proceedings may be briefly summarised as below:—

One Jagadhar Mal had three sons, Jhandoo Lal, Devi Chand and Joti Pershad. Jhandoo Mal had two sons, Ram Lal and Jagan Nath Singh. Debi Chand's son was Lachhmi Narain who had married two wives. By one wife he had two children, Mahabir Pershad a son and Musammât Ralla Wati a daughter. By his second wife Musammât Chandra Wati he had two sons Bal Kishan and Ram Kishan. Lachhmi Narain having died in July 1924, Jagan Nath Singh, the son of Jhandoo Mal, made an application on the 23rd December 1924 to the Court of the Senior Subordinate Judge at Ambala to be appointed guardian of both the property and person of Mahabir Pershad and Musammât Ralla Wati, the

(1) 72 Ind. Cas. 566; 49 I. A. 144; 24 Bom. L. R. 1233; 30 M. L. T. 295; 26 C. W. N. 697; 41 P. L. R. (P. C.) 1922; 3 P. L. T. 435; (1922) A. I. R. (P. C.) 112; 16 L. W. 37; 17 P. W. R. 1922; 3 L. 127; 43 M. L. J. 332; 4 U. P. L. R. (P. C.) 91; 36 C. L. J. 459 (P. C.).

children of Lachhmi Narain by his first wife who is admittedly dead. He also applied for the appointment of the guardian of the property of the children of Musammatt Chandra Wati. The date fixed of the first hearing was the 13th February 1925. Before the arrival of that date Jagan Nath Singh made an application purporting to be one under s. 12 of the Guardians and Wards Act asking the Court to appoint a Receiver to take possession of the property and shops belonging to the deceased Lachhmi Narain and he suggested in that application that preferably he himself be appointed a Receiver. The Subordinate Judge made an *ad interim* order appointing Jagan Nath Singh Receiver of the property then and there. Thereupon Musammatt Chandra Wati applied on the 15th January 1925 asking the Court to withdraw the order appointing Jagan Nath Singh temporarily a Receiver. In that application serious allegations were made against Jagan Nath Singh but the Court disposed it of summarily remarking *ke fil hal main apna hukm muarkha* 9 January 1925 *men tarmeem karne ke liye taiyar nahin hua*. The present appeal was lodged against the order of the 9th January 1925. When this appeal came on for hearing Mr. Badri Dass, Counsel for Jagan Nath Singh raised a preliminary objection to the effect that the order appointing his client a Receiver was made under s. 12 of the Guardians and Wards Act and that no appeal was provided against such an order under any of the clauses of s. 47 of the Act. Mr. Sardha Ram the learned Counsel for Musammatt Chandra Wati, on the other hand, contended that the order appointing a Receiver was made under O. XL, r. 1 of the C. P. C., and as such was appealable under cl. (s) of r. 1 of O. XLIII of the C. P. C. In support of his contention he relied upon the decision *In re Bai Jamnabai* (1). An objection was taken in that case that in cases coming under the Guardians and Wards Act the Court had no power to appoint a Receiver. Mr. Justice Robertson held that by reason of s. 141 of the C. P. C., the provisions of O. XL, r. 1 could be utilized for the purpose of appointing a Receiver. I agree in the view expressed by the learned Judge of the Bombay High Court and I hold that the Judge before whom the application for the appointment of a guardian was

pending had power to appoint a Receiver according to the provisions of the C. P. C. Mr. Badri Dass, however, has contended that a right of appeal is the creation of a Statute and as no right of appeal against an order passed under s. 12 of the Guardians and Wards Act has been given this appeal is not competent. Section 12 of the Guardians and Wards Act empowers a Court "to make such an order for the temporary custody and protection of the person or property of the minor as it thinks proper." The Court may appoint a guardian temporarily and another course open to the Court is to appoint a Receiver under the provisions of the C. P. C. If the Court chooses to appoint a Receiver it has power to do so according to the rules laid down under the C. P. C. Evidently the order in this case was made according to the provisions of that Code and it is clear that an appeal is allowed from an order appointing a Receiver. I, therefore, overrule the preliminary objection and proceed to dispose of the appeal on the merits.

As regards the merits it is unnecessary to say much because on the face of it, it appears to me that it was highly improper to appoint Jagan Nath Singh the Receiver of the property of the minor. Jagan Nath Singh is himself the applicant for the guardianship. Serious objections have been raised as regards his past conduct and he as it were, is on his trial and it is yet to be seen whether he is a fit person to be appointed a guardian. Musammatt Chandra Wati in her application to the Court below has made certain allegations which, if true, would make Jagan Nath Singh wholly unfit for the position of a Receiver. It is not my intention to pre-judge the case of Jagan Nath Singh and it is quite possible that after a thorough inquiry the Court may consider that it is in the interest of the minors that Jagan Nath Singh should be appointed the guardian of the person and property of the minors. What I am concerned with at present is whether Jagan Nath Singh should have been appointed a Receiver in this case. Having regard to all the surrounding circumstances I am clearly of opinion that the Court has not acted properly in appointing Jagan Nath Singh a Receiver. I am not prepared to hold at this stage that this is not a case where a Receiver should not be appointed. Possibly the application of Jagan Nath Singh is quite *bona fide* and it may be in the in-

(1) 11 Ind. Cas. 551; 36 B. 20; 13 Bom. L. R. 487.

terest of the minors that a Receiver should be appointed in the case.

I, therefore, accept the appeal and setting aside the order appointing Jagan Nath Singh as Receiver remand the case to the Court in order that it may on proper material come to a decision whether it is a fit case in which a Receiver should be appointed. Costs will abide the result.

N. H.

Appeal accepted.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 364 OF 1924.

August 26, 1925.

*Present:—*Mr. Dalal, J. C.

BUNYAD SINGH AND OTHERS—

DEFENDANTS—APPELLANTS

versus

NAUBAT SINGH AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 60, 61, 62—Mortgages, several—Redemption—Consolidation—Burden of proof.

The principle established by ss. 60 and 62 of the Transfer of Property Act is that redemption of every separate mortgage should be permitted unless there is clear and unequivocal evidence to prove a contract between the parties to the contrary. There is a heavy burden cast on a mortgagee who wishes to prove a contract between him and the mortgagor to prevent such a redemption enjoined by law. [p. 614, cols. 1 & 2.]

There is no authority for the proposition that a mortgagor not otherwise bound by contract, cannot redeem one or two or more mortgages held by his mortgagee over the same property without redeeming another or the others. If a mortgagee wishes to lend money or to make further advances on the term that one mortgage of the property shall not be redeemed until the money due on another mortgage is paid he should effect that object by making it expressly part of his contract with the mortgagor. [p. 613, col. 2.]

Second appeal against an order of the First Additional Subordinate Judge, Gonda, dated the 22nd May 1924, confirming that of the Munsif, Tarabganj, dated the 30th January 1924.

Mr. Bisheshar Nath, for the Appellants.

Mr. Niamat Ullah, for the Respondents.

JUDGMENT.—The plaintiff-mortgagor sued for redemption of his usufructary mortgage of 9th June 1882 and the defence was that it could not be redeemed unless the money due on a simple mortgage of 23rd December 1886 was paid at the same time. Both the Subordinate

Courts held that there was no consolidation of the two mortgages and decreed the suit for redemption as prayed for in the plaint.

In second appeal here it is argued that the terms of the second deed of 23rd December 1886 indicated a consolidation of that mortgage with the former mortgage. I think the principles to be observed in considering such a question are indicated in the case of *Tajjo Bibi v. Bhagwan Prasad* (1). The learned Chief Justice who was a party to that ruling is now one of their Lordships of the Privy Council. There the codification of the Transfer of Property Act of 1882 was explained. Their Lordships observed: "Section 61 of Act No. IV of 1882, it appears to us, was enacted with the object not of indicating that there might be some other restriction on the rights of a mortgagor, but of prohibiting the application of the principle of consolidation to this country, except where the parties had by contract agreed that such consolidation should take place" Their Lordships then explained how the doctrine of consolidation had been elaborated in the Courts of Equity in England and that the principle of tacking and consolidation was not applicable to India because there was no analogy between the usufructuary mortgage in this country and the ordinary forms of mortgage with reference to which the English principle of tacking and consolidation arose. They laid down the principle that there was no authority for holding that in these provinces a mortgagor not otherwise bound by contract, cannot redeem one or two or more mortgages held by his mortgagee over the same property without redeeming another or the others. If parties wish to lend their money or make further advances on the terms that one mortgage of the property shall not be redeemed until the money due on another mortgage is paid they can easily effect that object by making it expressly part of their contract.

The contract of consolidation, therefore, has to be strictly construed in the present case. What the mortgagor stated in the second mortgage was that he would pay the money borrowed under the second mortgage in 15½ years according to the promise contained in the previous mortgage of 9th June 1882. He further promised to pay the money due on the second mortgage

(1) 16 A. 295; A. W. N. (1891) 93; 8 Ind. Dec. (N. S.) 192.

when he paid the money due on the first mortgage. Finally the second deed was described as a *rahen nama kotli*, meaning a deed of further charge.

There can be no doubt that the second deed was by way of a charge on the same property which had been previously mortgaged under the usufructuary mortgage but the question which we are considering at present is a different one of consolidation. It is obvious that the mortgagor had the privilege of paying off the second mortgage without paying the usufructuary mortgage. Under these circumstances the question will arise whether he was prevented from paying off the first mortgage without paying the usufructuary mortgage. Under the law enunciated in the Transfer of Property Act there are no limitations for the redemption of any one mortgage separately and limitation can only be devised by contract between the parties. In the present case there is no definite term in the second mortgage that the prior usufructuary mortgage shall not be redeemed until the second mortgage is paid. In *Bhartu v. Dalip* (2), a Bench of the Allahabad High Court observed at page 674* of the report: "The parties contemplated that the mortgagor should be at liberty to redeem the later mortgage on payment of the two sums secured by it, namely, Rs. 1,500. If he was so at liberty to redeem that mortgage at any time, there is no reason why he should be precluded from redeeming the earlier mortgage by payment of the amount secured by it. It may be that the parties intended to consolidate the two mortgages but they have not expressed their intention with sufficient clearness so as to enable the Court to say that they had done so and prevent full operation being given to the provisions of ss. 60 and 62 of the Transfer of Property Act."

In that decision also their Lordships of the Allahabad High Court held that the provisions of ss. 60 and 62 as to redemption of any particular mortgage were imperative and a heavy burden was cast on the mortgagee to prove any contract between him and the mortgagor to prevent such a redemption enjoined by law.

In *Abhai Narain v. Matu Prasad* (3), Mr. Daniels (now Mr. Justice Daniels) had before him a case in which there was a

definite and unmistakeable clause in the second contract which prevented the redemption of the first mortgage without payment of the money due on the second mortgage. In such a case he rightly observed at page 243* of the report: "On the other hand there are a number of cases which lay down that where subsequent advances are charged on the property covered by a previous mortgage, a covenant that the mortgagor shall not be permitted to redeem the former deed without redeeming the earlier one is valid and enforceable."

On a consideration of the different rulings produced by learned Counsel in this Court (the Court was fortunate in having very able Counsel to argue this appeal) the principle established appears to me to be that redemption of every separate mortgage should be permitted unless there is clear and unequivocal evidence to prove a contract between the parties to the contrary. In my opinion there is no such contract in this case.

I dismiss this appeal with costs.

Z. K.

Appeal dismissed.

*Page of 24 O. C.—[Ed.]

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 455 OF 1924.

July 1, 1925.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

VIDYAVARDHAK SANGH COMPANY
AND OTHERS—DEFENDANTS—APPELLANTS

versus

AYYAPPA SANGIRIMALLAPPA

AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bombay Land Revenue Code (Act V of 1879), s. 84—Landlord and tenant—Denial of landlord's title—Forfeiture—Ejectment—Notice to quit, whether necessary.

Where in the case of a tenancy to which s. 84 of the Bombay Land Revenue Code applies, the tenant disclaims the landlord's title, the tenancy is determined and the tenant is liable to ejectment without any notice to quit. [p. 616, col. 1.]

Case-law considered.

Second appeal from the decision of the First Class Subordinate Judge, A. P., at Bijapur, in Appeal No. 27 of 1923, reversing that of the Joint Subordinate Judge at Bagalkot, in Civil Suit No. 374 of 1921.

Mr. Nilkant Atmaram, for the Appellant.

Mr. H. B. Gumaste, for the Respondents.

(2) 3 A. L. J. 672; A. W. N. (1906) 278.

(3) 64 Ind. Cas. 83; 24 O. C. 240; 8 O. L. J. 489.

*Page of 3 A. L. J.—[Ed.]

JUDGMENT.

Macleod, C. J.—This action was instituted by the plaintiffs to recover possession, together with mesne profits and costs, of the land in dispute from the defendants alleging that the land belonged to the father of defendant No. 3 who agreed to look after the trees, plant new trees and pay rent equal to the assessment, and that defendant No. 3 having denied their title they were entitled to take possession without giving any notice to quit.

The learned Trial Judge found all the allegations of the plaintiffs proved, but thought that notice to quit was necessary and on that ground he dismissed the plaintiffs' claim for possession.

The Appellate Judge having referred to various decisions said :—

"From the rulings cited above it is clear that a disclaimer of the landlord's title works forfeiture. The fact that there has been a disclaimer is not disputed. I, therefore, hold that no notice to quit is necessary in this case."

Accordingly the decree of the Trial Court was set aside and a decree was passed for possession.

In *Venkaji Krishna Nadkarni v. Lakshman Devji Kandar* (1), the following question was referred for decision of the Full Bench.

Whether in this Presidency a disclaimer of the lessor's title by the annual tenant of a holding to which s. 84 of the Land Revenue Code (Bom. Act V of 1879) applies, is, if made prior to suit, a sufficient cause of action to enable the lessor to recover possession without proof of notice to quit.

Sir Charles Sargent in giving judgment of the Full Bench said (page 361*) :—

"The object of s. 84 is to define the nature of the contract creating an annual tenancy, which, it is to be remarked, may be for agricultural or other purposes both as regards the period during which it runs and the landlord's power of determining it. The landlord's right of forfeiture, however, arising from disclaimer of his title, although it is treated as determining the tenancy at his election, is no part of the contract of tenancy, but is a right which the law implies in all cases from the relationship of landlord and tenant. Had it been the intention of the Legislature to exclude the right of forfeiture in the case

of all annual tenancies, we should have expected to find it expressly provided for. Section 111 of the Transfer of Property Act (IV of 1882), which gives the right of forfeiture, is, in common with all the provisions of Ch. V of the Act, declared to be inapplicable by s. 117 of the Act in the case of all leases for agricultural purposes, except so far as the Local Government may have otherwise declared. That Act, however, did not become the law of this Presidency before January, 1893, subsequent to the institution of this suit. In *Vithu v. Dhondi* (2) which was a case in which it was assumed that notice was required by s. 84 of the Land Revenue Code, it was not contended that the right of forfeiture had been taken away by the section. We think, therefore, that the first question should be answered in the affirmative assuming the case not to be governed by s. 117 of the Transfer of Property Act."

The tenancy in this case commenced before 1878, so that the provisions of the Transfer of Property Act would not apply.

In *Ochhavalal v. Gopal* (3), the question arose whether an annual tenancy to which the Bombay Land Revenue Code applied could be determined without a notice in writing by the landlord. It was urged before the Court that it could be so determined, because there was a repudiation of the landlord's title. As a matter of fact in that case, there was no repudiation of the landlord's title by the tenant. Apart from that, the Court considered that effect must be given to the express provisions of the Bombay Land Revenue Code. As no such notice was given the annual tenancy had not been determined. But in that case the defendant tenant did not disclaim the landlord's title, but merely contended that the plaintiffs had no right to expect payment of rent on a fixed date. Therefore, the relationship of landlord and tenant still existed.

The facts are somewhat similar in the case of *Rama Ranchhod v. Abdul Rahim* (4), where it was held that the setting up of a permanent tenancy by a yearly tenant is not tantamount to disclaimer of the landlord's title. Such a tenant is, therefore, entitled to a notice to quit before he can be evicted by the landlord.

It must be noted that in the case of

(2) 15 B. 407; 8 Ind. Dec. (N. S.) 277.

(3) 32 B. 78; 9 Bom. L. R. 1332.

(4) 59 Ind. Cas. 278; 22 Bom. L. R. 1214; 45 B. 303.

(1) 20 B. 354; 10 Ind. Dec. (N. S.) 798 (F. B.).

*Page of 20 B. —[Ed.]

Ochhavalal v. Gopal (3), the Full Bench decision in *Venkaji Krishna Nadkarni v. Lakshman Devji Kandar* (1) was not referred to.

In *Maharaja of Jeypore v. Rukmini Pattamahadevi* (5) it was said in the judgment of the Privy Council: The repudiation of a landlord's title by the tenant will in certain circumstances work a forfeiture. This is not the ancient Indian law, but has been adopted by the Courts from the Law of England, and is now embodied in the Transfer of Property Act, 1882, s. 3 of which merely gives statutory form to a rule already in force. The denial which operates forfeiture must—now—be by matter of record before institution of any suit for forfeiture, and must be in clear and unmistakeable terms.

It may also be noticed that in *Rama Ranchhod v. Abdul Rahim* (4), Mr. Justice Fawcett said (page 1220*):—

"In the case of an agricultural lease such as the present, s. 84 of the Land Revenue Code lays down that in the absence of any special agreement in writing to the contrary an annual tenancy shall require for its termination a notice given in writing in a certain form. Therefore, even where there has been a disclaimer of the landlord's title, such notice is necessary to determine an annual agricultural tenancy in this Presidency."

His Lordship referred to *Vithu v. Dhondi* (2) and *Ochhavalal v. Gopal* (3).

But in the first place, that particular question was not before the Court. Secondly, no reference was made to the Full Bench decision in *Venkaji Krishna Nadkarni v. Lakshman Devji Kandar* (1). We think then that this case comes within the purview of the Full Bench decision, and that no notice was required to determine the tenancy, once the tenant had disclaimed the landlord's title. We, therefore, confirm the decision of the lower Appellate Court and dismiss the appeal with costs.

Coyajee, J.—I agree.

Z. K.

Appeal dismissed.

(5) 50 Ind. Cas. 631; 21 Bom. L. R. 655 at p. 663; 36 M. L. J. 543; 17 A. L. J. 552; 29 C. L. J. 528; (1919) M. W. N. 271; 23 C. W. N. 889; 26 M. L. T. 16; 42 M. 589; 10 L. W. 381; 46 I. A. 109 (P. C.).

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 22 OF 1925.

April 8, 1925.

Present:—Mr. Justice Krishnan.

In re S. VENKATARAMA IYER—

PLAINTIFF—PETITIONER.

Madras Civil Rules of Practice, Appendix A, r. 1, cl. II—Emergent application for arrest—Process fee—Ordinary fee, whether includes additional fee for extra days of detention.

Under the Madras Civil Rules of Practice, Appendix A, on an application for the emergent issue of process for the arrest of the judgment-debtor, the fee payable is the ordinary fee and half as much again, and ordinary fee includes the extra amount that has to be paid for any further detention beyond the three days under sub-cl. (e) and (f) of cl. II of the rules in the Appendix. [p. 617, col. 1.]

The additional fee for detention beyond three days is as much a portion of the ordinary fee on an ordinary application for arrest of a person as the original fee itself is. [p. 617, col. 2.]

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise an order of the Court of the District Munsif, Mannargudi, dated the 10th December 1924, in E.P. No. 7 (E. P. No. 871 of 1924), in O. S. No. 166 of 1922, on the file of the Court of the Subordinate Judge, West Tanjore.

Mr. G. Lakshman, for the Petitioner.

The Government Pleader, for the Crown.

JUDGMENT.—This is an application to revise an order passed by the District Munsif of Mannargudi on an emergent application for execution by the arrest of the judgment-debtor. The application asked for the issue of an emergent process with detention for five days and on the application, a fee of Rs. 2-6-0 was paid for process fee and 12-annas in cash for subsistence allowance. We are not concerned in this case with the subsistence allowance; but the application was returned on the ground that the process fee paid was deficient by 7-annas. The way in which the fee for the process was calculated is this: According to the schedule of process fees in Appendix A to the Civil Rules of Practice, for a warrant of arrest in respect of one person to be arrested, the rate of fee is Re. 1 and this includes detention for three days. When the decreeholder wants a further detention for five days, he has to pay at the rate of 6-annas per day under sub-cl. (a) of cl. II of the Schedule of process-fees already referred to. He also paid 8-annas as extra fee for the urgent application, in all Rs. 2-6-0. The office calculated the fee

*1 age of 22 Bom. L. R.—[Ed.]

thus: For five days Rs. 1-14-0; half of that for the emergent application Re. 0-15-0; total Rs. 2-13-0; and hence the lower Court noted that there was a deficiency of 7-annas in the fee paid.

The contention before me is that, in an application for the emergent issue of process in the Munsif's Court the half fee that has to be calculated under Note 2 of Appendix A is only half of one rupee which it is contended, is "the ordinary fee". Note 2 to Appendix A reads thus: "For processes applied for and ordered to be executed as emergent, the fee will be the ordinary fee and half as much again". The Government Pleader, on the other hand, contends that the ordinary fee mentioned therein is not the Re. 1 but, that *plus* the extra amount that has to be paid for any further detention beyond the three days under sub-cl. (e) and (f) of cl. II. It is between these two contentions I have to decide.

I am inclined to think that the Government Pleader is correct. I think the words "ordinary fee" in the note are really used in contradistinction to what may be called the emergent fee. The ordinary fee payable in respect of a warrant for arrest if the detention was for three days is Re. 1 but if it was for more than three days an extra amount has to be added and the whole amount is the ordinary fee. For example, if a man applies for the issue of an ordinary process of arrest and wants that the warrant should be kept alive for ten days and wants that the warrant should be executed by an *amin*, he would have to pay Rs. 3-10-0 in all. That is the ordinary fee upon an application for arrest with ten days detention. If that very same thing has to be executed emergently he will have to pay half as much again under Note 2. It is clear that there is nothing wrong in adding the detention fee, when detention for more than three days is asked for to the fee payable for three days and treating the whole as "ordinary fee" for the purpose of ascertaining the emergent fee, because the applicant gets the benefit not only of the issue of the process urgently in the office and the sending of it to the central or Deputy Nazir for entry in his B register but also the benefit of its emergent execution by the *amin* who has to give preference to emergent applications over the ordinary applications in his hand, and there

is no reason why the *amin*'s fee should not also be increased by 50 per cent. in the case of emergent applications. The notification published on October 7, 1924, in Part II of the *Fort St. George Gazette* at page 1801 shows what the benefits are that a person, who gets an emergent process issued, gets. It says: "The processes shall be prepared urgently under the supervision of the Chief Ministerial Officer of the Court, and the process memos with the processes shall then be transferred urgently to the central or Deputy Nazir for entry in his B register and emergent execution of the processes". It is suggested that the words 'ordinary fee' used in Note 2 to application A are used to distinguish it from the additional fee which is spoken of in cl. II. I do not agree with this view. I think the words: "Ordinary fee" in Note 2 are used to distinguish it from the emergent fee and not to exclude the additional fee talked of in the beginning. The additional fee is as much a portion of the ordinary fee on an ordinary application for arrest of a person as the original fee itself is.

In these circumstances I think the order of the District Munsif calling for a further payment of 7-annas on the application before him was correct. The petition, therefore, fails and is dismissed. No costs.

V. N. V.

Petition dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE

No. 1496 OF 1922.

April 1, 1925.

Present:—Mr. Justice Suhrawardy
and Mr. Justice Duval.

KHATEMY CHHAIKUDDIN
CHAUDHURY AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

RAM NARAIN GHOSE AND OTHERS—
DEFENDANTS—RESPONDENTS.

Adverse possession—Landlord and tenant—Assertion of title by tenant—Re-entry, right of, absence of—Landlord, whether affected by assertion—Ejectment suit—Tenancy, plea of, whether bar to plea of adverse possession.

Where a tenant is in possession of land and the landlord has not the immediate right of re-entry, any assertion of title by the tenant would not make time run against the landlord, for the reason that the landlord cannot claim any redress so long as he is not entitled to get possession of the land. The real fact which makes the Law of Limitation run against the landlord is that he is entitled to immediate possession. [p. 619, col. 1.]

In a suit for possession of land, a mere assertion of tenancy does not deprive the tenant from pleading limitation and it is open to him in the first place, to plead that the land was comprised in his tenancy, and, in the second place to assert that if the tenancy is not established, as he has held possession of the land for more than 12 years, the right of the plaintiff to recover possession has been extinguished by the Law of Limitation. [p. 619, col. 2.]

Appeal against a decree of the Additional District Judge, Dinajpur, dated the 24th of March 1922, affirming that of the Subordinate Judge of that District, dated the 18th of February 1921.

Dr. Sarat Chandra Basak, Moulvi Nuruddin Ahmed and Babu Kali Kinkar Chakravarti, for the Appellants.

Dr. Dwarka Nath Mitter and Babu Peary Mohan Chatterjee, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for ejectment of the purchaser of a *jote* by the landlord. The plaintiff's case was that one Trailakhya Nath Chaudhury was the former tenant of the *jote*, that the defendants were in possession as purchasers of the whole *mouza* and as Trailakhya or his heirs were not in possession of any portion of the *jote* the defendants were trespassers although they purported to purchase the *jote* which was an ordinary non-occupancy holding or a non-permanent tenure which is not transferable. The defence was that the *jama* was a permanent tenure, that the son of Trailakhya had mortgaged it to the defendant's predecessor Khetshi Das who bought and obtained possession of the property in execution of the mortgage-decree in 1903 and that the defendants purchased the *jama* from Khetshi in 1907 and had been in possession since then. Both the Courts below on this pleading and the evidence in the case have found that the plaintiffs have lost their right to recover possession by lapse of time and that the defendants by asserting permanent right in the *jote* have acquired the right adversely to the plaintiffs. This finding recorded by the learned Judge is in the following words: "We thus have that since 1903 Khetshi Das, and subsequently the defendants have been holding this tenure asserting

it to be a permanent tenure to the knowledge of the landlord." This finding of fact, in our judgment, concludes the case. Three points have been argued in appeal by the learned Advocate for the appellants.

The first is that there being no case set up by the defendants as to the acquisition of any title by adverse possession, the lower Appellate Court is wrong in holding that the defendants have acquired a permanent right by adverse possession. In order to understand this objection, it is necessary to refer to the pleadings in the case. The plaintiff's case as made out in the plaint is that as the heir of Trailakhya gave up possession of the *jote* without making any arrangement for payment of rent, the same should be regarded as having come into possession of the plaintiffs and the defendants should, therefore, be regarded as trespassers illegally possessing the land; and, further, that as the *jote* was either a non-transferable occupancy or non-transferable non-permanent tenure, the heir of Trailakhya having transferred the same without the consent of the plaintiffs and against their will, the defendants acquired no right or title to the disputed land and they were, therefore, trespassers. The defendants, on the other hand, pleaded that they had purchased an *istamrari mokarrari* tenure from Trailakhya's heir and thus they and their predecessor have been in possession of the disputed land for more than 20 years by virtue of such purchase and under assertion of such right. The Courts cannot, therefore, be said to be wrong in holding that the defendants and their predecessors have been holding it for more than 12 years with adverse possession of a limited interest, and as they claim to hold the land as a permanent tenure, the suit of the plaintiffs for ejectment is barred by limitation. Reference has been made on behalf of the appellants to the case of *Madhavrao Waman v. Raghunath Venkatesh Deshpande* (1) and it is argued on the authority of the pronouncement of their Lordships of the Judicial Committee that the defendants could not acquire any title by adverse possession as against the plaintiffs landlords. The case referred to has no bearing on the present question.

(1) 74 Ind. Cas. 362; 50 I. A. 255; 47 B. 798; 25 Bom. L. R. 1005; (1923) M. W. N. 689; (1923) A. I. R. (P. C.) 205; 33 M. L. T. 389; 28 C. W. N. 857; 20 L. W. 248; 47 M. L. J. 248 (P. C.).

There their Lordships held that persons in possession who had a limited right cannot acquire a permanent right by adverse possession. The case of *Beni Pershad Koeri v. Dudhnath Roy* (2) is next relied upon. That case too has no bearing on the present question. There it was held that a life-tenant cannot acquire a higher title by adverse possession; or to put more broadly, a tenant who is in possession of land under a certain right cannot acquire a higher right by merely asserting that he is a tenant of a superior *chur* or possessing rights higher than what he already had in the land. This view of the law cannot be disputed. If a tenant is in possession of land and the landlord has not the immediate right of re-entry, any assertion by the tenant would not make time run against the landlord for the reason that the landlord cannot claim any redress so long as he is not entitled to get possession of the land. To hold that whenever the tenant asserts a right which he did not possess, it is the duty of the landlord to repudiate such right would be to drive the landlord to have recourse to Courts of Law almost every day, merely because the tenant has chosen to assert a right which he does not possess. The real circumstances which makes the Law of Limitation run against the landlord is that he is entitled to possession. This principle has been enunciated in the case of *Birendra Kishore Manikya v. Fuljan Bibi* (3), when it is said that while a contract of tenancy is in force, either party cannot practically obtain a variation thereof by persisting for a long period in his assertion that the term is otherwise than what it really is.

It is next argued that the defendants are not competent to claim any title by adverse possession as they stand in the shoes of Surendra or Trailakhya the nature of whose tenancy has not been investigated by the Courts below. The contention is that Surendra's tenancy was a temporary one and, therefore, the defendants who have purchased his tenure cannot claim a higher right than that possessed by Surendra. The question is whether the defendants really claim such right and whether the Courts below are wrong for not enquiring into the nature and the character of Surendra's tenancy. The Courts below have

held that the defendants as purchasers purchased the property as a permanent tenure and they have been holding it since their purchase as a permanent tenure to the knowledge of the plaintiff. This fact gives rise to the claim of adverse possession in favour of the defendants.

The third contention is that the learned Judge is wrong in holding that the plaintiffs had knowledge of the possession of Khetsi Das in 1903 merely on the fact that Khetsi Das deposited rent in that year under s. 61, Bengal Tenancy Act. This is a question of fact which we cannot deal with in second appeal. Under s. 63, Bengal Tenancy Act, notices must have been served upon the plaintiffs of the deposit and knowledge must be presumed therefrom. It may also be presumed that the Court did what the law required it to do for the purpose, and that the plaintiffs were informed of the deposit of rent by Khetsi. At any rate, it is not the plaintiffs' case that he looked to some body else for rent. The finding of the lower Appellate Court, therefore, that the defendants have acquired a permanent right in the tenure by adverse possession is based on considerations of facts and the evidence of the case. But it is not necessary to go so far in the present case in order to determine the plaintiffs' right to eject the defendants. The case may be disposed of on the simple ground of limitation apart from adverse possession. The defendants claim to be in possession of the land as tenants for more than 12 years with the knowledge of the plaintiffs and, therefore, the latter's claim for ejectment must be taken to be barred according to the principles laid down in the case of *Raktoo Singh v. Sudhram Ahir* (4), where it is held on the authority of the case of *Dino Monee Debia v. Doorga Pershad Mojoomdar* (5) that in a suit for possession of land a mere assertion of tenancy does not deprive the tenant from pleading limitation and that it is open to the defendants, in the first place, to plead that the lands were comprised in their tenancy and the second place to assert that if the tenancy was not established as they had held possession for more than 12 years the right of the plaintiffs to recover possession was extinguished by the Law of Limitation.

(2) 26 I. A. 216; 27 C. 156; 4 C. W. N. 274; 7 Sar. P. C. J. 580; 14 Ind. Dec. (N. S.) 103 (P. C.).

(3) 38 Ind. Cas. 469; 25 C. L. J. 467.

(4) 8 C. L. J. 557.

(5) 21 W. R. 70; 12 B. L. R. 274.

It is further argued on behalf of the appellants that if the defendants had acquired the rights of a tenant by adverse possession, their tenancy has been determined by the plaintiffs by service of notice. This question in fact is covered by the point we have dealt with above. The defendants have acquired by adverse possession the right to remain on the land as against the plaintiffs whose right to eject the defendant has been extinguished under the Law of Limitation. Moreover the plaintiffs came to Court on the allegation that the defendants were trespassers. They, therefore, cannot now set up a different case. On all these considerations we think that the decree of the lower Appellate Court is correct and this appeal must be dismissed with costs.

Z. K.

Appeal dismissed.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 296
OF 1925.

May 20, 1925.

Present:—Mr. Justice Abdul Raoof.
GURBACHAN KAUR—DEFENDANT—
APPELLANT

versus

SATWANT KAUR AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Probate and Administration Act (V of 1881), s. 64—Court Fees Act (VII of 1870), s. 19 (1)—Letters of Administration for portion of property, application for—Stamp duty payable—Inventory of entire property, whether necessary.

An application for the grant of Letters of Administration with the Will annexed in respect of a portion of the property covered by the Will need not contain an inventory of the entire property.

Letters of Administration can be granted in respect of a part of the property covered by a Will. In such a case the petition is leviable with stamp duty only on the value of the property claimed, and not on the value of the entire property.

Miscellaneous first appeal from an order of the District Judge, Ambala, dated the 29th October 1924.

Mr. K. J. Rustomji, for the Appellant.

Pandit Sheo Narain and Dr. Nand Lal, for the Respondents.

JUDGMENT.—By a Will, dated the 18th of May 1923, Hakim Singh devised his entire property in the following manner—

1. the self-acquired moveable property

was left to *Musammât Satwant Kaur*, one of his widows, while the ancestral moveable and immoveable property was to be shared equally by *Musammât Satwant Kaur* and *Musammât Gurbachan Kaur*, her co-widow. *Musammât Satwant Kaur* was given the right of the monies deposited in the Banks or due from the Post Office and other debtors. An application was made by *Musammât Satwant Kaur* for the grant of Letters of Administration with the Will annexed in respect of a sum of Rs. 3,000 which was deposited in the National Bank of India, Amritsar Branch. The application was opposed by *Musammât Gurbachan Kaur* and *Gujar Singh*, the brother of the deceased. On the pleadings, four issues arose. Two of those issues were:—

(2) Whether the application was in proper form, and

(3) whether the petitioner could apply for grant of Letters of Administration in respect of the part of the property of the deceased covered by the Will.

Issue No. 1 related to the question of jurisdiction, and issue No. 4 raised the question whether the Will had been executed by Hakim Singh and whether he had a disposing mind at the time he executed the Will. All these issues were decided by the District Judge against the objectors, who granted under s. 77 of Act V of 1881, Letters of Administration with a copy of the Will annexed with regard to the realising the sum of Rs. 3,000 and interest from the National Bank of India.

In the argument before me the findings on issues Nos. 1 and 4 are not challenged. The only questions that have been argued before me are those covered by issues Nos. 2 and 3. Mr. Rustomji has contended that the application was not in proper form, inasmuch as an inventory of the entire property covered by the Will was not annexed to the application. The application related to only one particular item and Mr. Rustomji has not shown any authority that even in such a case it was necessary to give an inventory of the entire property.

The other contention put forward before me is that Letters of Administration cannot be granted in respect of part of the property covered by the Will. He has been unable to draw my attention to any provision in the Act prohibiting the grant of Letters of Administration for part of the property only. He has, however, relied upon s. 19(1) and Schedule III of the Court

Fees Act and has contended that stamp duty should have been paid on the value of the entire property covered by the Will. I cannot hold that the provisions of the Probate and Administration Act are in any way controlled by the Court Fees Act. Stamp duty has been paid in respect of the amount claimed. As remarked by the District Judge the words "The amount of assets which are likely to come into the petitioner's hand occurring in s. 61" indicate in a way that the Legislature did contemplate that a case may occur in which it may be necessary to make an application for the grant of administration for part of the property only. The learned Counsel has not been able to cite any direct or indirect authority in support of his contention.

The appeal fails and is dismissed with costs.

N. H.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 9
OF 1923.

July 1, 1925.

Present:—Mr. Justice Ross.

Maharaja KESHO PRASAD SINGH
BAHADUR—PLAINTIFF—APPELLANT
versus

RAM SWARUP AHIR AND OTHERS—
DEFENDANTS—RESPONDENTS.

Cess Act (IX B. C. of 1880), ss. 41, 93, 107—Landlord and tenant—Liability to pay cess, determination of—Cess valuation statement, entries in, value of—Jurisdiction of Civil Courts.

The meaning of the provision contained in s. 107 of the Cess Act is that what is done under the Act is done only for the purposes of the Act and has no other effect on the rights of the parties. The section does not in any way modify the conclusive effect given by s. 93 of the Act to the cess valuation. [p. 622, col. 1.]

The question as to the liability of a tenant to pay cess has to be determined under s. 42 of the Cess Act and involves the question of the tenant's status. It is not, however, his status under the Bengal Tenancy Act that is in question, but his status under the Cess Act and his liability under s. 41 of the latter Act must be determined according to the entries in the cess valuation statement and not with reference to the entries in the Record of Rights. A Civil Court has no jurisdiction to interfere with the entries in the cess valuation statement. [p. 622, cols. 1 & 2.]

Appeal from a decision of the Subordinate Judge, Arrah, dated the 18th of September 1922, modifying that of the

Munsif, Buxar, dated the 28th of April 1922.

Mr. L. N. Singh, for the Appellant.

Mr. P. Dayal, for the Respondents.

JUDGMENT.—This is an appeal from a decree of the Subordinate Judge of Arrah, varying a decree passed by the Munsif of Buxar. The plaintiff is the appellant. He sued the defendants for rent and cess for 1325 to 1328 and the only question is as to the amount of cess legally payable by the defendants.

The plaintiff's case was that the defendants were tenure-holders within the meaning of the Cess Act, that the annual value of their holding was Rs. 95-4-0 as entered in the cess valuation papers; that the rent of their holding as entered in the Record of Rights was Rs. 31-0-6, and that consequently under s. 41, cl. (2) of the Cess Act the defendants were liable to pay cess at the rate of one anna in the rupee calculated on the annual value of the holding, namely, Rs. 95-4-0, less half an anna in the rupee on the rent of the holding Rs. 31-0-6. The defence was that the defendants were cultivating *raiya*ts within the meaning of the Cess Act, and that they were liable only to pay cess under s. 41, cl. (3) at the rate of half an anna in the rupee upon the rent of their holding Rs. 31-0-6.

The Munsif held that the defendants were liable to pay cess at half an anna in the rupee on the annual value of their holding which was Rs. 95-4-0. There was an appeal by the plaintiff and a cross-appeal by the defendants. The plaintiff's appeal was dismissed and the cross-appeal was allowed and it was held by the Subordinate Judge that the defendants were liable to pay cess at half an anna in the rupee on Rs. 31-0-6. The plaintiff has come up to this Court in second appeal.

The argument on behalf of the appellant is that under s. 93 of the Cess Act the Civil Courts have no jurisdiction to question the cess valuation. Section 93 provides that "Every valuation under this Part shall be open to revision by the Commissioner or Board of Revenue, and not otherwise." Now the cess valuation statement shows the names of the defendants in column 1 which is headed: "Name of *zemindars*, tenure-holders and sub-tenure-holders" In column 2 of which the heading is "*Nij-jote* and other assessed areas of landlords" is entered Rs. 63-3-0. In column 3 which is headed "*raiya*twari lands" is

entered Rs. 32-1-0. The total valuation is given in column 7 as Rs. 95-4-0 and that is the total of columns 2 and 3. Column 8 which is headed "Revenue or rent on which deduction under s. 41 is allowable" shows an entry of Rs. 31-0-6. The appellant contends that, on this document, it must be taken for the purposes of the Cess Act that the defendants are tenure-holders, that the annual value of their holding is Rs. 95-4-0 and that deduction is allowable under s. 41 on the rental of Rs. 31-0-6, in other words, that this document establishes the plaintiff's claim.

The argument on behalf of the respondents is that the defendants are accorded in the Record of Rights as tenants at fixed rates at a rental of Rs. 31-0-6 and that they must, therefore, be assessed as cultivating *raiya*s, and that their liability is determined by s. 41, cl. (3). The argument based on s. 93 is sought to be answered by a reference to s. 107 which says: "Nothing in this Part contained, and nothing done in accordance with this Act, shall be deemed to affect the rights of any person in respect of any immovable property or of any interest therein except as otherwise expressly provided in this Act." Now the meaning of this section is clear, namely, that what is done under the Cess Act is done only for the purposes of that Act and has no other effect on the rights of persons. It does not in any way modify the conclusive effect given by s. 93 to the cess valuation. The fact that the defendants are recorded in the Record of Rights as tenants at fixed rates is strictly irrelevant to the present question. The question is not as to the status of the defendants under the Bengal Tenancy Act; the question is as to their status and liability for the purposes of the Cess Act. The Revenue Authorities have determined that the defendants are tenure-holders and that the annual value of their holding is Rs. 95-4-0 of which Rs. 63 3-0 is in respect of lands held by themselves and Rs. 32-1-0 is in respect of lands let out to tenants.

It is argued for the respondents that the question in the suit is as to the defendants' liability to pay and that this has to be determined under s. 41 and involves the question of the defendants' status. But it is not their status under the Bengal Tenancy Act that is in question, but their status under the Cess Act and their liability under s. 41 must be determined according

to the entries in the cess valuation statement. This statement was compiled in the presence of the defendants; and, if they were aggrieved at the entry, they ought to have appealed to the Commissioner or to the Board of Revenue as provided by s. 93. Not having done so, they are concluded by the entry in the valuation statement.

It is obvious that a great injustice would be done to the plaintiff if the defendants' contention were to prevail. The plaintiff has been made liable for cess on a valuation of which one of the items is the annual value of the defendants' tenure. If it were now held that the defendants were not tenure-holders, then the liability for this cess will fall on the plaintiff alone through no fault of his, but because the defendants had failed to contest the entry. In my opinion it was for the Revenue Authorities to decide whether the defendants were tenure-holders of cultivating *raiya*s for the purposes of the Cess Act and in this matter the entry in the Record of Rights is wholly irrelevant. The status of the defendants under the Bengal Tenancy Act is in no way affected by this valuation which stands by itself and the Civil Courts have no jurisdiction to interfere with it.

I would, therefore, allow this appeal with costs and decree the plaintiff's suit in full. The plaintiff is entitled to his costs in all the Courts.

Z. K.

Appeal allowed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 845
OF 1922.

June 23, 1925.

Present:—Mr. Justice Adami and
Mr. Justice Sen.

RAM AUTAR PANDE AND OTHERS—
—APPELLANTS

versus

SHANKAR DAYAL AND OTHERS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, O. II, r. 2—Transfer of Property Act (IV of 1882), s. 68 (b)—Mortgage, usufructuary—Dispossession of mortgagee—Suit to recover possession, dismissal of—Money suit, whether maintainable—Abandonment of claim—Res judicata.

A usufructuary mortgagee who had been dispossessed from the land mortgaged brought a suit

for recovery of possession but the suit was dismissed on the ground that the property mortgaged was joint family property and that all the members of the family had not joined in the mortgage. It was found that the mortgage was genuine and that consideration had passed but that there was no legal necessity for the mortgage. The Court also stated in its judgment that a money-decree could not be passed in favour of the plaintiff as he had made no prayer for such a decree. Against that decree the defendants filed an appeal attacking the finding as to the genuineness of the mortgage and there was a cross-appeal by the plaintiff asking for a money-decree. The cross-appeal was dismissed on the ground that it was not sufficiently stamped and the appeal was dismissed on the ground that although no consideration had passed the appeal was not competent inasmuch as the suit had been dismissed in the lower Court. The plaintiff subsequently brought a money suit to recover the amount due under the mortgage-bond:

Held, (1) that it was open to the plaintiff in the previous suit to sue for the mortgage money under the provisions of s. 68 (b) of the Transfer of Property Act and that plaintiff having failed to ask for that relief in the previous suit the present suit was barred under the provisions of O. II of r. 2 of the C. P. C.; [p. 624, cols. 1 & 2.]

(2) that the finding by the Appellate Court in the previous suit that no consideration had passed in respect of the mortgage-bond operated as *res judicata* between the parties and that the present suit must, therefore, fail on that account also. [p. 624, col. 2.]

Appeal from a decision of the District Judge, Shahabad, dated the 30th June 1922, confirming that of the Subordinate Judge, Shahabad, dated the 14th July 1921.

Messrs. C. C. Das and D. N. Varma, for the Appellants.

Mr. Parmeshwar Dayal, for the Respondents.

JUDGMENT.

Adami, J.—The plaintiff in the case out of which this second appeal comes to us took a mortgage from Basudeo Rai and Shankar Dayal Rai in consideration of an advance of Rs. 950. He was to take possession of 3 *bighas* of *raiya* land and to enjoy the usufruct in lieu of interest; no date was fixed for re-payment, but the mortgagor was to be entitled to recover possession by payment of the amount advanced on the 30th *Jeth* in any year. The usufructuary mortgage bond was executed on August 11th 1914. In 1919 a dispute arose regarding the possession of the land which resulted in proceedings under s. 145, Cr. P. C. In those proceedings it was decided that the plaintiff mortgagee and his lessee were out of possession. Thereupon the plaintiff instituted a suit for recovery of possession on the strength of his mortgage-bond. His only prayer in the plaint was for recovery of possession. After the close of the case, however, he put in a petition

that he might amend the plaint by an alternative prayer for recovery of the mortgage debt. The learned Munsif rejected this petition and thereafter dismissed the suit on the ground that the property mortgaged was joint family property and that the defendant No. 3 had not joined in the mortgage and that the plaintiff had failed to prove any legal necessity. The Munsif held that the mortgage was genuine and consideration had passed. In his judgment the learned Munsif stated that a money-decree could not be allowed as there had been no prayer for it; he said that he left the point open and plaintiffs may seek their remedy, if so advised, against defendants Nos. 1 and 2 for the money actually advanced.

Against this judgment and decree an appeal was filed by defendants Nos. 1 and 2 against the decision that the mortgage-bond was genuine. There was a cross-appeal by the plaintiff asking for a money-decree. This cross-appeal was dismissed by the learned Subordinate Judge because the cross-appeal was not sufficiently stamped. As to the appeal, the learned Subordinate Judge held that no consideration had passed, but he proceeded to find that no appeal lay because the defendants had been successful in the Court below and, therefore, there was nothing to appeal against.

The present plaintiffs, on the basis of the statement made by the Munsif that they might seek their remedy for the money actually advanced, instituted the present suit on the 17th August 1921, praying for recovery of the debt under the bond of 1914.

The learned Subordinate Judge dismissed the suit, first, on the ground that a money-decree had been asked for in the previous suit and refused and that the provisions of s. 11 of the C. P. C. barred the present suit, and secondly on the ground that as the plaintiff has the opportunity in the previous suit of asking for the relief and had not taken that opportunity, O. II, r. 2 of the C. P. C. precluded him from suing for the relief.

On appeal the learned District Judge has upheld the finding of the Subordinate Judge.

Before us Mr. Das takes up the point that s. 11 of the C. P. C. cannot operate because, though the Subordinate Judge on appeal held that no consideration passed, that finding can have no strength as *res*

judicata since the Subordinate Judge found that no appeal lay and dismissed the appeal.

The second point taken by Mr. Das is that the lower Courts are mistaken in thinking that O. II, r. 2 will operate. His contention is that the cause of action in the previous suit and the cause of action in the present suit are wholly different. He says that in the previous suit the cause of action was the dispossession of the plaintiffs and the prayer was only for recovery of possession, whereas in the present suit the plaintiff is merely asking for the re-payment of a debt incurred under the bond. He contends that it cannot be argued that in the previous suit the plaintiff could have asked for a money decree on the basis of s 68 cl. (b) of the Transfer of Property Act, because it was found in that suit that there was no mortgage, and in fact the Court in the previous suit, having come to that finding, could not have given relief under s. 68, cl. (b).

I will deal with the second contention of Mr. Das first. It is quite plain that when the plaintiff instituted his first suit claiming the bond to be a mortgage-bond and asking for recovery of possession, it was open to him to claim for the re-payment of the mortgage money under s. 68, cl. (b). That relief was open to him and he did not claim it. His prayer for an amendment of the plaint was rejected and the remark of the Munsif in his judgment can hardly be held to amount to the grant of leave to institute a suit for money. It is quite true that the Munsif having found that there was no valid mortgage would be unable to grant a decree under s. 68, cl. (b). It is true too that the cause of action for recovery of the money as a debt due under the bond would be different from the cause of action in the mortgage suit asking for recovery of possession, for the facts to be proved would not be similar in the two cases. In both, however, the bond would have to be relied on. The trouble to my mind is, if Mr. Dass' arguments are accepted and it is held that the present suit is merely a suit for a debt due on the bond, limitation will come in, for the bond was executed on the 11th August 1914 and the suit was not instituted till the 17th August 1921 and the suit would be barred. There is no doubt in my mind that in the previous suit the plaintiff should have asked for the relief allowed by s. 68,

cl. (b) of the Transfer of Property Act. He certainly cannot ask for that relief now.

With regard to s. 11 of the C. P. C. the learned Subordinate Judge came to a direct finding on an issue between the parties that consideration did not pass in 1914. The reason given by the learned Subordinate Judge for dismissing the appeal was not altogether a good reason. It was necessary to decide the point whether consideration passed between the parties and the learned Munsif came to a decision on that point which was against the interest of the defendants. If no appeal had been brought the finding of the Munsif would have operated as *res judicata* against the defendants, and, therefore, as decided by Mullick, J., in the case of *Raghunath Kurmi v. Deonarain Rai* (Second Appeal No. 1419 of 1916), the defendants had a right of appeal although the suit against them had been dismissed. I think, therefore, that s. 11 of the C. P. C. will operate and bar this second suit, it having been found that no consideration passed on the bond of 1914.

I would, therefore, dismiss this appeal with costs.

Sen, J.—I agree.

Z. K.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS NOS. 133 AND 210
OF 1922.

April 30, 1925.

Present :—Justice Sir Babington Newbould,
Kt., and Mr. Justice Pearson.

HEM CHANDRA KUNDU AND OTHERS—
APPELLANTS

versus

JNANENDRA CHANDRA KUNDU

AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. II, paras. 14, 20—Partition suit—Compromise referring certain matters to arbitration—Arbitration, nature of—Arbitrator proceeding ex parte after due notice, legality of—Finding that no material has been produced by parties with regard to certain items, effect of—Award, validity of—Appeal—Oral evidence, appreciation of—Trial Judge, opinion of, value of.

A partition suit was compromised and a decree was passed in accordance with the compromise. The compromise provided that certain preliminary matters had been settled in a certain way between the parties.

and that certain properties which were the subject of the suit should be treated as joint properties and should be divided among the parties by a named arbitrator according to the shares of the parties, taking into consideration the conveniences and inconveniences. The compromise also contained a clause that if the arbitrator "fails or becomes unable to make the divisions and partition of all these properties that are settled as *ijmali* and to adjust and settle the account relating to such of the *karbars* as to which accounts have to be taken, in such a case, any of the parties shall have power to enforce such divisions and partition and the taking of such accounts by executing this decree and upon such adjustment and settlement of accounts each party shall get a decree for the amounts that may be found due to him or her thereby":

Held, that the parties intended that no further steps should be taken in Court and that the arbitration should be an arbitration without the intervention of the Court and that the rules contained in the Second Schedule to the C. P. C. relating to such arbitrations were applicable to the case. [p. 626, col. 1.]

Where an arbitrator is authorised to proceed in the absence of a party who fails to appear in spite of the notice of the date of hearing being given to him, the award made by the arbitrator cannot be objected to on the ground that the arbitrator carried on an *ex parte* enquiry owing to the failure of one of the parties to the reference to appear before him after proper notice. [p. 626, col. 2; p. 627, col. 1.]

Where with reference to certain items in dispute between the parties, no material is produced before the arbitrator on which he can decide that there is any liability from one party to another, the award of the arbitrator cannot be objected to on the ground that it fails to determine some of the points in dispute between the parties. The effect of the award is that no party can make any claim against any other party in respect of such items, and the award is final for all time settling the dispute between the parties relating to such items. [p. 629, col. 1.]

Where there is direct conflict of oral evidence with regard to any point, an Appellate Court must give weight to the impression that the witnesses made on the Judge in whose presence they gave evidence. [p. 627, col. 2.]

Appeals against an order of the Subordinate Judge, Burdwan, dated the 20th February 1922.

Babus *Brojo Lal Chakravarti*, *Baranashibashi Mookerjee* and *Pyari Mohan Chatterji*, for the Appellants.

Babus *Rupendra Coomar Mitra* and *Rama Prasad Mukhopadhaya*, for the Respondents.

JUDGMENT.—These two appeals are both preferred against the same order of the Subordinate Judge of Burdwan, dated the 20th February 1922, by which he directs that a certain award be filed. The parties to this case are members of a joint family being the descendants of one Hira Lal Kundu. The appellants in Appeal No. 133 of 1922 represent all the members of one branch of the family, being Hem Chandra Kundu the son of Hira Lal's

son Trilochan, Srimati Madhabi Sundari Dasi, the mother of Hem Chandra and Srimati Bhuvati Sundari Dasi his wife. The other parties to this litigation are Kumud Kamini Dasi, widow of Hira Lal's son, Gour Mohan Kundu, and the descendants of Gour Mohan. The appellant in Appeal No. 210 is Atulashi Dasi widow of Rampada Kundu son of Gour Mohan. In 1915 Bibhuti Bhusan Kundu grandson of Gour Mohan instituted a suit for partition of the family property. That suit was decreed on compromise on the 21st December 1916. The *solehnama* which was filed on behalf of all the parties was made part of the decree, and in that decree Radha Kishore Ta was appointed arbitrator. He pronounced the award on the 20th December 1919 and Jnanendra Chandra Kundu the youngest son of Gour Mohan applied to the Court for an order directing that the award be filed. This application has been contested by all the members of the family except Jnanendra's mother.

Before us objection has been taken to the award on several grounds which we will deal with in order. The first ground taken is that the reference was one in a pending suit and that, therefore, the award cannot be filed in accordance with the procedure laid down in the Second Schedule of the C. P. C. from para. 20 onwards which relate to arbitration without the intervention of a Court. This point depends on the effect of the decree which was passed in the original title suit of 1915. In form that decree appears to be a final decree which terminated the litigation and not a preliminary decree which required further direction by the Court before effect could be given to it. The decree after setting out the claim goes on to state that this suit coming up on the 22nd December 1916 for final disposal it is ordered and decreed that this suit be decreed in the terms of the *solehnama* and the *solehnama* provides that certain preliminary matters relating to certain deeds of release have been settled in a certain way between the parties and that the remaining properties which were the subject of the suit shall be treated as joint properties and shall be divided by the arbitrator according to the shares of the parties taking into consideration the conveniences and inconveniences. It further provides that the arbitrator shall examine the accounts of various business and other

matters and settle those accounts between the parties. There is further a provision regarding other matters which are not of importance with reference to this appeal. The important clause with reference to the present argument is cl. 9 of the *solehnama* which is in the following terms: "If Radha Kishore Ta fails or becomes unable to make the divisions and partition of all these properties that are settled as *ijmali* and to adjust and settle the account relating to such of the *karbars* as to which accounts have to be taken, in such a case, any of the parties shall have power to enforce such divisions and partition and the taking of such accounts by executing this decree and upon such adjustment and settlement of accounts each party shall get a decree for the amounts that may be found due to him or her thereby". That is the only clause in the decree which provides for any further action by the Court. But action can only be taken under this clause in the event of the arbitrator failing to perform his duty. If there has been compliance by the arbitrator with the conditions of the *solehnama* as regards dividing the properties and settling accounts nothing remains to be done by the Court. In the present case it is not necessary to decide what action can be taken under this clause in the event of such failure on the part of the arbitrator. If he has failed to make a binding award which can be filed, this suit would be dismissed. If the award is held to be a proper award this cl. 9 will not come into operation. In our opinion cl. 9 is in favour of the respondents' case that the parties intended that no further steps should be taken in Court and that the arbitration should be an arbitration without the intervention of the Court and that this is the effect of the decree in which the *solehnama* is embodied.

The next point urged is that if there was a valid submission to arbitration it was revoked for good cause. On this point we are in agreement that the findings of the lower Court that the revocation either by Hem Chandra Kundu or by Hrishikesb, the brother and *am muktear* of Atulashi Dasi, has not been proved. It is not necessary to deal with this point at great length because it is dependent on the question as to whether there has been misconduct by the arbitrator. The

connection is two-fold. Whether there was actual revocation or not is a question of fact on which there is contradictory evidence and we shall have to deal with the credibility of the evidence in dealing with the question of misconduct. Further even if there were revocation it would not be effective unless it was for just cause, and unless we hold that there has been misconduct on the part of the arbitrator we could not give effect to the contention of the appellant that there was revocation of the arbitrator's authority.

As regards the question of misconduct the strongest case is made on behalf of the appellants in Appeal No. 133 of Hem Chandra Kundu. The case on this point as put forward on his behalf is as follows: The dispute was referred to the arbitrator towards the end of December 1916. The arbitrator sat in January 1917 and March 1917, but practically nothing was done. Then for 2 years and 8 months nothing more was heard of the arbitration. In December 1919 the arbitrator was advised and he believed that he must decide the case within three years from the date of the order of reference. On the 2nd December he fixed the 10th of December as the date of hearing the parties. On receiving notice of this date Hem Chandra Kundu wired that he could not come on the ground that his son was ill, and on this information the arbitrator postponed the sitting till the 20th December. On that date Hem Chandra appeared with certain *khata*s which he wished the arbitrator to examine. In the meantime in the absence of Hem Chandra the arbitrator had been holding his enquiry and had really finished it on the 19th. The drafting of the report continued on the 19th and the morning of the 20th December. The draft report was then fair copied and pronounced, and Hem Chandra's application that his *khata*s should be examined was refused. If these facts had been established there can be no doubt that the arbitrator would have been guilty of legal misconduct. On examination of the evidence we find that this case has not been established. In the first place Hem Chandra's application for adjournment did not reach the arbitrator until the 11th December. He had given due notice that he would proceed with the arbitration on the 10th and the *solehnama* expressly provides that if the

parties do not appear after due notice the arbitrator can proceed *ex parte*. Consequently on the 10th when Hem Chandra did not appear the arbitrator was justified in proceeding with the arbitration in his absence as he did. Then further it is not shown that Hem Chandra was led to believe that the arbitration proceedings were postponed till the 20th December. Admittedly the arbitrator wrote a letter to Hem Chandra as regards his appearance on the 20th. That letter has not been put before us. It is not clear whether or not it was put in evidence before the lower Court. If it was it has not been printed in the paper-book; consequently there is nothing to rebut the arbitrator's story as to what actually happened in this connexion. This will be found set out in the commencement of the award. There it is stated that after issue of notice on the 2nd December Hem Chandra on obtaining notice appeared before the arbitrator at Burdwan and asked for time and it was settled that the arbitration proceeding would commence from the 10th December. The arbitrator understanding that he was trying to waste time for nothing sent him a telegram on the 10th December. But notwithstanding he failed to appear. On the 11th December the arbitrator received a registered letter from him asking for adjournment. But he had already commenced taking accounts. Then having perceived that on settlement of accounts Hem Chandra would become liable for a large amount he again sent a telegram on the 12th December and also a letter through a messenger not only to Hem Chandra but also to his mother and wife who have joined with him in this appeal, for the purpose of enabling them to appear and produce if they so liked evidence on their behalf on the 20th December at 8 A.M., in the morning. It would thus appear that Hem Chandra had no reason to think that the enquiry would be postponed to the 20th December. He was aware that the arbitrator would proceed in his absence. All that the arbitrator undertook was that he would not finally pronounce his award without giving Hem Chandra and the other members of his branch of the family an opportunity of being heard on the 20th December. As regards what happened on the 20th December there is direct contradiction in the evidence. According to the arbitrator Hem Chandra appeared and he heard

all that he had to say. That statement he makes in para. 1 of his award a contemporaneous record written on that very day. According to Hem Chandra the arbitrator refused to look at the accounts he had produced or hear him at all. In our opinion the probabilities are in favour of the arbitrator's version. He was an independent person selected for the office of arbitrator by consent of all parties. When he had specially fixed the 20th December for hearing what Hem Chandra had to say it seems unlikely that he would not have listened to him. Further where there is direct conflict of evidence we must give weight to the impression that the witnesses made on the Judge in whose presence they gave evidence. Here the learned Subordinate Judge was evidently most favourably impressed by the manner in which Radha Kishore gave his evidence and took the contrary view as to the value of the evidence of Hem Chandra, Harishikesh and the other witnesses who supported them on this point. As regards Harishikesh we certainly agree that his evidence is most unsatisfactory. He has not given any reason for his absence during the arbitration proceedings. He has admitted that the arbitration proceedings were going on for three or four months before the 20th December and he cannot be heard to say that he was in ignorance of the proceeding that was going on. But he has given no explanation of his absence from the 10th to the 19th December. That there was a quarrel between him and the arbitrator on the 20th is admitted. But it would appear from the evidence that it had nothing to do with the arbitrator's conduct in connexion with the arbitration proceedings but arose out of a dispute in consequence of Harishikesh having entered Radha Kishore's house under circumstances which Radha Kishore thought improper. We have no hesitation in accepting the evidence on the plaintiff's side that this quarrel took place after delivery of the award and not before.

Another point that has been urged as regards the case of Hem Chandra relating to the refusal to examine the *khata*s is that Hem Chandra in cross-examination stated that he filed all the *khata*s he had before Salis. If he had done this he could not have had any *khata* to produce before him on the 20th December. No question was put to him in re-examination to enable him to explain this damaging admission. We

hold, therefore, that the contention that the arbitrator refused to admit evidence produced before him or to hear the parties when they appeared has not been sustained and that the proceedings were properly held *ex parte* after due notice to all parties concerned in accordance with the terms of the *solehnama*.

Another point in which there is alleged to have been misconduct is that the *solehnama* provided that the arbitrator should work in consultation with two other gentlemen, a Pleader Babu Bidhu Bhusan Sikdar and a *mukhtear* Babu Jagabandhu Hajra. It is contended that he did not consult the *mukhtear* Babu Jagabandhu Hajra. The evidence as to what actually happened is contradictory. The arbitrator says that he consulted Babu Jagabandhu Hajra, who left the entire matter to him and his uncle. Babu Jagabandhu Hajra's story is that he advised the arbitrator not to proceed *ex parte* and the arbitrator did not take his advice and after that he never gave him any opinion as to the proceedings. Here also we think the arbitrator's version should be accepted. But whatever version may be accepted the fact remains that for some reason or other Babu Jagabandhu Hajra refused to advise the arbitrator. After advice was refused the arbitrator was not bound to consult Babu Jagabandhu Hajra further.

The next objection taken to the conduct of the arbitrator is as regards the method in which the partition of the immoveable properties was made. As regards the division between two branches of the family into 8 annas share it appears that there had previously been an amicable partition between them. This amicable partition was accepted by the arbitrator. It does not appear that any objection was made before him by any one concerned, and by so doing the arbitrator acted quite properly. Objection is taken to the arbitrator's method of dividing the property belonging to the branch of the family descended from Gour Mohan. This property had to be divided into four parts. It appears from the evidence that the plaintiff Jnanendra made a division of this property into four shares and it was decided by lot; which share should come to the representative of each of the four sons of Gour Mohan. It is contended that this was not in compliance with the terms of the *solehnama* which provided that the division should be made after considering the relative conveniences

and inconveniences of the plaintiff and the defendants Nos. 2, 3 and 4. There is nothing in the evidence to suggest that the partition by lot was not properly conducted. In our opinion it is hard to imagine a fairer way of dividing the property, since Jnanendra in making the allotments would be bound to make them as equal as possible inasmuch as he was as likely as any of the other four members of the family to get the worst lot if there was any appreciable difference between them. There is nothing to show that there was any material before the arbitrator on which he could hold that there was any difference in the lots as regards the question of convenience and inconvenience. It is said that he was wrong in not himself preparing the four list of shares of property, but it was sufficient that it was done under his orders and the division was approved by him. We hold, therefore, that the arbitrator did not violate the terms of the reference in dividing the shares of this branch of the family in this manner. We may add that there was no specific ground of objection taken on this point nor was the arbitrator cross-examined as to his reasons for making the division of this part of the property in this manner.

We now come to the question of the accounts. So far as the accounts of the *khata* businesses are concerned we have already given our reasons for holding that the arbitrator had full material before him to come to a decision on these accounts. Objection is also taken in respect of the other matters of accounts which were referred to the arbitrator. He was required to take accounts relating to the Mohanpur dwelling house up to the year 1317. The only accounts which were produced before him ended on the death of Trilochan in *Sarvan* 1314 and on those accounts he held that Hem Chandra was liable for the sum of Rs. 1,341-4-10 *gundas*. In respect of other matters to which reference is made in the *solehnama* no accounts were produced before him and he has stated that it is impossible to determine whether any of the parties had any liability in relation thereof. Some other objections also have been taken as regards the items, but these related to matters which were most undoubtedly within the arbitrator's powers to decide.

The point that is strongly urged is that as the arbitrator has not adjudicated on all the points which were referred to him his award must be set aside, since that is one

of the grounds referred to in para. 14 of the Second Schedule of the C. P. C., and under para. 21 of that Schedule if such ground is proved in a case of arbitration without the intervention of the Court, the Court cannot order the award to be filed. There has been an interesting argument as to the case law on the question whether the concluding portion of cl. (a) of para. 14 is applicable in the case of arbitration without the intervention of the Court. But on the view we take it is unnecessary to decide this point. In our opinion the learned Subordinate Judge and also the arbitrator himself have not realized the real effect of the arbitrator's findings with reference to these accounts. The arbitrator's finding really comes to this. In respect of these claims in dispute between the parties with reference to these accounts no material was produced before him on which he could decide that there was any liability from one party to another. The effect of this finding if the award is filed will be that no party to these proceedings could make any claim against any other party in respect of these accounts. They had an opportunity to make out their claims and they failed to take advantage of it. They cannot in any subsequent proceeding again raise such claim. It, therefore, follows that the arbitrator's award is final for all time settling the dispute between the parties relating to these accounts. We, therefore, hold that no ground mentioned in para. 14 has been proved, since the award has not left undetermined any of the matters referred to arbitration.

We hold, therefore, that the objections taken by the appellants fail and that the order of the lower Court directing the award to be filed should be upheld. The appeals are dismissed with costs.

We assess the hearing fee in each appeal at ten gold mohurs.

Z. K.

Appeal dismissed.

LAHORE HIGH COURT.

CIVIL REVISION No. 397 OF 1925.

June 17, 1925.

Present:—Mr. Justice Jai Lal.
RADHA KRISHAN—PLAINTIFF—
PETITIONER

versus

MEHTAB MIAN AND OTHERS—

DEFENDANTS—RESPONDENTS.

*Court Fees Act (VII of 1870), Sch. II, Art. 17 (6)—
Decree, mode of execution of, appeal against—Court-
fee payable.*

When an appeal is not preferred against a decree as a whole, but only against the mode of the execution of the decree, the case falls under Art. 17 (6) of Sch. II to the Court Fees Act, and a stamp of Rs. 10 is sufficient. [p. 630, col. 1.]

Civil revision from the decision of the District Judge, Attock, dated the 28th November 1924.

Bakhshi Tek Chand, for the Petitioner.

Sheikh Niaz Muhammad, for the Respondents.

JUDGMENT.—The plaintiff in this case instituted a suit against the defendant for dissolution of partnership. The Trial Court decreed the suit but added a direction that a Receiver should be appointed in respect of the partnership property (timber) who should bring it to the market and sell it. The plaintiff was ordered to supply the necessary funds for bringing the timber to the market. The plaintiff appealed to the District Judge with a view to have this direction removed. The learned District Judge held that the amount which would have to be paid by the plaintiff in pursuance of the direction was more than Rs. 5,000 and, therefore, he had no jurisdiction to entertain the appeal. He also held that the Court-fee stamp of Rs. 10 paid by the plaintiff on the memorandum of appeal was insufficient. The plaintiff has appealed to this Court from both these orders. A preliminary objection was taken on behalf of the respondent that no appeal lay from the above orders. The appellant has, however, in his memorandum of appeal expressly prayed that, in case no appeal lay, the memorandum of appeal may be treated as a petition for revision. I pointed out to the learned Counsel for the respondent that it was a fit case in which petition for revision should be entertained under any circumstances. The learned Counsel did not argue the question of incompetency of an appeal. The question whether an appeal lies is a doubtful one.

and I would prefer, therefore, to treat the proceedings as a revision.

The view of the learned District Judge on both the points referred to above is erroneous. The value of the suit in the Trial Court for purposes of jurisdiction was Rs. 1,200. This valuation has not been shown to be erroneous and must, therefore, for the purposes of the appeal be accepted to be correct. The consequence is that an appeal from the decree or any part thereof lies to the District Judge and not to the High Court. As regards the question of Court-fees the plaintiff appealed to the District Judge only so far as the direction regulating the conduct of the Receiver in respect of the timber and as to the payment of expenses for bringing the timber to the market is concerned. He did not attack the decree as a whole. In other words the objection in appeal was to the manner in which the decree passed by the Trial Court was to be enforced. The case under the circumstances was clearly covered by cl. 6 of Art. 17 of the Second Schedule of the Court Fees Act. No authority was cited on behalf of the respondent in support of the view taken by the learned District Judge. The learned Counsel for the petitioner on the other hand relied upon the judgment of this Court in Civil Appeal No. 467 of 1917, where it was held that a Court-fee stamp of Rs. 10 was sufficient on a memorandum of appeal from a decree for partition where the appellant did not dispute the respective shares of the parties but sought only to impeach the mode of partition. The case was held to fall within the purview of Art. 17 (6) of Schedule II to the Court Fees Act. In *Rup Chand v. Fateh Chand* (1) a decree was granted to the plaintiff for possession of certain property but its operation was limited to the lifetime of a female holder. An appeal by the plaintiff seeking to have the condition limiting the tenure of the property to the time of the female holder was held to be sufficiently stamped with a Court-fee of Rs. 10. In *Fateh Chand v. Bilas Rai* (2) in a suit for partition the Trial Court passed a preliminary decree fixing the share of the parties and then appointed a Commissioner and ordered that the separate pieces of immoveable property shall

be auctioned by the Commissioner among the parties, the share-holder being allowed to bid. The total sum thus paid in will be divided among the parties in the proportionate shares given above. The memorandum of appeal objecting to the mode of partition was held by the Chief Court of the Punjab to be sufficiently stamped with a Court-fee of Rs. 10 under Art. 17 (6) Schedule II of the Court Fees Act.

The judgment of this Court in *Rama Singh v. Ram Chand*, First Appeal No. 564 of 1914, also supports the contention of the appellant. In my opinion, therefore, the Court-fee paid on the memorandum of appeal before the District Judge was sufficient and the learned District Judge was competent to entertain the appeal.

Accepting the petition I order that the memorandum of appeal be returned to the petitioner for being presented in the Court of the District Judge and I direct the District Judge to hear the appeal on its merits. The respondent will pay the costs of the petitioner in this Court.

N. H.

Petition accepted.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1615.
OF 1922.

April 28, 1925.

Present:—Mr. Justice Cuming and
Mr. Justice Panton.

DHIRAJUDDIN BEPARI—DEFENDANT
—APPELLANT

versus

BAHARULLA SHEIKH—PLAINTIFF
AND ANOTHER—DEFENDANT No. 1—

RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Transfer of Property Act (IV of 1882), s. 59—Mortgage—Attestation, proof of—Court, refusal of, to examine scribe—Appellate Court, power of, to admit evidence of scribe—Proof of execution.

In a suit on a mortgage one of the witnesses to the mortgage being dead and the other attesting witness being unable to say whether the mortgage-deed was or was not the document which he had attested, the plaintiff made an application for the issue of a commission to examine the scribe of the deed as a witness, it being alleged that the scribe was ill and was unable to attend the Court. This application was refused on the ground that it was not supported by a certificate from a recognized medical practitioner. In appeal the Appellate Court admitted in evidence the testimony of the scribe who deposed that the deed was executed in his presence;

(1) 11 Ind. Cas. 977; 33 A. 705; 8 A. L. J. 821.

(2) 34 Ind. Cas. 587; 96 P. R. 1916; 61 P. L. R. 1916; 89 P. W. R. 1916; 140 P. W. R. 1916.

Held, (1) that the Appellate Court had power to admit the evidence of the scribe both under cl. (a) and cl. (b) of r. 27 of O. XLI of the C. P. C.;

(2) that the evidence of the scribe was sufficient to prove the execution of the mortgage-deed.

Appeal against a decree of the Subordinate Judge, Rangpur, dated the 22nd April 1922, reversing that of the Munsif, First Court, at Gaibandha, dated the 14th June 1921.

Mr. Atul Chandra Gupta (with him Babu Radhika Ranjan Guha), for the Appellant.

Babu D. N. Bagchi, (with him Babu Mohini Mohun Bhattacharjee), for the Respondents.

JUDGMENT.

Cuming, J.—This appeal arises out of a suit to enforce a mortgage-bond executed by the defendant No. 1 in favour of the plaintiff on the 2nd April 1909. The amount secured by the bond was Rs. 400 and the total amount claimed was Rs. 1,000. The plaintiff's suit was resisted by defendant No. 2 who was a subsequent purchaser of the mortgaged property. He contended that the bond was collusive and without consideration. The defendant No. 1 in his written statement pleaded part payment. He did not, however, appear at the trial to contest the suit.

The Court of first instance dismissed the plaintiff's suit holding that the transaction was not a real one and that the plaintiff had not proved the execution of the mortgage.

The plaintiff appealed and on appeal the learned Subordinate Judge admitted certain additional evidence, namely, the statement of one Arabuddin who was the writer of the mortgage-bond and whom the plaintiff desired to examine on commission in the lower Court on the ground that he was ill but that application was refused by the learned Munsif. There was also an application to admit in evidence a certain order of the Sub-Divisional Officer of Gaibandha. On a consideration of this evidence and of the evidence adduced in the Trial Court the Subordinate Judge decreed the appeal with costs.

The defendant has appealed to this Court. The first contention of the appellant is that the lower Appellate Court is wrong in admitting in evidence the testimony of Arabuddin the writer of the document. He urges that the admission of this evidence and also of the order of Sub-Divisional Officer of Gaibandha does not come within the purview of O. XLI, r. 27, C. P. C. With regard to the evidence of

Arabuddin it would appear that in the lower Court the plaintiff had applied for his examination on commission but his application was refused on the ground that it was not supported by a certificate from a recognised medical practitioner. The learned Advocate for the appellant contends that this will not, therefore, come within the purview of O. XLI, r. 27, C. P. C. Rule 27 has two clauses viz., (a) and (b). They run thus: (a) "The Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or" (b) "the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced or witness to be examined".

It seems to me that the admission of the evidence of Arabuddin may well come under either of these clauses. The order of the Sub-Divisional Officer at Gaibandha is to the following effect. "This may or may not be true. File 19th November 1920". As far as can be seen this piece of evidence proved nothing one way or the other.

The next ground taken by the learned Advocate for the appellant is that the lower Appellate Court is wrong in treating the scribe as an attesting witness in the case to prove execution of the bond. It is, however, quite clear from the judgment of the Subordinate Judge that he did not treat the evidence of Arabuddin as evidence of an attesting witness. The fact appears to be this: one of the witnesses to the mortgage deed is dead and the other witness when the document was read over to him was unable to say whether this was or was not the document which he had attested because, he stated that at the time of the execution of the deed it was not read over to him. He merely attested the signature of the executor. In such circumstances it was open to the plaintiff to prove execution of the deed by a person who was present at the time of the execution and for this purpose, he examined the scribe.

In these circumstances the appeal fails and is dismissed with costs.

Panton, J.—I agree.

Z. K.

Appeal dismissed.

LAHORE HIGH COURT.

CIVIL REVISION No. 615 OF 1924.

March 14, 1925.

Present:—Mr. Justice Scott-Smith.

ISHAR DAS AND OTHERS—DEFENDANTS—
PETITIONERS

versus

LAL SINGH AND OTHERS—PLAINTIFFS
RESPONDENTS.*Civil Procedure Code (Act V of 1908), s. 115, O. XXIII, r. 1—Withdrawal of suit—Inability to produce evidence—Revision.*

The High Court can interfere on the revision side with an order passed under O. XXIII, r. 1 of the C. P. C., where that order proceeds on grounds other than those laid down in the rule. The words "other sufficient ground" in the rule are *ejusdem generis* with the grounds mentioned. [p. 632, col. 2.]

An order granting leave to withdraw a suit with liberty to bring a fresh suit on the ground that the plaintiff had been unable to produce sufficient evidence to prove his case within the time allowed is without jurisdiction and can be set aside in revision. [p. 633, cols. 1 & 2.]

Civil revision from an order of the Sub-Judge, Tarn Taran, dated the 31st July 1924.

Lala Fakir Chand, for the Petitioners.

Mr. Durga Das, for the Respondents.

JUDGMENT.—This is an application for revision of an order of a Subordinate Judge granting the plaintiffs leave to withdraw from their suit with permission to bring a fresh suit under the provisions of O. XXIII, r. 1, C. P. C.

The facts are briefly as follows:—

Lal Singh and Hir of full age of Hazara, and their minor brothers sued for redemption of a house on payment of Rs 77-5-0. The chief plea was that they were the legal heirs of the mortgagor. On the 8th July 1924, Jagat Ram applied to be appointed the next friend of the minor plaintiff in the place of Lal Singh. He also requested he might be allowed to produce fresh evidence but his application was refused by the Court on the ground that it was not a *bona fide* one. On the 23rd July the plaintiffs applied for leave to withdraw the suit with liberty to bring a fresh one as they had not been able to adduce sufficient evidence within the time allowed. The Court upon this passed the order of which revision is sought.

The Counsel for the respondents objects that no revision lies in a case of this sort and cites the case of *Jhunku Lal v. Bisheshar Das* (1) in which it was held that on an application for revision against

an order passed under O. XXIII, r. 1, C. P. C., the Court had jurisdiction to grant leave to the plaintiffs to bring a fresh suit, and the fact that the Court may have exercised, and probably did exercise a wrong discretion in granting the plaintiff's application was not sufficient to bring the case within the purview of s. 115 of the C. P. C. The Judges in that case quoted with approval certain remarks of their Lordships of the Privy Council in the case of *Balakrishna Udayar v. Vasudeva Aiyar* (2) which were as follows:—"It will be observed that the section applies to jurisdiction alone, the irregular exercise, or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

I have referred to the case in question and I do not think that the Privy Council intended to lay down any general rule and that their remarks must be deemed to have application to the case which was before them. There the High Court had, under s. 115, C. P. C., interfered on the revision side with the order of the District Judge and their Lordships of the Privy Council held that the High Court had the power so to interfere. No other case decided by any High Court in India has been referred to by Counsel for the respondents in which it has been held, as in *Jhunku Lal v. Bisheshar Das* (1) that the High Court has no power to interfere on the revision side with the order passed under O. XXIII, r. 1.

On the other hand numerous cases have been cited by Counsel for the petitioners in which High Courts have so interfered. The same point came up before me as a Judge of the Punjab Chief Court in the case of *Munna Lal v. Chhabil Das* (3) and, after considering the authorities then cited, I held that an order passed under O. XXIII, r. 1, C. P. C., is open to interference by the High Court on revision. I also held that the words "other sufficient ground" in O. XXIII, r. 1 (2) (b), C. P. C., are *ejusdem generis* with the defect referred to in rule 1 (2) (a) of the Code, so that permission to withdraw a suit with liberty to bring a fresh suit cannot be

(2) 40 Ind. Cas. 650; 40 M. 793; 44 I. A. 261; 15 A. J. J. 645; 11 Bur. L. T. 48; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; 22 C. W. N. 50; 19 Bom. L. R. 715; (1917) M. W. N. 628; 6 L. W. 501 (P. C.).

(3) 46 Ind. Cas. 181; 117 P. W. R. 1918.

(1) 46 Ind. Cas. 71; 40 A. 612; 16 A. L. J. 495.

granted except on grounds which are of the same nature as the grounds specified in cl. (a).

The following cases support the argument of Counsel for the petitioners:—

Bai Kashibai v. Shidappa Anapa (4). In that case the Court gave time to the plaintiff to adduce documents to counter-act the effect of the documents already produced by the defendants; and on the plaintiff's inability to adduce the documents on the appointed day, he applied for leave to withdraw from the suit with permission to file a fresh one on the same cause of action and the Court granted the leave. It was held that the Court acted with material irregularity in the exercise of its jurisdiction, and that the plaintiff's failure to produce the documents was not a sufficient ground to put the defendant to the trouble and annoyance of a fresh suit.

In *Kannusami Pillai v. Jagathambal* (5), it was held that assuming that the lower Court had jurisdiction to act under O. XXIII, r. 1 (2) (b), it acted with material irregularity in the exercise of its jurisdiction, as it did not exercise a judicial discretion in passing the order. The High Court accordingly set aside its order.

In *Kali Prasanna Sil v. Panchanan Nandi* (6), where the lower Court had granted permission and leave to withdraw from the suit under s. 373 of the C. P. C., 1882, on the grounds of formal defect and the plaintiff's inability to produce the necessary evidence in time it was held that the ground on which the order was made by the Appellate Court was not a ground which contemplated by s. 373 of the C. P. C. and that, therefore, the order was without jurisdiction.

Again in *Rama Singh v. Janak Singh* (7), a Division Bench of the Patna High Court held that a Court has no jurisdiction to permit a suit to be withdrawn with liberty to bring a fresh suit except under O. XLIII, r. 1, C. P. C.

I prefer the view expressed in these rulings to the one taken by the Allahabad High Court in the case reported as *Janku Lal v. Bisheshar Das* (1). I am of opinion that the High Court can interfere on the

(4) 21 Ind. Cas. 23; 37 B. 682; 15 Bom. L. R. 823.
(5) 46 Ind. Cas. 285; 41 M. 701; (1918) M. W. N. 497; 24 M. L. T. 46; 8 L. W. 145; 35 M. L. J. 27.
(6) 33 Ind. Cas. 670; 44 C. 367; 23 C. L. J. 489; 20 C. W. N. 1000.

(7) 56 Ind. Cas. 697; 1 P. L. T. 300; (1920) Pat. 232; 2 U. P. L. R. (Pat.) 121 & 222.

revision side with an order passed under O. XXIII, r. 1, if that order proceeds on grounds other than those laid down in r. 1. The only ground on which leave was granted in the present case was that the plaintiffs had failed within the time allowed to them to produce sufficient evidence upon which to prove their case.

Having regard to the authorities above referred to, I hold that this was not a ground which comes within the purview of O. XXIII, r. 1. I, therefore, allow the revision and setting aside the order of the lower Court, direct it to decide the case in accordance with law.

Counsel for the petitioners has stated before me that his clients have no objection to the plaintiffs putting in the document which they wish to produce and which the lower Court refused to accept on the ground that they were put in late but states that he does object to their being allowed to produce their oral evidence. Having regard to the fact that one of the plaintiffs is a minor it is for the Court to consider whether it should allow any further evidence to be produced or not.

Costs in this Court will abide the result.

N. H.

Revision allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 220 OF 1923.

April 28, 1925.

Present:—Justice Sir Ewart Greaves, Kt., and Mr. Justice Cuming.

JORINA AKTAR KHATUN—DEFENDANT
—APPELLANT

versus

HAFEZUDDIN KHAN—PLAINTIFF AND
ANOTHER—DEFENDANT—RESPONDENTS.

Muhammadan Law—Hanafi School—Divorce pronounced under compulsion, legality of—Pronouncement of divorce contained in compromise deed, validity of.

According to the Hanafi School of Muhammadan Law a divorce pronounced under compulsion is valid even when contained in a written document, provided that the document is addressed to the party to be divorced and provided it actually pronounces the divorce and is not merely an acknowledgment of something agreed to under compulsion. [p. 634, col. 2; p. 635, col. 1.]

A criminal proceeding was compromised and the compromise deed contained the following clause:—
"I release you Akhtar Khatun from the marital bond by giving you three talqas according to the Muham-

muhammadan scriptures." The compromise was signed by the husband who pronounced the divorce and by the wife who was divorced and was addressed by the husband to the wife:

Held, that the compromise deed contained not merely an acknowledgment of divorce but an actual pronouncement of divorce and operated as a valid divorce under Muhammadan Law. [p. 634, col. 2.]

Appeal against a decree of the Subordinate Judge, Fourth Court, Mymensingh, dated the 29th August 1922, affirming that of the Munsif, First Court, at Netrakona, dated the 23rd May 1921.

Mr. Gopal Chandra Das and Babu Bhuban Mohan Saha, for the Appellant.

Mr. Gunada Charan Sen and Babu Annada Charan Karkoon, for the Respondents.

JUDGMENT.

Greaves, J.—Defendant No. 1 in the suit appeals against a decision of the Subordinate Judge of Mymensingh confirming a decision of the Munsif of Netrakona directing restitution of conjugal rights at the instance of the plaintiff the husband of the appellant.

Both parties are Sunnis and governed by the Hanafi School. The marriage took place on the 21st Kartick 1315 and the parties lived together as husband and wife. The appellant left her husband in Aswin 1322 and after this as a result of land disputes between defendant No. 7 and the plaintiff, criminal proceedings under s. 147 of the Indian Penal Code were instituted, these were settled by a compromise which was reduced to writing, one of the terms of the compromise was that the plaintiff should divorce his wife. The compromise was subsequently set aside at the husband's instance and both Courts have found that the plaintiff signed the terms of compromise under compulsion and the question is whether according to the Hanafi School a divorce extorted by compulsion is binding and if so, whether a divorce in writing in the form in which it was contained in this suit is binding. Subsequent to the compromise the wife is said to have married defendant No. 2 in *nikah* in Aswin 1325. No reliance can be placed upon another document which was produced, namely, an unregistered *talaqnama*, it is undated and found to be unreliable.

The only question, therefore, is whether a valid divorce was effected by the compromise which has been found to have been executed by the husband under coercion. According to the Hanafi School a pronouncement of divorce is effectual although it has been

made under coercion Hamilton's Hedaya, Vol. I, page 210; Tyabji's Principles of Muhammadan Law, page 134, (para. 123). Although the learned author raises the question whether at the present time the Courts would give effect to a divorce pronounced under such circumstances.

The respondent contends, however, that even if a divorce pronounced under compulsion is valid the divorce contained in the compromise is not binding as it is contained in a "noncustomary" writing that is to say, in a writing not addressed and directed to any person. And we are referred to Ballie's Digest of Muhammadan Law, Vol. I, 2nd Edition, page 235, where it is stated as follows:—

"A man is compelled by beating and imprisonment to write the repudiation of his wife and he writes that his wife such an one, the daughter of such an one, the son of such an one, is repudiated, but his wife nevertheless is not repudiated".

This passage is I think explained by the foot note in the same page. The writing here is treated as an acknowledgment of repudiation which if written under compulsion is not binding but I do not think that it can be taken as an authority for anything else or to effect the rule that a written repudiation is valid provided it is addressed to the person to be repudiated. In the case referred to in Ballie, *ubi supra*, there was no repudiation but merely an acknowledgment of one which is not enough.

On an examination of the authorities I think the law according to the Hanafi School is clear that a written divorce is valid, provided it is addressed to the person to be divorced. It remains, therefore, to see the nature of the compromise. It is in these words:—

"I release you the 3rd party Akhtar Khatun from the marital bond by giving you three *talaqs* according to the Muhammadan scriptures".

The compromise was signed by the husband and by the wife and it was registered and was addressed by the husband to the wife. It seems to me to be not an acknowledgment but a document which actually effects the divorce.

As I have already stated to my mind the law is clear that according to the Hanafi School, which governs the parties, a divorce pronounced under compulsion is valid and that such divorce is nonetheless valid

because it is contained in a written document provided this document is addressed to the party to be divorced and provided it actually pronounces the divorce and is not merely an acknowledgment of something agreed to under compulsion which in my view the compromise is not.

The appeal accordingly succeeds and we set aside the decree of the First Court which was confirmed on appeal and the appellant will be entitled to her costs here and in the Courts below.

Cuming, J.—I agree.

Z. K.

Appeal allowed.

RANGOON HIGH COURT.

CIVIL APPEAL No. 94 OF 1924.

February 16, 1925.

Present:—Mr. Justice Heald and
Mr. Justice Chari.

MA HNIN YI—APPELLANT

versus

CHEW WHEE SHEIN—RESPONDENT.

*Contract Act (IX of 1872), s. 73—Lessor and lessee—
Option of renewal—Failure to give possession—
Damages—Profits of premises.*

A lessee who is not given possession is entitled to recover as damages the value of the possession of the premises between the time from which it ought to have been given, to the time he succeeds in obtaining other premises. [p. 636, col. 1.]

Jaques v. Millar, (1877) 6 Ch. D. 153; 47 L. J. Ch. 514; 37 L. T. 151; 25 W. R. 816, *Zamindar of Vizianagaram v. Behara Suryanarayana Patrulu*, 25 M. 587; 12 M. L. J. 249 and *Amanchi Venkatarama Sastrulu v. Nama Venkanna*, 53 Ind. Cas. 191; 37 M. L. J. 335; (1919) M. W. N. 683; 10 L. W. 405; 26 M. L. T. 287, relied on.

Even in respect of agreements relating to immovable property, the principles enunciated in s. 73, Contract Act, are applicable, and a plaintiff is entitled to damages which only arise in the usual course of things from the breach. In assessing such loss the amount which is expected to remedy the inconvenience caused by the non-performance of the contract must be taken into account. [p. 635, col. 2.]

Plaintiff obtained a lease of a rice mill from the defendant for a year, with option of renewal for another year. The possession, which was to be delivered shortly before the paddy season, was not given to the plaintiff, and he sued for damages. The plaintiff admitted that he made no attempt to secure another mill, but the defendant did not show that other mills were available:

Held, (1) that it may be presumed that it was not possible for the plaintiff to look for and obtain another mill in time for the paddy season of the first year, and that, therefore, he was entitled, as damages, to the profits he would have made from the mill in that year; [p. 636, col. 2.]

(2) that, however, the plaintiff was not entitled to any damages for the second year, as, in the first place, he might not have exercised the option, and, secondly, because the presumption as to his inability to obtain another mill could not be made as to the second year. [*ibid.*]

Appeal from a decree of the District Court, Thaton, in C. R. No. 24 of 1924.

Mr. Foucar, for the Appellant.

Mr. U. Shwe Thwin, for the Respondent.

JUDGMENT.—The facts of this case are as follows:—One Ma The Nyo was the owner or purported to be the owner of a rice mill in Khadazo village, Thaton District. In a previous Suit No. 6 of 1922 of the District Court of Thaton, the plaintiff in this suit had sued Ma The Nyo for a sum of Rs. 15,000 damages for failure to carry out her agreement to lease her rice mill to the plaintiff. The suit was compromised and one of the terms of the compromise was that Ma The Nyo should execute a fresh lease in pursuance of that agreement so executed by Ma The Nyo on the 6th of October, 1923. Among other terms that lease contained a clause that the lessor will, on the 31st day of December next, hand over the demised premises in good working order and condition. Ma The Nyo failed to give possession of the mill and the plaintiff has filed the present suit to recover Rs. 15,000 damages in respect of this failure. Ma The Nyo died during the pendency of the suit and her daughter, Ma Hnin Yi, has been brought on the record as her legal representative. The Judge of the Trial Court gave a decree in favour of the plaintiff for Rs. 5,000 damages and both sides appeal. The defendant appeals on the ground that the plaintiff failed to prove the damages sustained by him or alternatively that the damages awarded are excessive. The plaintiff also has filed objections on the ground that the Trial Court ought to have given him at least Rs. 10,000 as damages. The argument before us was confined solely to the question of damages. The first question which naturally arises is the basis on which the damages have been calculated. Even in respect of agreements relating to immovable properties the principles enunciated in s. 73 of the Contract Act are applicable. The plaintiff will, therefore, be entitled to damages which only arise in the usual course of things from the breach. In assessing such loss the amount which is expected to remedy the inconvenience caused by the non-performance of the contract must

be taken into account. The plaintiff was merely asked in cross-examination whether he made an attempt to get another mill and he admitted that he did not do so. No evidence was given on behalf of the defendant to show that there were other mills available. The learned District Judge on this ground refused to allow this matter to be taken into consideration. He was justified in doing so and his refusal can also be supported on another ground. In this case the agreement to hire had passed beyond the stage of a mere agreement. The registered lease deed had been executed and the effect of that deed is to vest the leased property in the plaintiff. The breach alleged is not a breach on a mere agreement to grant a lease but the failure to give possession of property actually leased. Even in such cases there would be a duty cast upon the plaintiff to minimise the damage if he could, but the burden of proving that the plaintiff had the means available and did not take steps to avail himself of the means will lie heavily on the defendant. The measure of damages, therefore, will be the profit the plaintiff would have made from the mill had possession been given to him as stipulated. The authorities on this point are *Jaques v. Millar* (1), *Zemindar of Vizianagram v. Behara Suryanarayana Patrulu* (2) and *Amanchi Venkatarama Sastrulu v. Nama Venkanna* (3). In the first of these cases Mr. Justice Fry held that a lessee who was not given possession would be entitled to recover as damages the value of the possession of the premises between the time from which it ought to have been given to the time that he succeeded in obtaining other premises. This value would ordinarily be the profits the lessee would make. Mr. Justice Fry does not give reasons for his decision but the judgment shows that he did apply the rule in *Hadley v. Baxendale* (4). In the first of the Madras cases [*Zemindar of Vizianagram v. Behara Suryanarayana Patrulu* (2)] the point was not argued or considered and it is taken for granted that in such cases the damages would be the profits which the lessee

would have made. The point, however, is discussed at length in the later of the Madras cases above cited [*Amanchi Venkatarama v. Nama Venkanna* (3)]. If it had been proved in this case that the plaintiff could have obtained some other mill then it might be argued that he was only entitled to the difference between the rent reserved in his lease and the rent he would have to pay for the other mill. It may be presumed that on the 1st December 1923 when the defendant ought to have given possession it would not be possible for the plaintiff to look for and obtain another mill in time for the paddy season of that year. This presumption, therefore, would not arise in the case of the second year over which he had an option to renew the lease. This consideration will be an additional ground for refusing, as the learned Judge rightly did, to take into consideration the option for renewal in assessing the damage. We are of opinion that the first method of assessment considered by the learned Judge was correct. He calculated the profits on the basis of what the plaintiff would have obtained had he used the mill for milling paddy for the year. On the evidence it could be safely assumed that a lease of a mill would be able to work for at least six months in a year with an average of eight hours per day. This presumption is very much in favour of the defendant. We have already expressed our opinion that the plaintiff cannot claim damages for the second year in respect of which he had an option for renewal. As the learned Judge rightly points out it is an option to take effect at later time and such an option might not be exercised. For this reason and for the additional reason given by us, the learned Judge rightly declined to take profits of the second year into consideration in assessing the damages. Though the profits of the second year cannot be taken into consideration in assessing the plaintiff's damages, we cannot refuse to give the plaintiff the benefit of a covenant contained in the renewal clauses. This covenant enables the plaintiff to retain two months' rent in the second year as compensation for the expenses incurred by him in the suit which had been compromised. By her breach of the contract Ma The Nyo had deprived the plaintiff of the opportunity to recoup his expenses. The plaintiff is, therefore, entitled to this sum of Rs. 1,200 (two months' rent) as damages. He is, there-

(1) (1877) 6 Ch. D. 153; 47 L. J. Ch. 544; 37 L. T. 151; 25 W. R. 846.

(2) 25 M. 587; 12 M. L. J. 249.

(3) 53 Ind. Cas. 191; 37 M. L. J. 335; (1919) M. W. N. 633; 10 L. W. 405; 26 M. L. T. 287.

(4) (1854) 9 Ex. 341; 2 C. L. R. 517; 23 L. J. Ex. 179; 18 Jur. 358; 2 W. R. 302; 156 E. R. 145; 23 L. T. (o. s.) 69; 96 R. R. 742.

fore, entitled altogether to the sum of Rs. 6,840. The appeal is dismissed without costs. The cross-appeal is allowed to the extent of varying the decree of the lower Court by ordering that the plaintiff will be entitled to the sum of Rs. 6,840. The defendant will pay the plaintiff's costs on this amount in the Court below and in this Court.

N. H.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1499
OF 1922.

April 7, 1925.

Present:—Mr. Justice Suhrawardy and
Mr. Justice Duval.

GAJENDRA NARAIN MAITY—
PLAINTIFF—APPELLANT

versus

SITA NATH DAS—DEFENDANT—
RESPONDENT.

*Debtor and creditor—Tender, refusal of, effect of—
Interest, cessation of—Deposit in Court whether neces-
sary.*

Where a valid tender of the amount of a loan is made by a debtor to his creditor and is improperly refused by the latter, interest ceases to run on the loan from the date of the tender and the debtor is not bound to follow up the tender by a deposit of the amount in Court. [p. 638, cols. 1 & 2.]

Appeal against a decree of the First Additional District Judge, Midnapur, dated the 28th March 1922, modifying that of the Munsif, Third Court at Contai, dated the 17th September 1920.

Mr. Satya Charan Sinha and Babu Mohendra Kumar Ghose, for the Appellant.

Babu Apurba Charan Mukerjee, for the Respondent.

JUDGMENT.

Suhrawardy, J.—This appeal raises a question which is not covered directly by authorities of this Court. It appears that the defendant borrowed Rs. 350 from the plaintiff on a note of hand dated the 4th April 1916. The present suit was brought by the plaintiffs for recovery of principal with interest at the stipulated rate of 35 per cent per annum. The defendant admitted execution of the note of hand but pleaded tender of the amount due on the 13th July 1916. It is found by the lower Appellate Court that the plaintiff unlawfully refused to accept the money that was tendered to him. It was first sent by

the defendant through his servant and on the refusal of the plaintiff to accept it, it was sent by money order on the 15th July 1916. The lower Appellate Court, therefore, held that the tender was good and that the defendants' plea was substantiated. But as the defendant did not deposit the money in Court either before or after filing of the written statement, the learned Judge thought that he should allow interest to the plaintiff on the sum tendered from July 1916 to the date of institution of the suit at the rate of 6 per cent. per annum and he decreed accordingly.

The plaintiff appeals and it is argued on his behalf that the defendant not having deposited the money tendered in Court the tender was not kept alive and, therefore, he is entitled to full interest at the stipulated rate till the date of the institution of the suit. In support of this position he has relied on the case of *Haji Abdul Rahman v. Haji Noor Mohammed* (1) which is a decision of a Single Judge sitting on the Original Side of the Bombay High Court. The learned Judge in that case relied upon O. XXII, r. 3 of the English Judicature Acts and on the law founded upon that provision of the English Procedure Act as laid down in Leake on Contract and other text-books on the Law of Contract, and accordingly held that a plea of tender before action must be accompanied by a payment into Court, otherwise, the tender is ineffectual. I am unable to follow this *dictum* in view of the absence of a provision in the C. P. C. corresponding to O. XXII, r. 3 of the English Judicature Acts. The only mention of the defendant's right to deposit is to be found in Appendix A of the First Schedule under the heading Forms of Pleadings. In giving the different defences that may be taken in an action, with regard to payment in Court it is stated that the defendant may aver that he has paid into Court the sum of Rs. and that this sum is enough to satisfy the plaintiff's claim. This provision is apparently made to enable the defendant to avoid costs and possibly some further liability, but it does not lay down any substantive law. In the absence of any express provision either in the law of contract or in the law of procedure which is applicable to Indian Courts I do not see how it can be laid down as a binding rule

1) 16 B. 111; 8 Ind. Dec. (N. S.) 570.

of law that if a tender is not followed by a deposit in Court, it is an ineffectual tender. The view taken in the Bombay case is reiterated without examination in the case of *Sabapathi Pillay v. Vanmaha-linga Pillai* (2). But it was not necessary for the decision of that case to adopt the view laid down in the Bombay case because the fact found in that case was that "though the plaintiff failed to pay the money into Court, as the defendants failed to fulfil their part of the agreement or to make a valid unconditional offer to perform the same, the defendants were not entitled to enforce the other terms included in the compromise decree". The question has not directly arisen in this Court in any case but a similar objection was considered by Mookerjee and Holmwood, JJ., in the case of *Jugat Tarini Dasi v. Naba Gopal Chaki* (3). That was a case in which tender was made by the tenant of the rent due to the landlord. The tenant sometime after deposited the rent under s. 61, Bengal Tenancy Act but did not deposit it forthwith in Court or in the suit by the landlord for recovery of arrears of rent. In dealing with the objection that the deposit was not made in Court the learned Judges observed as follows: "It appears to us to be extremely unjust to hold that a tenant who has made a valid tender, which has been improperly refused, should be driven to make a deposit under s. 61 (Bengal Tenancy Act) in order to protect himself from further liability to pay interest. We ought not to place a construction upon the Statute, the effect of which would be to throw upon a tenant, who has made a valid tender, which has been improperly refused, the burden of additional interest, which must accrue between the date of tender and the date of deposit, and the costs of an application under s. 61, which may in some instances, as in the case before us, amount to a substantial sum. We must hold, consequently, that as there was a valid tender in this case, which was improperly refused, interest ceased to run from the date of tender. It was suggested, however, that, as the amount tendered was not deposited in Court, the tender was not kept good. In our opinion, there is no foundation for this argument. It is well settled that the debtor, whose tender has

been refused, may retain the money in his own possession. The identical money need not be kept in hand, since the money tendered does not become the property of the creditor; the debtor may use it as his own without destroying the effect of the tender, if he is ready at all times to pay the debt in current money, when requested". I fully agree with the above observation made in this connection. There being no provision in the Statute law as to make it obligatory upon a debtor in order to keep the tender alive to make deposit in Court, I am unable to lay down as a rule of general applicability in the *muffussil* that where the defendant fails to make the deposit in Court the tender must be ineffectual though it was validly made and unlawfully refused by the creditor. The deposit by the defendant of the amount admitted to be due by him in Court generally exempts him from the liability for costs and that is all the benefit that he can expect from such deposit under the provisions of the C. P. C. The learned Judge, however, has taken this omission of the defendant into account and has allowed interest to the plaintiff upon the sum tendered at the rate of 6 per cent. per annum from the date of the tender down to the date of the suit. In my opinion substantial justice has been done in this case and the decree of the learned Judge is accordingly upheld.

This appeal is dismissed with costs.

Duval, J.—In this appeal the findings of fact are that the tender was duly made by money order sent on the 15th July 1916 and that three years and a-half after on the 8th January 1920 the present suit was brought. It is clear that just after the suit was brought the plaintiff applied for attachment of defendant's moveables before the judgment and that the attachment order was issued in February 1920 when the defendant filed his written statement he admittedly pleaded tender in July 1916. He did not, however, deposit the amount which he had tendered in that year. The question, therefore, arises and it appears to be the only point that can arise is whether in this suit the defendant can now plead tender in view of the fact that he did not deposit the money in Court. In support of the argument that he cannot now plead tender, we have the English rule made under the Rules of the Supreme Court and applied to County Courts under which the plea of tender is not available if tender

(2) 23 Ind. Cas. 581; 38 M. 959; 15 M. L. T. 203; 26 L. J. 331; (1914) M. W. N. 256.
(3) 34 C. 305; 5 C. L. J. 270.

is made before action unless the amount is paid into Court after the action. Has this rule of pleading been imported into the Indian Law? So far as I can see it has not been. No doubt in the forms of written statement in Appendix A to the C. P. C., a form is given to which my learned brother has referred and the words of which I need not repeat. But there is nothing that I can find either in the substantive law or in the orders dealing with pleadings generally and written statements which makes it compulsory where tender is pleaded to deposit the money in Court. In my opinion, therefore, this rule of English Law is not yet in force in this country and in this view the appeal must be dismissed with costs.

Z. K.

*Appeal dismissed.***RANGOON HIGH COURT.**

SPECIAL FIRST APPEAL No. 76 OF 1924.

January 29, 1925.

Present:—Mr. Justice Heald and
Mr. Justice Chari.

S. K. NAGOOR MEERA—APPELLANT

versus

Hajee MOIDEEN NAINAR MEERA
ALI—RESPONDENT.

Promissory-note—Pro-note executed by partner—Firm's name not given—Firm, liability of—Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of plaint—New cause of action.

No person can be made liable on a negotiable instrument unless his name appears on the promissory-note, or if it is sought to make him liable as a partner the name of the firm in which he is a partner appears on it. [p. 639, col. 2; p. 640, col. 1.]

Sadasuk Janki Das v. Kishan Pershad, 50 Ind. Cas. 216; 46 C. 663; 29 C. L. J. 340; 17 A. L. J. 405; 25 M. L. T. 258; 36 M. L. J. 429; 21 Bom. L. R. 605; (1919) M. W. N. 310; 23 C. W. N. 937; 10 L. W. 143; 1 U. P. L. R. (P. C.) 37; 46 I. A. 33 (P. C.) and *Kutti Ammu v. Raggi Seth*, 8 Ind. Cas. 851; 21 M. L. J. 526; 9 M. L. T. 120; (1911) 1 M. W. N. 45, relied on.

The powers as to amendment of plaint given to Court are very wide but they should not ordinarily be used to allow a new cause of action to be introduced where the defendant would be deprived of his plea of limitation if the amendment were granted. [p. 640, col. 1.]

Special appeal against the decree of the Small Cause Court, Rangoon, in C. R. No. 6169 1923.

Mr. Hay, for the Appellant.

Mr. Foucar, for the Respondent.

JUDGMENT.—The plaintiff files a suit on a pro-note signed by the first defend-

ant alone and in his own name. In the plaint he states that the 1st defendant for himself and on behalf of his partner, the 2nd defendant, by their promissory-note promised to pay to the plaintiff or order the amount of the note. There is nothing whatever in the promissory-note either on the face or on the back of it to indicate that the promissory-note was executed by the 1st defendant in his capacity as a partner and on behalf of the partnership. The firm's name does not appear anywhere. It will also be noticed that the plaint is based entirely on the promissory-note and not on the original cause of action, namely, the supply of goods. In the written statement the 1st defendant raised certain defences, namely, (1) a general denial of the allegations in para. 1; (2) a denial of the partnership; and (3) a denial that any demand was ever made on him. No defence was raised specifically on the question, whether, assuming that the 1st defendant executed the promissory-note on behalf of the 2nd defendant the suit is maintainable against the latter when neither the name of the firm nor that of the 2nd defendant appears in the pro-note. The Counsel for the 2nd defendant who is the appellant before us argues that his defence is implied in the general denial. We do not think so and the issues framed seem to us to show that neither the Judge of the Trial Court nor the Pleaders who appeared there understood the pleadings to have involved this question. The learned Judge of the Trial Court has given a decree against both the defendants and the 2nd defendant now appeals. The sole argument raised on his behalf is that the suit being one on a promissory-note there cannot be a decree against the 2nd defendant, whose name does not appear on the note. It is also urged that, even assuming he is a partner with the 1st defendant because the name of the firm does not appear on the note he cannot be held liable as a partner in the firm. As the point raised is a point of law which does not involve the taking of fresh evidence and as it is raised in the grounds of appeal we have allowed the appellant to argue it before us though it was not specifically pleaded in the Trial Court.

It is settled law that no person can be made liable on a negotiable instrument unless his name appears on the promissory-note or if it is sought to make him liable

as a partner the name of the firm in which he is a partner appears on it. That principle was actually applied in the case of *Sadasuk Janki Das v. Kishan Pershad* (1) and *Kutti Ammu v. Raggi Seth* (2).

We are, therefore, bound to hold that the plaintiff's suit which is entirely based on the promissory-note must fail as against the 2nd defendant. We have considered the question whether an amendment should not at this stage be allowed in view of the fact that the point was not raised in the lower Court and the written statement of the 2nd defendant did not disclose this as one of his defence. We are of opinion that we ought not to do so because if the second defendant had raised this defence when he filed his written statement on the 11th of December 1920 and the plaintiff had then withdrawn the suit and filed a new one, that new suit would have been time barred. The powers of amendment given to Court are very wide but they should not ordinarily be used to allow a new cause of action to be introduced where the defendant would be deprived of his plea of limitation if the amendment were granted, and we see no reason to make an exception to the ordinary rule in this case. Under these circumstances we cannot allow the plaint to be amended.

The result is that the appeal must be allowed. The decree of the lower Court will be varied and the plaintiff's suit will stand dismissed as against the 2nd defendant. There will be no costs in either Court in favour of the 2nd defendant as he did not raise the point in the lower Court as he ought to have done.

N. H.

Appeal allowed.

(1) 50 Ind. Cas. 216; 46 C. 663; 29 C. L. J. 340; 17 A. L. J. 405; 25 M. L. T. 258; 36 M. L. J. 429; 21 Bom. L. R. 605; (1919) M. W. N. 310; 23 C. W. N. 937; 10 L. W. 143; 1 U. P. L. R. (P. C.) 37; 46 I. A. 33 (P. C.).

(2) 8 Ind. Cas. 851; 21 M. L. J. 526; 9 M. L. T. 120; (1911) 1 M. W. N. 45.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2570 OF 1924.

April 27, 1925.

Present:—Mr. Justice Jai Lal.

RAHMAT ALI—DEFENDANT—APPELLANT
versus

Musammât DAULAT BIBI AND OTHERS—
PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Muhammadan Law—Gift to daughter-in-law of

residential house—Actual transfer of physical possession, whether necessary.

The fact that a Muhammadan, after making a gift to his daughter-in-law of a house in which both reside, by a registered deed, which recites that possession of the house has been delivered to the donee, continues to live in the same house with the donee for about a month after the date of the gift till his death, does not show that possession was not given to the donee as expressly stated in the deed, and the gift is not invalid on that account. [p. 642, col. 1.]

Actual transfer of physical possession is not necessary to complete the gift in such a case. [*ibid.*]

Case-law reviewed.

Appeal from a decree of the District Judge, Sialkot, dated the 3rd May of 1924.

Mr. *Mukund Lal Puri*, for the Appellant.

Malick *Muhammad Hussain*, for the Respondents.

JUDGMENT.—On the 28th of August 1908 one Khan Muhammad made a gift of the house in dispute in favour of *Musammât Bholi*, wife of his son Imam Din. The gift was made by means of a registered-deed which recited that possession had been given to the donee. Khan Muhammad died on the 29th of September 1908 leaving two sons Imam Din and Chiragh Din. The latter died on the 28th of November 1921. It has been found that Khan Muhammad and Chiragh Din both died in the house in dispute. In other words they continued residing in the house after the gift to *Musammât Bholi*. *Musammât Bholi* and *Musammât Niaz Bibi* wives of Imam Din mortgaged the house to Rahmat Ali for Rs. 1,500. *Musammât Daulat Bibi* widow of Chiragh Din instituted a suit out of which this appeal arises, for a declaration that the mortgage in favour of Rahmat Ali shall not affect her rights in the house. She claimed that after the death of Khan Muhammad his two sons succeeded to his estate including the house in suit in equal shares and on the death of Chiragh Din she succeeded to his interest in the house. The District Judge has held that the gift in favour of *Musammât Bholi* was made as alleged by her but that it was not established that possession of the house was delivered to the donee and that, therefore, the gift was not complete.

The only point before me is whether the gift is void for want of delivery of possession by the donor to the donee. On behalf of the appellant it is contended that owing to the relationship between the donor and the donee the mere fact that the donor continued residing in the house along with the donees did not make the gift void consider-

ing that the gift had been made by means of a registered deed which recited that possession had been given to the donee. It was contended by the learned Counsel that the donor did all that was possible under the circumstances to effectually transfer the property and control in the house to the donee and further that under such circumstances actual removal of the donor from the house was not necessary. Counsel for the respondents, on the other hand, contended that the gift was not valid according to Muhammadan Law as actual delivery of possession to the donee was necessary to complete it. Counsel for the appellant relied upon para. 127 of Mulla's Muhammadan Law, 7th Edition, and also on the following authorities:—

(i) *Humera Bibi v. Najm-un-Nissa Bibi* (1), (ii) *Muhammad Mumtaz Ahmad v. Zubaida Jan* (2), (iii) *Raja v. Jannat Bibi* (3), (iv) *Kandath Veettil Bava v. Musaliam Veettil Pakrukutti* (4).

The learned Counsel for the respondents, on the other hand, relied principally on the judgment of the Bombay High Court in *Abdul Majid Khan v. Hussinbu* (5). In clause 3 of para. 127 of Mulla's Muhammadan Law the following opinion is expressed:—

"No physical departure or formal entry is necessary in the case of a gift of immovable property in which the donor and the donee are both residing at the time of the gift. In such a case the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift. This rule has been applied mainly to cases in which the donor stands *in loco parentis* to the donee."

The same view was expressed in *Humera Bibi v. Najm-un-Nissa Bibi* (1). On page 152* of the report the following remarks were made by the learned Judges:

"We are not prepared to hold that in a case such as the present actual physical departure of the donor from a house which is the subject of a gift evidenced by a written instrument is necessary in order to complete the gift by delivery and possession. On

the contrary, we think that, if the parties are present on the premises, it is sufficient that an intention on the part of the donor to transfer the possession has been unequivocally manifested. There can be no doubt in this case that such an intention was unequivocally manifested. In the document itself it is expressly stated that the plaintiff not merely made a gift of the property to Minnatullah, but also put him into proprietary possession of it, and a further statement that Minnatullah had accepted the gift and taken possession of the property. In addition to this,....mutation of names was effected in favour of the donee."

The gift in that case was by an aunt in favour of her nephew. *Muhammad Mumtaz Ahmad v. Zubaida Jan* (2) is a judgment of their Lordships of the Privy Council and was relied upon by the learned Counsel to establish that recitals in a deed as to transfer of possession under a gift are binding on persons who claim to derive their title from the donor. In *Raja v. Jannat Bibi* (3) the gift was to a minor daughter for whom the donor acted as guardian. The daughter's husband cultivated the donor's land and lived with him. It was held that formal delivery of possession was not essential under the circumstances in order to complete the gift. The head-note* of *Kandath Veettil Bava v. Musaliam Veettil Pakrukutti* (4) is as follows:—

"Under the Muhammadan Law, to constitute a valid gift, possession must pass to the donee. Where a house and lands were given as a gift by a Muhammadan mother to her daughter and the daughter was put in exclusive possession of the lands and her title to both properties was perfected by mutation of names in the register, the mere fact that the mother continued to reside with her daughter, will not constitute a non-delivery of possession which will invalidate the gift."

In *Abdul Majid Khan v. Husseinbu* (5) it was held that "under the Muhammadan Law a gift is invalid unless there is a delivery of possession. Where the donee is with the donor on the premises at the time of the gift, an appropriate intention may put the one out as well as the other into possession without any actual physical departure or formal entry. But it does not follow in every case necessarily that where the two are present the possession must be deemed to have been transferred. The

(1) 28 A. 147; 2 A. L. J. 778; A. W. N. (1905) 222.

(2) 11 A. 460; 16 L. A. 205; 5 Sar. P. C. J. 433; 6 Ind. Dec. (N. S.) 721 (P. C.).

(3) 13 Ind. Cas. 409; 40 P. R. 1912; 94 P. L. R. 1912; 79 P. W. R. 1912.

(4) 30 M. 305; 2 M. L. T. 180.

(5) 55 Ind. Cas. 952; 22 Bom. L. R. 229.

*Page of 28 A.—[Ed.]

*Head-note of 30 M.—[Ed.]

question as to whether the donor intended to transfer the possession at the time of the gift must be answered with reference to the facts of each particular case." On a consideration of the facts of the case before them the learned Judges of the Bombay High Court came to the conclusion that possession had not been given to the donee and, therefore, the gift was invalid. This view of the Bombay High Court does not necessarily conflict with the view held by the other Courts as expressed in the cases cited above. It will, therefore, be observed that actual transfer of physical possession is not necessary to complete a gift in cases like the present. The donor continued to live in the same house for about a month after the date of the gift which he had made by means of a registered deed and that fact alone does not show that possession was not given to the donee as expressly stated in the deed. The donee herself who appears to be colluding with the plaintiff in this case mortgaged the property to Rahmat Ali by virtue of title derived by her under the gift. In my opinion, therefore, under the circumstances the gift was a valid one and possession was given by the donor to the donee in a manner that effectively transferred the property in the house to the donee. The residence of Chiragh Din in the house did not invalidate the gift which was otherwise complete.

The appeal, therefore, must be accepted and the plaintiff's suit dismissed with costs throughout, and I order accordingly.

N. H.

Appeal accepted.

MADRAS HIGH COURT.

CIVIL APPEAL No. 342 OF 1920.

January 30, 1925.

Present :—Sir Victor Murray Coutts-Trotter, Kt., Chief Justice, and Mr. Justice Ramesam.

N. M. KHAJAMIYAN ROWTHER—

DEFENDANT—APPELLANT

versus

APPAVU PILLAI AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1 (1)—Abandonment of part of claim at completion of trial—Sufficient grounds for abandonment—Jurisdiction—Revision—Duty of defendant.

A Civil Court has no jurisdiction to permit a plaintiff at the completion of the trial to withdraw a part of his claim with leave to bring a fresh suit in respect of it, on the sole ground that the plaintiff preferred to withdraw. If such an order is made the High Court will set it aside in revision. [p. 643, cols. 1 & 2.]

It is the duty of the defendant to have such an

order vacated without delay. He need not wait until the suit in respect of the claim withdrawn by the plaintiff is filed and then to plead that the permission was given wrongly. [p. 643, col. 1]

Thuljaram Row v. Gopala Aiyar, 40 Ind. Cas. 611; (1917) M. W. N. 234; 21 M. L. T. 229; 32 M. L. J. 434, relied upon.

Appeal against the decree of the Court of the Additional Subordinate Judge, Trichnopoly, dated the 30th September 1920, in Original Suit No. 2 of 1920 (O. S. No. 134 of 1916 on the file of the Subordinate Judge's Court of Trichnopoly).

Messrs. A. Krishnaswami Iyer and K. Balasubramaniya Iyer, for the Appellant.

Messrs L. A. Govinda Raghava Iyer and Watrap Subramaniya Iyer, for the Respondents.

This appeal and the memorandum of objections filed by the respondent plaintiff coming on for hearing on the 7th and 8th September 1921, the Court (Oldfield and Ramesam, JJ.), made the following

ORDER.—We deal first with the preliminary point raised in the ground of Appeal No. 21, that the action of the lower Court in allowing the plaintiff at a late stage in argument to withdraw his claim for *melvaram*, and in having permitted him to bring a fresh suit thereon was altogether illegal and unjust.

The facts, as we have ascertained them, are that after a prolonged trial, in the course of the plaintiff's arguments after the defendant had been heard, the plaintiff on 25th September 1920 presented a petition asking for permission to withdraw his claim in respect of the *melvaram* right in the suit lands with liberty to file a fresh suit in respect of the same, and that the petition was granted. In the plaint the claim had been stated in very general language and the relief asked for was a decree for partition and possession and a permanent injunction restraining the defendant from entering on the plaintiff's share. In the body of the plaint, however, the plaintiff's right is described very generally. In paras. 3 and 4, for instance, there are references to his ownership or acquisition of shares in both the *melvaram* and *kudivaram* of the suit and lands. The defendant in his written statement met him in respect of both. The issues again are very general, there being but a general reference in them to the nature and extent of the interest acquired by the plaintiff. In the judgment, para. 5, however, we have the lower Court's own state-

ment as to what it understood was the real scope of the suit. It stated clearly that the plaintiff was claiming *melvaram* as well as *kudivaram*. In the plaintiff's petition and affidavit already referred to there was no suggestion that the suit was not for *melvaram* or that it had not been tried in respect of the claim to *melvaram* as well as to *kudivaram*.

Turning to the ground on which the plaintiff asked for permission to withdraw the suit and to sue again we find nothing alleged at all except that he preferred for the time being to confine himself to the claim to *kudivaram* and that a decision as to *melvaram* in the present suit was unnecessary. There is no further explanation of any sort for this change in his attitude and something was necessary to justify it, beyond his mere preference. It has to be observed that this was announced after the defendant had been put to the trouble and expense of the trial, which was almost completed. In these circumstances there can be no doubt that the lower Court used its discretion wrongly in permitting the withdrawal and granting leave. The only remaining question is whether the defendant is at liberty to make that a ground of appeal. It is possible that speaking strictly we ought not to allow him to do so. There is, however, no doubt that it is his duty to have an order such as this vacated without delay and that it is not for him to wait until the suit in respect of *melvaram* is actually filed and then to plead that this permission was given wrongly—*Tuljaram Row v. Gopala Aiyar* (1). The question is then only whether he is at liberty to advance this objection in an appeal against this decree or should have made it in a revision petition. In view of the fact that no question of delay or limitation arises and of the obvious advisability of an early disposal of this matter, we think ourselves justified in treating this portion of the appeal as a revision petition. In doing so we hold that the lower Court had no jurisdiction to permit the withdrawal and grant leave on the sole ground that the party did not prefer to proceed with his litigation. We, therefore, set aside the order of the lower Court, dated 30th September 1920.

The result is that this portion of the

(1) 40 Ind. Cas. 611; (1917) M. W. N. 234; 21 M. L. J. 229; 32 M. L. J. 434.

plaintiff's suit has not been disposed of. We, therefore, call on the lower Court for findings on the issues already framed so far as they relate to the plaintiff's claim to *melvaram*. The findings will be recorded on the evidence on record. They are due in this Court within six (6) weeks and seven (7) days will be allowed for objections.

[In compliance with the above order, the case was sent back to the lower Court for further findings. The appeal came on for final hearing before, Coutts-Trotter and Ramesam, JJ., and the case was decided in favour of the plaintiffs on 30th January 1925.]

V. N. V.

Order accordingly.

S. D.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES Nos. 110 AND 267 OF 1922.

April 2, 1925.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Panton.

ABDUL HAMID CHOUDHURI AND ANOTHER
—DEFENDANTS NOS. 2 AND 3—APPELLANTS

versus

BROJENDRA KUMAR ROY
CHOUDHURY AND ANOTHER—PLAINTIFFS
AND ANOTHER DEFENDANT NO. 1—RESPONDENTS.

Evidence Act (I of 1872), ss. 21, 35—Admission of co-defendant, value of—Map prepared for purposes of partition affecting public revenue, admissibility of—Boundary dispute—Commissioner, report of, value of.

The fact that a co-defendant took part in certain *batwara* proceedings in which the land in dispute was measured and a map was prepared in which the plaintiff's title was admitted, is admissible in evidence though it is not binding as an admission on the other defendants who claim under an independent title. [p. 646, col. 1.]

A map prepared for the purposes of a partition which affects the public revenue, is admissible in evidence, though it may be for a limited purpose only. [p. 649, col. 2.]

Ordinarily in a boundary dispute the Commissioner's report is of great importance, but the report cannot be of much help to the Court where the findings of the Commissioner are inconclusive. [ibid.]

IN APPEAL No. 110 OF 1922.

Appeal against a decree of the Subordinate Judge, Third Court, Mymensingh, dated the 19th of January 1922.

IN APPEAL No. 267 OF 1922.

Being Title Appeal No. 243 of 1922 preferred on the 30th of March 1922 in the Court of the District Judge, Mymensingh, against the decree of the Subordinate Judge, Third Court, of that District, dated the 19th of January 1922, and transferred to the file of this Court by an order of Sir Thomas William Richardson, Kt., and B. B.

Ghose, two of the Judges of this Court made on the 29th of August 1922.

Dr. *Dwarka Nath Mitter* (with him Babu *Atul Chandra Gupta*), for the Appellants in both.

Babu *Jogesh Chandra Roy* (with him Babu *Rajendra Chandra Guha*), for the Respondents in No. 110.

Babu *Rajendra Chandra Guha*, for the Respondent in No. 267.

JUDGMENT.—These two appeals arise out of two suits (Nos. 35 and 36) for recovery of possession of certain lands on declaration of plaintiff's title thereto.

It appears that Taluk No. 130 of the Mymensingh Collectorate was partitioned in 1261 among the proprietors, and the estate was divided into 14 estates Nos. 6042 to 6054 and 130, out of which Estate No. 6049 was allotted to the predecessors of the plaintiff, and Estates Nos. 6042 and 6052 to the defendants' predecessors-in-title. In No. 1265 (1849) a *batwara chitta* was prepared, and Dag No. 372 was allotted to plaintiff's Estate No. 6049.

The plaintiffs claimed the lands of both the suits, as being covered by Dag No. 372. Suit No. 35 related to Cadastral Survey Dags Nos. 186 to 195 and 203 but, the plaintiffs by a petition gave up their claim to Dags Nos. 186 to 195 in the Court below and the claim with respect to those Dags was accordingly dismissed. Dag No. 203 was claimed by the defendants as appertaining to their Estate No. 6052 of which the defendant No. 3 was proprietor of a moiety share. The defendant No. 3 by compromise gave up his 8-annas share in favour of the plaintiffs. The claim, therefore, in Suit No. 35 is now confined to an 8-annas share of Dag No. 203 and is contested by the defendants Nos. 2, 4 and 5 only.

Appeal No. 110 arises out of Suit No. 36 which relates to lands described in two schedules. Schedule No. I is said to comprise Cadastral Survey Plots Nos. 584, 587/622, 585, 586 and 588 to 594, and Sch. II Cadastral Survey Plots Nos. 833, 834, 2135, 2136 and 2224.

The defence does not deny that Dag No. 372 is in Estate No. 6049 of which the plaintiffs are the owners, but the defendants deny that the lands are covered by that *dag*. As stated above the lands of Suit No. 35 are claimed by the defendants as appertaining to Dag No. 368 of their Estate No. 6052, and the lands covered by Suit No. 36 as owners of Estate No. 6042 (the lands of

Sch. I as being comprised in Batwara Dags Nos. 430 to 434, and the Sch. II lands as Batwara Dag No. 291).

Certain persons—Sens—were the owners of 6042, Abdul Hamed (defendant No. 2) at first acquired one-third share by purchase from the Sens and then took another one-third share in *patni* from them. Ebadut (defendant No. 1) the father of defendant No. 2 purchased the proprietary interest of this one-third share from the Sens. So two-thirds of the proprietary interest (and one-third *patni* interest) are vested in the defendants. One Debendra Sen has still one-third share left in the estate.

There was a Cadastral Survey in 1912 to 1916, and in the Settlement and Record of Rights which followed, the lands were recorded in the names of the defendants. The plaintiffs' case is that the defendants being emboldened by the entry in the Record of Rights dispossessed them in 1323.

The Court below held that the lands were covered by Dag No. 372 and accordingly gave a decree to the plaintiffs. The defendants have appealed to this Court.

The nature of the lands in dispute is thus described by the Court below:—"The land here is undulating, parts being uplands covered with jungle which are called '*chalas*.' Between two *chalas* there are sometimes low lands which are called '*baid*' if they are wide and the figures are not much irregular, while when they are narrow and with many branches they are called '*ghuni*.' This distinction between '*baid*' and '*ghuni*' is not always adhered to, and sometimes a piece of low land is called '*baid*' and '*ghuni*' indifferently"..... "To the west of Sch. I of Suit No. 35 there is a *baid*. Whether it is called *baid* or *ghuni* the parties agree that it goes by the name of *kanchir*. To the east of Cadastral Survey Dag No. 203 which is the subject-matter of Suit No. 35 there is a *baid* as to the name of which there is a dispute between the parties. To the east of the *baid* is a *chala* which is Cadastral Survey Dag No. 218 of Suri Chala Khatian. It is described by the plaintiff as Bara Kuthir Chala. The plaintiff's case is that the whole of the tract having *kanchir baid* on the west and the *baid* to the west of Bara Kuthir Chala on the east is their Dag No. 372 of the Batwara Chitta of Garhbari. Within this tract there are three *baid*s. For the sake of brevity I shall call the westernmost *baid* which

is the eastern portion of Schedule I land of Suit No. 36 as Baid No. 1. The middle *baid* which is not the subject-matter of these suits I shall call *Baid* No. 2. The eastern *baid* of which part forms the western part of Schedule II land of Suit No. 36 I shall describe as *Baid* No. 3."

The *kanchir* referred to above is outside, but 585-594 is within, the disputed land of Schedule I. The middle *baid* (which is between the chain lines 417 and 418) i. e., *baid* No. 2 is Cadastral Survey plot No. 830 and is not in dispute. A portion of the *Baid* No. 3 (between chain lines 71 to 73) is within the disputed area only the southern part of 833 (*Baid* No. 3) being in dispute.

The main question for consideration in these appeals is whether the disputed lands are covered by Dag No. 372 of the *batwara chitta* appertaining to plaintiff's Estate No. 6049.

Before dealing with that question we would refer to certain partition proceedings which took place in 1904 among the proprietors of Estate No. 6042.

It appears that in the year 1904 the then proprietors of *Touzi* No. 6042 (including the predecessors-in-interest of the present contesting defendants) applied for partition of Estate No. 6042 by the Revenue Authorities. There was a Survey in 1904 for the purpose of the *batwara* proceedings and the maps Exs. 12 and 36 (maps Nos. 4 and 5) were prepared. The neighbouring proprietors were called upon to be present before the measurement was made. The plaintiffs filed a petition on the 12th July 1904 complaining that the Amin had already finished the Survey and submitted his papers (the map was filed on 25th May 1904) before notice was served upon them. The plaintiffs objected to the inclusion of some lands which they claimed as part of their Dag No. 372 of the *Batwara Chitta* of Garhbari, and prayed that the land in the southern portion of Dags Nos. 15 and 16 might be excluded from the *mahal* under partition. In map Ex. 12 to the south of plots Nos. 15 and 16 was written "*Nij Mauzah Brindaban Mandal's chala*" (i. e., plaintiff's *chala*). An investigation was made by the *Peshkar* who reported that the objection about plot No. 15 was untenable but that a part of plot No. 16 should be excluded from partition. The parties were called upon to state whether they had any objection against the report of the *peshkar*, but no objection was raised

by the objector against his report with respect to plot No. 15. The partition Deputy Collector accordingly in his report dated the 23rd September 1905 held that the claim for exclusion of plot No. 15 might be disallowed. He held, however, that the part of plot No. 16 claimed by the objectors should be excluded from partition because the evidence of the only witness produced by the owners of No. 6042 was not sufficient to prove that the part belonged to that estate, and as Ebadut and Meajan the *ijaradars* on behalf of the parent estate had executed *kabuliyats* in favour of the objectors that part of the plot No. 16 belonged to the latter. Collector accepted the view taken by the Deputy Collector viz., that plot No. 15 should not be excluded but that a portion of plot No. 16 should be excluded from partition.

The Court below has found that the land in respect of which plaintiff's objection to that part of Cadastral Dag No. 834 which lies to the east on *Baid* No. 3 and *Baid* No. 3 which latter was plot No. 15 in map Ex. 12 was disallowed, but the objection was allowed with respect to the "stretch of land lying between *Baid* No. 3 and the eastern limit of Cadastral Survey Dag No. 2135 which is the north western part of Schedule II land of Suit No. 36. To the south of this plot it was admitted lay the plaintiff's *chala*, and this is identical with what I may say to be the middle portion of Schedule II land of Suit No. 36".

With respect to the lands of Schedule I (in Suit No. 36) also, the plaintiffs claimed them as within their Garhbari Chitta Dag No. 372. The *peshkar* reported that the defendants were in possession and that plots Nos. 99 to 108 did not fall within Garhbari. Another *peshkar* Kailas Chandra Roy was appointed, and he also reported (on the 22nd March 1907) upon the basis of existing possession that the lands were in *bagerhati*, i. e., belonged to the defendants. The Deputy Collector accordingly held that the objection should be disallowed. The Collector was of opinion that the defendants were in possession of a small fraction of the whole, but that the lands according to the revenue survey were within Garhbari. The objection of the objectors, however, was held to be untenable having regard to the provisions of s. 88 of the Partition Act.

The partition proceedings accordingly became infructuous, and were struck off by

reason of the objections in connexion with the lands of Schedule No. I of Suit No. 36. But the Court below has attached great importance to the facts that the proprietors of No. 6042 did not claim that their *mahal* extended up to the limit of Kakrajan, and the land which may be said to be identical with the middle part of Schedule II land of Suit No. 36 was shown in the map prepared, as the plaintiff's *chala*, and that notwithstanding the Collector's decision to exclude from Estate No. 6042 the north-western portion of Schedule II land of Suit No. 36, the proprietors did not challenge that decision. With reference to the fact that the defendants' predecessors did not claim the middle portion of Schedule II, it is pointed out on behalf of the respondent relying upon the evidence of plaintiff's Amin Kala Chand that the defendant No. 1 Ebadut who was the principal *gomashta* of the proprietors of No. 6042 was present at the time when measurement was made and map prepared in the *batwara* proceedings in which the land was mentioned as plaintiff's *chala* and that although those facts were alleged in para. 6 of the plaint, the only thing he stated in para. 5 of his written statement was that he "took no steps in the *batwara* proceedings" which should not be believed having regard to the fact that he was the principal *gomashta*, and that he wholly denied that he took any *ijara* of any land in dispute, which is manifestly false. Ebadut in his evidence says that he was examined in the *batwara* case and he showed the boundaries there, but he was speaking of another *Mouzah* Nagbari. His evidence runs thus: "Nagbari was surveyed in the *batwara* case, and I showed the boundaries there".

On the other hand it is contended that the evidence of Amin Kala Chand does not show that Ebadut was present at the time the particular portion was measured and that in any case the map and the conduct of Ebadut cannot be treated as an admission against the defendants who claim under a title subsequently acquired from the proprietors.

It is difficult to hold that Ebadut was unaware of the measurements or that he did not take any part in the proceedings. We are of opinion that the fact is certainly evidence though not binding as an admission upon the defendants who claim under an independent title.

On behalf of the appellants it was con-

tended that the maps were not prepared for public purposes and were not, therefore, evidence without proof of their accuracy. It appears, however, that no objection was taken to map No. 4 (Ex. 12). Objection was taken to Map No. 5 (Ex. 36), but the map was made for purposes of a partition which affected the public revenue, and the map, therefore, is evidence for what it is worth, though it may be for a limited purpose only. On the other hand, the learned Subordinate Judge does not appear to have considered the presumption in favour of the defendants under s. 103-B of the Bengal Tenancy Act arising from the entries in the Record of Rights prepared in the later Settlement Proceedings held in 1912 to 1916. It is true the entries in the Record of Rights also are based upon possession, but they cannot be ignored, and we think that in these circumstances the question of title has to be determined upon the question of boundaries.

A Commissioner was appointed to hold a local investigation in the cases. His report is in favour of the plaintiff. Ordinarily in a boundary dispute the Commissioner's report is of great importance, but in the present case the findings of the Commissioner are inconclusive and are not of much help to the Court. It is contended on behalf of the respondents that no objections were taken to the report of the Commissioner, but as stated above, his findings are inconclusive, and the learned Subordinate Judge does not appear to have relied upon them. He has referred to it expressly in two places only. The first is where the Court considers the question whether Jani is in Kholar Baid. The Commissioner in para. 19 of his report found that it was, but the learned Subordinate Judge (in para. 14 of his judgment) differs from him. The second is with respect to the southern boundary of Dag No. 372. The Commissioner in para. 18 of his report states that on the south of the disputed land of Suit No. 36 are the lands of Doani, i. e., the southern boundary of plaintiff's *Batwara* Dag No. 372 is *Mouzah* Kakrajan. The Court below observes:—"As to the southern boundary it is difficult to understand the exact import. The proprietors of *Zemindari* Nos. 12 and 16 are known by the name of Two Ani. The Commissioner mentioned the whole of the tract to the south of the lands in dispute in this case as the lands of the Two Ani. The learned Pleader for the

defence contends that this is incorrect. In my opinion the matter is not of much importance." These go to show that much weight cannot be attached to the Commissioner's report except where it is in accordance with the boundaries of the *chitta*.

On behalf of the respondents reliance was placed upon an *ijara kabuliyat* for three years executed by Ebadut the defendant No. 1 and two others in favour of plaintiffs in respect of the whole of the disputed lands including the lands of Suit No. 35 as appertaining to Taluk No. 6049. This was on the 17th November 1903. The circumstances under which it was executed are these. On the 27th August 1903 Ebadut and two others executed a *kabuliyat* in respect of the lands of both Schedules I and II in favour of the Sens, the owners of Touzi No. 6042. This was just before the *batwara* which took place in 1904. On the strength of the said settlement they cut down some *gajari* trees from the land, when the plaintiffs objected to the same on the ground of the land being included within Dag No. 372, and Ebadut and others thereupon paid Rs. 25 as the price of the *gajari* trees already cut down, and Rs. 275 for the remaining trees and executed the *kabuliyat* in favour of the plaintiffs admitting the lands to be within plaintiff's Taluk No. 6059. It was stipulated in the *kabuliyat* that if any suit be instituted in the Civil Court, the owners of No. 6059 (the lessors) would have to take steps and pay the costs.

It appears that on the 25th March 1896, one Madhu Khan executed a *kabuliyat* in favour of the Sens in respect of the lands of Schedule II as part of their Taluk No. 6042 describing Kholar Baid as the eastern boundary. This was about eight years before the *batwara* proceedings in which certain portions of Schedule II lands were excluded. They were included in the *kabuliyat* of 1896 as part of Taluk No. 6042. The learned Subordinate Judge does not notice this document. The defendant Ebadut denied execution of the *kabuliyat* dated the 17th November 1903 in favour of the plaintiffs, which, no doubt, is false, and the map annexed to the *kabuliyat* bears out the plaintiff's case. But so far as the owners of No. 6042 are concerned there is, as stated above, the *kabuliyat* dated the 25th March 1896 executed by Madhu Khan in respect of the lands of Schedule II, (not noticed by the Court below) about eight years before the *batwara* proceedings. There is the

other *kabuliyat* executed by Ebadut shortly before the *batwara*, and it was only after the plaintiffs objected to the cutting of *gajari* trees under that *kabuliyat* that Ebadut and others attorned to the plaintiff under the *kabuliyat* dated the 17th November 1903. Ebadut appears to have acted in the matter for securing the land for himself and not in the interest of his masters.

Much reliance is naturally placed upon the map annexed to the *kabuliyat* dated the 17th November 1903 executed by Ebadut in plaintiff's favour. On behalf of the appellants the execution of the *kabuliyat* (and the map) is sought to be explained on the ground of mistake or misapprehension. It is pointed out by the learned Pleader for the respondents that the execution of the *kabuliyat* was wholly denied by Ebadut. That is so, and it is certainly false and at the same time foolish. But the argument advanced on behalf of the appellants is not a new one. It was set up in the partition proceedings. The Partition Deputy Collector in his order in the Objection Case No. 2 of 1905-06 considered the map and observed as follows:—"Ebadut explains it away by saying that he signed the map merely relying on the words of one Alakddin another executant in the deed. It can hardly be expected from a half-literate man like Ebadut that he would understand maps of this nature specially as the boundaries given in the *kabuliyat* do not show clearly up to what extent the lease has been taken. Ebadut executed another *kabuliyat* in favour of the proprietors of Bagerbari for the disputed *chala* clearly specified therein about two months before the execution of the *kabuliyats* in favour of the objector". Then again the matter was considered in the settlement proceedings and no importance was attached to the *kabuliyat*.

Having regard to all these facts we are unable to attach any importance to the execution of the *kabuliyat* by Ebadut and the map annexed to the *kabuliyat* in favour of the plaintiffs in November 1903. Reliance was also placed on behalf of the respondents upon the *Thak* and Survey map; but the issue upon which the parties went to trial was "does the disputed land appertain to Touzi No. 6049, and is the disputed land included in *batwara* plots Nos. 372 as alleged in the plaint." The discussion in the Court below also, as the judgment shows, proceeded mainly upon a comparison of the *chitta dags*.

We will now deal with the question whether the disputed lands are included in Dag No. 372 of the *chitta*. The boundaries of Dag No. 372 are as follows:—

North.—Dengua Kochir Ghuni.

West.—Nabu Sheikh.

South.—Kanchir Ghuni and the boundary of Two Ani's land Bagherbari jungle.

East.—Jani Sheik and Barachala Gajari, Jungle etc. Jungle Chala half of 500½ nals. Bat tree within this *chala*.

The Court below finds that there is no dispute as to the identity of Dengua Kochir Ghuni on the north and Kanchir Ghuni on the south. The former commences at station 116 in the Commissioner's map and lies to the right of the line 113 to 116, and the Ghuni comprises Cadastral Survey Dags No. 844-847. Kanchir Ghuni commences at station No. 431 and lies to the left of the line from stations Nos. 431-437 and of the line from stations Nos. 439 to 431 and on both sides of the line from stations Nos. 437 to 439. The southern portion of this tract of land between the Dengua Kochir Ghuni on the north and Kanchir Ghuni on the south is in the possession of the plaintiffs, and the northern portion was the subject-matter of another Suit (No. 37) the right to which has been settled by compromise. The case of the defendants is that Dag No. 372 lies between Dengua Kochir Ghuni on the north, Kanchir Ghuni on the south, Baid No. 2 on the west and Baid No. 3 on the east. The land between Baid No. 1 and Baid No. 2, is not the subject-matter of this litigation, though the defendants deny the plaintiff's right to it, and claim it as part of their Estate No. 6042 Bagherbari.

The real controversy, therefore, is about the western and eastern boundaries. The Western boundary of Dag No. 372 is described as Nabu Sheikh, and the identity of this boundary relates to the lands of Sch. I of Suit No. 36. Schedule I consists of the Chal portion and the Baid to its east. The plaintiffs' case is that Nabu had land in Kanchir Baid just to the west of Sch. I land, while defendants say that Nabu's land lay in Baid No. 2 and that this is the western limit of plaintiffs' *chala*.

According to the defendants, Cadastral Survey Dag No. 584 is identical with Dag No. 430 of the Bagherbari *chitta*. Baid No. 1 is identical with Dags Nos. 431 to 434 of the said *chitta* and Cadastral Survey Dag No. 828 which lies between Baid Nos. 1 and 2 (not

in suit) a part of which was shown in the partition proceedings as plaintiff's *chala* and of which the plaintiffs are admittedly in possession is identical with Dag No. 435 of the Bagherbari *chitta*.

The boundaries of Dag No. 430 of the Bagherbari *chitta* are as follows:—

West—Dag No. 429 (described as *jote* Kanchi Sheikh).

East—Patit, Hingu Mandal, and Darbari Bansi.

North—Boundary of Garhbari.

South—Kamakhya's Debutter.

Now Cadastral Survey Dag No. 584 has on the west Kanchi Baid, on the north Garhbari and on the south Kamakhya's *debutter*. So that the boundaries on three sides are identified. The learned Subordinate Judge also finds it, but he says: "it is obvious that there may be other lands fulfilling these conditions". There may be Kanchis elsewhere, for instance, Saham paper Ex. U describes Dag No. 315 as *Jote Kanchi Sheikh*, but Kanchir Baid to the west of Schedule I must be Bagherbari. It is not contended that Schedule I extends to its west, and the respondents have not shown that any *dag* except No. 429 in Bagherbari is recorded in the name of Kanchi. However that may be, we do not find that there is any other land which lies between Garhbari on the north, Kanchir Baid on the west and Kamakhya's *debutter* on the south, nor is it suggested what other piece of lands fulfills all these "conditions". The defendants also attempted to identify Dag No. 430 with Cadastral Survey Plot No. 584 by other means. They say Cadastral Survey Plot No. 552 corresponds to Dags Nos. 369 and 400 which were allotted to Touzi No. 6045 (See Saham paper Ex. S) and were held by the tenant Niamat. The Settlement Khatian Ex. A shows that they are now held by Salim son of Niamat and appertain to No. 6045. Then the Cadastral Survey Plots Nos. 553 and 624 were sought to be identified with Chita Dag No. 401, which has Kanchir Ghuni on the east. Dag No. 429 (Cadastral Survey plots Nos. 578 to 583) is Kanchir, *Jote* and Cadastral Survey plot No. 584 is thus identical with Dag No. 430. The learned Subordinate Judge says the "argument is undoubtedly very plausible". He is of opinion that "it will not be quite unsafe to identify Cadastral Survey Dag No. 552 with Chitta Dags Nos. 399-400, and it may even be held that Cadastral Survey Dags Nos. 533 and 624 are identical with Chitta

Dag No. 401". But he does not accept the defendants' contention because he is of opinion that there is no connection between Dag No. 401 and Dag No. 429. He says "an examination of the *chitta*, however, shows that after Dag No. 401, the *chitta* proceeded from a different place altogether from a distance from Dag No. 401 on the south-west side"; and again "But Dag No. 401 is not connected with Dag No. 429 and it will be a mere assumption to say that Kanchir Baid is the land of Chitta Dag No. 429. The elaborate argument to establish the identity of Cadastral Survey Dag No. 552 with Chitta Dags Nos. 399 and 400 even if well founded becomes unavailing, because there is no connection between Dag No. 401 and Dag No. 429. If Dag No. 429 is to be identified with land in Kanchir Baid, the basis for that would be simply this, namely, Dag No. 429 is described as Jote Kanchir Ghuni, Kanchi may have had land elsewhere and it will not be safe to presume from the description of Kanchir Jote that Dag No. 429 is identical with land in Kanchir Baid. In my opinion Dag No. 430 is not sufficiently identified with Dag No. 584". It appears, however, from the original *chitta* that on the next day after the measurement of Dag No. 401, the Amin measured other Dags at some distance, viz., Dags Nos. 402 to 428, and then came back to Dag No. 429. The words in the *chitta* "on the north-eastern corner of the preceding plot at a long distance" refer to Dag No. 428 to the south-west which was the last preceding plot and which was separated by a long distance.

It appears, therefore, that the conclusion at which Court below arrived that Dag No. 429 was not connected with Dag No. 401 was based upon a misconception.

Dag No. 431 (Cadastral Survey plot No. 585 the northern portion of Baid No. 1) is to the east of the preceding plot (Plot No. 584, i. e., Dag No. 430). Then Dag No. 432 (Cadastral Survey plots Nos. 586, 583 and 589) is to the east of 431. To the south-west corner of No. 422 is Dag No. 433 (Cadastral Survey plots Nos. 590, 591 and 592) and Dag No. 434 (Cadastral Survey plots Nos. 593 and 595) are to the south of No. 433. Dag No. 435 part of Cadastral Survey plot No. 828) is on the north-eastern corner of Dag No. 434. They appear so on the case map.

We will now consider the contentions of

the learned Pleader for the respondents with respect to the lands of Schedule I, some of which are based upon the findings of the Court below and of the Commissioner.

(1) That the parties directed the controversy to the question whether the land is in *garhbari* or in *bagherbari*, and the land being in *garhbari* according to the *thak* the defendants' contention should not be entertained. But in the written statement (para. 6) the defendants stated that "the Thak Authorities did not follow the *batwara* in any particular. Consequently the right and possession of the *maliks* who had *Sahams* of *Mahal* No. 130 and of their representatives cannot be determined by the Thak or Survey Map". Then again the 7th issue upon which the parties went to trial was "Does the disputed land appertain to Touzi No. 6049 and is the disputed land included in Batwara plot No. 372 as alleged in the plaint". The Court below also in its judgment states: "the point for determination in these cases is whether the lands claimed in these suits are covered by the plaintiff's Dag No. 372 of the Batwara Chitta of Garhbari." It cannot, therefore, be said that the controversy was limited to the question of boundaries of two contiguous estates according to the Thak Map. As a matter of fact the owners of 6042 have plots of lands in Bagherbari as well as in Garhbari, see Saham papers Ex. T and Ex. U.

(2) That the western boundary of Dag No. 372 is Nabu Sheikh and as Nabu's grandson holds one plot of land No. 575 in the *baid* on the west of Sch. I, he must be the Nabu mentioned in the *chitta*. The learned Subordinate Judge takes the same view. The plaintiffs examined one Amanulla, and the defendants examined Samed, both of whom are grandsons of Nabu. The former supports the plaintiff, and the latter says that to the east of the *chala* is called Nabu's Baid (Baid No. 2 according to the defendants). The learned Subordinate Judge disbelieves Samed as he described his grandfather as Nabi and not as Nabu but in the Settlement Khatian (Ex. 24) it is stated "Jote Nabi Sheikh possessor Samed Ali Sheikh". Amanulla holds only one plot (575) in Kanchir Baid but Kanchir Baid consists of plots Nos. 570 to 583 and the Court below finds "whether it is called Baid or Ghuni the parties agree that it goes under the name of Kanchir." The statement of Samed that Nabu's land is in

Baid No. 2 is supported by the boundary of Dag No. 435 which is described as being on the west of the land of Nabu Sheikh. Dag No. 435 corresponds to part of Cadastral Survey Dag No. 828. Nabu, therefore, is on the East of No. 828 and would be in Baid No. 2 (see the case map). In any case it is not established that Nabu mentioned in the *chitta* is in Kanchir Baid.

(3) That Dag No. 430 mentions only Kanchir Sheikh as the western boundary, and defendants say that Cadastral Survey plots Nos. 578 to 583 are Kanchir Dag No. 429. If so, only a portion of Schedule I land would be covered by the boundary as there are other plots to the south of plots Nos. 578 to 583 as the map shows. But all the land marks or lands on all the boundaries do not appear to have been given in the *chitta*. The plaintiffs at any rate cannot urge this objection because the northern boundary of Dag No. 372, Dengua Kochir Ghuni, does not exhaust the northern boundary. Besides the western boundary of Dag No. 430 is not separately mentioned. It gives only the direction with reference to the preceding plot and says "on the east of the preceding plot" that plot being Kanchir.

(4) That the Police map (in a criminal case relating to some land of Schedule I) shows the whole Baid outside the disputed land on the west of Schedule I land as Kanchir Baid whereas the defendants now say that Nos. 578-583, *i. e.*, the northern portion only as Kanchir Baid. But as the Court below finds these *baid*s go by the names of the persons who first brought them under cultivation and it does not follow that the entire *baid* was held by Kanchir at the date of the *chitta*.

(5) That Dag No. 429 (Cadastral Survey plots Nos. 578 to 583 Kanchir) has Hingu Mandal to its south, but defendants stated before the Commissioner that Hingu (Dag No. 397) is identical with Cadastral Survey plots Nos. 555-558 so that to the South of No. 578 would be Nos. 577 and not No. 555. The defendants say that Nos. 571 to 577 (Chitta Dag No. 396 is recorded in the name of Gogra so that Gogra Cadastral Survey plots Nos. 577 to 571 (Dag Nos. 396) and not Hingu Mandal plots Nos. 578-783 (Dag No. 429) would be to the south of Kanchir as in the *chitta*. This argument, however, proceeds upon the basis that the Cadastral Survey lines followed the lines of the *chitta*. The

Dag No. 696 (Jote Gogra) has Hingu Mandal and Kanchi Sheikh on the north and the map shows that to the north of No. 577 is Nos. 778-783 (*viz.*) Kanchir Baid and the western bifurcation is Nos. 558 to 555.

(6) That Dag No. 430 shows Hingu on the east and, therefore, Hingu cannot be identified with Cadastral Survey plots Nos. 555-558 (397) which is on the west of No. 584. It appears, however, that not only Dag No. 397 but two other plots Chitta Dags No. 432 (Cadastral Survey plots Nos. 586 588, 589), and No. 433 (Cadastral Survey plots Nos. 590 591 and 592) are also recorded in the name of Hingu and they are on the East of No. 430 (Cadastral plot No. 584). The defendants want to fix Dag No. 430 in Cadastral Survey plot No 584 by its southern boundary shown in the *chitta* as Kamakhya's *debutter*, and Cadastral Survey plot No. 2322 appears from the settlement record to be Kamakhya's *debutter* in the possession of Dharma Lochan Soshi Lochan and others.

(7) That No. 2322 recorded as Kamakhya Debutter in the Cadastral Survey cannot be the Kamakhya Debutter of the *chitta* because the *chitta* shows that Kamakhya Debutter is on the South of No. 394 which is described in the *chitta* as Chambalitolar Chala, and the Settlement Record shows that Chambalitolar Chala is Cadastral Survey plot No. 559 and, therefore, Kamakhya Debutter must be to the south of No. 559 at the time of the *chitta* and cannot be No. 2322 which is now recorded as Kamakhya Debutter.

It appears, however, that Dag No. 390 of the Chitta is Chambalitolar Chala (Cadastral Survey plot No. 559) and Dag No. 394 is not Cadastral Survey plot No. 559 but Cadastral Survey plot No. 569. On the north of Cadastral Survey No. 559 is Cadastral Survey No. 552. The northern boundary of Dag No. 390 is recorded as Niamat Mandal, and Niamat Mandal's plot is recorded as Nos. 399-400 of the *chitta*. The learned Subordinate Judge finds that Dag Nos. 399 and 400 corresponding to No. 599, and Dag No. 394 corresponds to Cadastral Survey No. 569 which also is Chambalitolar and Jungle Chala. The defendants' witness No. 6 Soshi Lochan mentions his *debutter* as being situated on the south of the disputed land. Dag No. 282 Kamakhya Debutter is cultivated land and there is no place for cultivated land to the south of Cadastral Survey plot No. 559.

(8) That Nabu Sheikh cannot be in Baid

No. 2 because Brindaban plaintiff's Chala was mentioned in the map. That is in plaintiff's favour. On the other hand as stated above Chitta Dag No. 435 corresponding to Cadastral Survey plot No. 828 is west of the land of Nabu Sheikh, and that would go to show that Nabu is in what defendants call Baid No. 2.

(9) That in the partition proceedings the final order of the Collector dated the 6th December 1907 was in favour of the plaintiffs. As already stated the *peshkar* Sarat Chandra Roy reported that the lands were in the possession of the owners of No. 6042 through *ijaradars* and tenants and that the latter "used to pay rent of these lands from a long time". Another *peshkar* Kailash Chandra Roy also was of opinion that possession is undoubtedly with the proprietors of the No. 6042 and the lands should be treated as lands of Bagherbari. We have referred to the report of the Deputy Collector who agreed with the *peshkars*. The Collector in his order dated 6th December 1907 stated "From the evidence and from reports of the *peshkar* and Deputy Collector, it seems clear that lands so far as they are in possession of any one are in possession of tenants of the parent estate. The Thak boundary shows about half of the land to be in Garhbari, but the Thak has been found by the *amin* to be incorrect. The revenue Survey boundary shows the whole plot to be in Garbari. The greater part of this land is uncultivated forest as regards which both sides claim to have exercised the right of giving leases for cutting timber. The parent estate seems to have been in possession of certain plots of land a very small fraction of the whole but even though these may possibly have been in possession of the parent estate for over 12 years, I do not think this will cause the objector's claim to the whole stretch of land untenable under s. 88 of Act V of 1897. I have, therefore, no course but to strike the partition case off the file which will accordingly be done". In these circumstances the partition proceedings cannot help the plaintiffs and if they show anything, they show that the lands were in possession of the owners of No. 6042 so far back as 1906 and even if plaintiffs were in possession for short periods through *ijaradars* the Record of Rights shows the defendants in possession.

For all these reasons we are of opinion that plaintiffs have failed to locate Nabu in Kanchir Baid, and we think that lands

of Schedule I are not included in Chitta Dag No. 372, of Garhbari.

We now come to the lands of Schedule II. The eastern boundary of Batwara Dag No. 372 as stated above, is Jani Sheikh Bara Chala Gajari Jungle, etc., Jungle Chala, half of 500 $\frac{1}{2}$ nals.

The parties are not agreed as to the position of Jani Sheikh. The case for the defence is that Baid No. 3 of which the southern part is portion of this schedule is the *baid* where Jani had land and that it forms the eastern boundary of plaintiffs' Dag No. 372. The plaintiffs, on the other hand, tried to locate it in the *baid* to the east of Cadastral Survey Plot No. 2135. But that *baid* (plots Nos. 2131 to 2142) is admittedly Kholar Baid. Now Jani is mentioned in Dag No. 291 as the western boundary of Bara Chala belonging to the defendants. The Court below observes, "if this Jani Sheikh be identical with Jani named in Dag No. 372, then to locate Jani in the Kholar Baid would lead to the exclusion of much land that is admittedly part of Bara Chala. But they may not be identical in which case the consideration just mentioned would not apply". It has not, however, been shown that they are not identical. The learned Pleader for the respondents contends that the only reason assigned by the Court below for not accepting the plaintiffs' case as to Jani Sheikh being in Kholar *baid* is that if that were accepted some portion of Bara Chala which is admittedly in possession of the defendants would be excluded; and he suggests that the defendants might have overstepped the boundaries of Dag No. 291 (as pointed out by the plaintiffs) by taking possession of lands to the north-west of the place where Jani Sheikh is located by the plaintiffs. This suggestion, however, is not borne out by the evidence, and does not seem to be a probable one, because the original homestead of the Bansis stood on the west of the Chala of Dag No. 291.

The Court below observes: "In this connection it will be borne in mind that that part of Baid No. 3 which is included in Schedule II of land of Suit No. 36 is identical with Dag No. 15 in map Ex. 12, and the plaintiffs' claim to it was overruled by the Collector in 1905, and since then the plaintiff did nothing to contest that finding by the Collector". The conclusion arrived at by the learned Sub-Judge about the eastern

boundary is as follows: "In my opinion Jani should be located in Baid No. 3 and this *baid* should be taken as the Eastern boundary of part of the plaintiff's Dag No. 372, I mean the plaintiffs' land between Baid No. 1 and Baid No. 3 as Bara Chala is the Eastern boundary of that part of plaintiffs' Dag No. 372 which is the North-Western and the middle part of Schedule II land of Suit No. 36. This, of course, does not exhaust the whole Eastern boundary. If my interpretation of Dag No. 373 of Ex. 15 be correct then that will show that the plaintiffs' land extends up to Nagar Mandal's Ghuni and would cover the remaining part of Sch. II land of Suit No. 36, and the subject-matter of Suit No. 35". The learned Subordinate Judge does not locate Jani Sheikh in Kholar Baid but in Baid No. 3 but he is of opinion that Baid No. 3 is the eastern boundary of only the northern part, and Bara Chala is the eastern boundary of the middle portion of Dag No. 372. According to the Subordinate Judge, therefore, there are two eastern boundaries. It is contended on behalf of the appellants that the two eastern boundaries are not contiguous; they are at a considerable distance from each other; and that it is not at all likely that in such a case two such boundaries should be given. Ordinarily two such boundaries on the same side would not be given, but cases may be conceived where the land is irregular in shape, and extends up to a certain place on the north eastern side, and to another place on the south eastern side. In such cases two boundaries must necessarily be given, though the two places may be at considerable distance from each other.

The greater portion of Schedule II lands have Bara Chala on the east. The defendants say that the lands of Schedule II are identical with Chitta Dag No. 291 known as Bara Chala. The boundaries of Dag No. 291 are as follows:—

W.—Jani Sheikh.

E.—Kholar Baid, Jote Saleh Pahalwan's Ghuni Guzari Chit Jungle etc.

S.—Nagar Mandal's Ghuni.

N.—Bheuraidd Baid.

Jani Sheikh, as already stated, is in Baid No. 3, Kholar Baid is in Nos. 2131 to 2142, but both the Commissioner and the Court below have found that plots Nos. 2139 and 2140 are Saleh Pahalwan's land. That finding appears to be correct, and that being so, Bara Chala is not confined to Kholar Baid,

but extends up to Saleh Pahalwan. Then the material point is the position of Nagar Mandal's Ghuni. The plaintiffs' case is that it is between Dags Nos. 372 and 373. The defendants pointed out Nos. 2611, 2612, 2613 as Nagar Mandal's Ghuni. The Court below finds that they are not, and that the whole of the belt encircling plot No. 203 is Nagar Mandal's Ghuni. The learned Pleader for the respondents referred to the evidence of the witnesses Madhu Khan, Ebadut and Samed. The first stated that Nagar Mandal's Ghuni commences from the south of Kholar Baid, runs towards the east, then south, then west. The second says that Nagar Mandal's Ghuni goes from the south and proceeds towards north-west towards Bara Chala on its southern side. According to Samed Ali, Nagar Mandal's Ghuni is to the north of Bara Kutir Chala.

Dag No. 373 is described as Bara Kutir Chala. This Bara Kutir Chala (Dag No. 373) according to the plaintiff is Cadastral Survey plot No. 218, and it has been so found by the Court below. According to Budhai witness No. 7 for the defendants, "Barakutia Chala" is to the east of Guptas Chala, and according to the statements of the defendants recorded in the field book "the Gajari Chala pointed out by the plaintiffs as appertaining to the land claimed in Suit No 35 is a Chala within Touzi No. 652 commonly known as Gupta's Chala". That goes to support the finding of the Court below with regard to the position of Bara Kutir Chala being in Cadastral Survey plot No. 218. On behalf of the appellant, it is contended that according to the field book it should be to the east of Nos. 2611 to 2618 (i. e., Nagar Mandal's Ghuni). But even if Dag No. 373 is where defendants locate it, it has according to the copy of Chitta (Ex. 15) Nagar Mandal's Ghuni and Dag No. 372 to its west. That being so, the southern portion of the lands in dispute in Schedule II of Suit No. 36 would fall with Dag No. 372. On behalf of the appellants reference was made to another copy of the Chitta Ex. A (16) in which the western boundary of Dag No. 373 is thus described:—"On the east of the preceding plot (Dag No. 372) separated by another plot and on the east and southern corner of Nagar Mandal's Ghuni". It is contended that according to this copy Dag No. 373 is separated from Dag No. 372 by another plot, and that is Dag No. 291. The copy Ex. 15 was produced by the defendants.

but marked as an Exhibit by the plaintiffs, while the copy Ex. A (16) was produced by the plaintiffs but marked as an Exhibit by the defendants. Of the two copies the Court below preferred the former for the reasons stated in its judgment, and we have proceeded upon its basis in our decision with regard to the lands of Schedule I. We think, therefore, that we should go by the copy Ex. 15. As stated above, according to that copy Dag No. 372 is to the west of Dag No. 372 Bara Kutir Chala, and the southern portion of the Schedule II lands are, therefore, included in Dag No. 372.

As to the middle portion of the Sch. II lands, it was not even claimed by the owners of No. 6042 in the partition proceedings in 1904-05. We have not attached any importance to the orders in the partition proceedings as they evidently were based upon possession, and as the defendants have the later settlement record in their favour. But the fact that the owners of No. 6042 did not even claim the middle portion of the Schedule II lands when the estate was going to be partitioned is a very important circumstance in favour of the plaintiffs. We, therefore, see no sufficient reasons for differing from the conclusion arrived at by the Court below.

We now come to the land of Suit No. 35 which is Cadastral Survey plot No. 203. This plot was not the subject-matter of the partition proceedings, as it is claimed not as part of No. 6042 but of No. 6052. It is said by the defendants to correspond to Dag No. 368 of the Garhbari Chitta. The learned Subordinate Judge observes:—"It would seem that the defence does not rely so much upon their ability to establish the identity of Cadastral Survey Dag No. 203 with Dag No. 368. What they hope to do is to establish that Schedule II land of Suit No. 36 is covered by their Bara Chala, the result of which would be that the plaintiff would have no land to the east of Baid No. 3. For the defence did not mention in the written statement that the subject-matter of the Suit No. 35 was their Dag No. 365. Nor was the Commissioner asked to compare the Chitta with the locality and find whether Cadastral Survey Dag No. 203 is identical with Dag No. 368 of the Garhbari Chitta. It may be that before the return of the Commissioner from the locality, but after the measurement was over a statement was made on the side of the defence, that such and such land is identical with such and

such a dag of a particular chita. This might have sufficed to give notice to the plaintiff as to the case that would be made at the hearing. But the Court has not the benefit of a comparison of the locality with the dag mentioned and the benefit of the Commissioner's opinion on the point. This has caused a good deal of difficulty to the Court, and the complaint on the plaintiff's side is not without foundation. Turning now to Dag No. 368, it is quite clear that Dag No. 369, which is Nagar Mandal's Ghuni is not contiguous to Dag No. 368. But if the evidence was well-founded, Dag No. 368 would be contiguous to Dag No. 369. Further, Dag No. 369, that is, Nagar Mandal's Ghuni at same distance from Dag No. 268, and is to the south-west of Dag No. 368. Now a small part of the Ghuni may be to the contiguous south-west of a part of Cadastral Survey Dag No. 203, but the description of Nagar Mandal's Ghuni as being at some distance and to the south-west of Cadastral Survey Dag No. 203 would be quite inappropriate, indeed untrue. Thus, I have no doubt that Cadastral Survey Dag No. 203 is not identical with Dag No. 368 of Garhbari Chita, and the defendant's case on this point certainly fails."

We agree with the observations of the learned Subordinate Judge and hold that the identity of the lands of Chitta Dag No. 368 with Cadastral Survey plot No. 203 is not established.

The result is that Appeal No. 267 is dismissed with costs and Appeal No. 110 is allowed in part. The decree of the Court below will be modified. The plaintiff's claim will be dismissed with respect to the lands of Schedule I of Suit No. 36 and in respect of any portion of the land of Schedule II which may be found to form part of Dag No. 15 of Map of Ex. 12, and will be decreed with respect to the rest of the lands of Sch. II. The identity of the said land of Dag No. 15 of map Ex. 12 will be determined in execution. Each party will bear their own costs in both Courts in Appeal No. 110.

In Appeal No. 267 we assess the hearing fee at Rs. 50 only.

In Appeal No. 110 of 1922 the plaintiffs will get Rs. 100 as mesne profits for the portion of the lands decreed.

Appeal No. 267 dismissed.
z. k. Appeal No. 110 partly allowed.

BOMBAY HIGH COURT.CIVIL EXTRAORDINARY APPLICATION No. 38
OF 1925.

June 26, 1925.

Present:—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Coyajee.
GANPATI KONDAJI SANDBHAR—
PETITIONER*versus*MARUTI GANGAJI SANDBHAR—
OPPONENT.*Mamlatdars' Courts Act (II of 1906), s. 23—Revision—Applicant, whether entitled to be heard.*

The ordinary rule is that where the law allows a party to make an application to a Court, the applicant is entitled to be heard either in person or through his Pleader, before his application is rejected.

Therefore, where a person dissatisfied with the decision of a *mamlatdar* under the *Mamlatdars' Courts Act* applies to the Collector under s. 23 of the Act to revise the order of the *mamlatdar* he is entitled to be heard either in person or through his Pleader before his application is rejected.Application against an order of the Collector, Poona, confirming that of the *Mamlatdar*, Khed, in Possessory Suit No. 48 of 1924.

Mr. A. G. Desai, for the Petitioner.

Mr. V. D. Limaye, for the Opponent.

JUDGMENT.—The applicant is the lessee of certain property which was leased to him for ten years on July 30, 1921, by the owner Kashibai, one of the terms of the lease being that the tenancy was to be forfeited if the tenant failed to pay the rent provided for in the lease. The opponent purchased the land in dispute from Kashibai on June 30, 1924, and got the lease in suit transferred to himself on August 20, 1923. As the applicant had not paid rent, the opponent filed a suit on June 19, 1924, in the *Mamlatdar's* Court to recover possession. The *mamlatdar* decided the suit in favour of the plaintiff and directed that the plaintiff should be put in possession of the land. An application to the Collector to revise this order was rejected without hearing the applicant. He has now come to this Court asking us to interfere on the ground that the Collector ought not to have rejected the application without hearing the applicant or his Pleader. We are not concerned in this application with the merits of the case. We are concerned with the important question of principle, namely, whether person dissatisfied with the decision of the *mamlatdar* under the *Mamlatdars' Courts Act*, is entitled to be heard when he applies to the Collector under s. 23 of the Act to

revise the order of the *mamlatdar*. Under s. 23 (1) there shall be no appeal from any order passed by a *mamlatdar* under the Act. Under sub-s. (2) the Collector may call for and examine the record of any suit under the Act, and if he considers that any proceedings, finding or order in such suit is illegal or improper, may, after due notice to the parties, pass such order thereon, not inconsistent with the Act, as he thinks fit. Under sub-s. (3) where the Collector takes any proceedings under the Act, he shall be deemed to be a Court under the Act.

The Collector, therefore, must follow the ordinary rule of procedure followed by a Court, and it is one of those commendable rules of procedure which ought to be followed, that if any party is entitled to make an application to a Court, he is entitled to be heard either in person or through his Pleader, before his application is rejected.

We think, then, that the Collector was wrong in rejecting the present application. We set aside his order declining to revise the order passed by the *mamlatdar*, and we direct him to hear the applicant on the question whether the application should be entertained. Rule absolute. No order as to costs.

Z. K.

*Rule made absolute.***LAHORE HIGH COURT.**

SECOND CIVIL APPEAL No. 237 of 1923.

March 16, 1925.

Present:—Mr. Justice Broadway and
Mr. Justice Jai Lal.PHUL CHAND-FATEH CHAND—
DEFENDANTS—APPELLANTS*versus*CHHOTE LAL-AMBA PERSHAD—
PLAINTIFFS—RESPONDENTS.*Vendor and purchaser—Goods to be imported, sale of—Shipment arriving at different dates—Breach of contract—Damages, suit for—Due date of performance of contract.*

In the case of a contract for sale, by a firm of importers, of goods of a particular shipment, where a portion of the goods of that shipment arrives some months after the receipt of the bulk of the goods, if no goods are appropriated to the contract, the due date for the performance of the contract, both for the purposes of limitation and the assessment of damages, is the date when all the goods have arrived. [p. 655, col. 2.]

Second appeal from the decision of the District Judge, Delhi, dated the 11th December 1922.

Mr. Sardha Ram, for the Appellants.

Mr. Jagan Nath Agarwal, for the Respondents.

JUDGMENT.—On the 13th of September 1916 the firm of Phul Chand-Fateh Chand entered into a contract with Chhote Lal-Amba Pershad for the sale to the said Chhote Lal-Amba Pershad of 15 bales of Mull, No. 9252 "November lot 3 grace 60 days" at the rate of Rs. 3—13 per piece. On the 14th of June 1920 Chhote Lal-Amba Pershad instituted a suit against Phul Chand-Fateh Chand for a sum of Rs. 1,875 as due to them for non-delivery of eight bales under the contract of sale. The Trial Court held that the plaintiffs were entitled to a sum of Rs. 271-14 as damages for non-delivery of one bale. The suit *qua* the remainder, the other seven bales, was dismissed.

The plaintiffs appealed to the District Court when it was held by the learned District Judge that the suit had been rightly decreed *qua* one bale and ought to be decreed for six others. It was found that the rate at which damages should be assessed *qua* these six should be Rs. 5-4, and the amount worked out to a sum of Rs. 1,068. *Qua* the 8th bale the learned District Judge held that the defendants had broken the contract but that having regard to s. 75, illustration (c) of the Contract Act, no damages could be awarded as the market rate at the date of the breach had not been proved.

Against this decree the defendants Phul Chand-Fateh Chand have preferred this second appeal through Mr. Sardha Ram, and the plaintiff Chhote Lal-Amba Pershad have filed cross-objections through Mr. Jagan Nath. In the appeal it is sought to have the decree passed by the learned District Judge set aside, while in the cross-objections it is claimed that a sum of Rs. 535 should be added to the decree already passed.

Both sides have contended that the findings of the learned District Judge are vague. There is some force in this contention, but we think that the findings may be fairly accurately deduced. Firstly, on the question of limitation, the learned District Judge has held that the parties by their conduct clearly considered that the contract was in force up to the 15th June 1917. It has been urged by Mr. Sardha Ram that this finding is unsatisfactory and it is not based on any evidence. A reference to the judgment, however, clearly shows that the conduct of

the parties which influenced the learned District Judge was deduced from certain correspondence and there can be no doubt that the construction placed on this correspondence by the learned District Judge is one that it can bear, although it may possibly be open to a different interpretation. Further as contended by Mr. Jagan Nath, for the respondents, the contract was an indivisible one and as the arrival of the last shipment under the contract did not take place till November 1917, we think that the plea of limitation advanced by Mr. Sardha Ram must fail.

It was next contended that the damages had been wrongly assessed. Here again it must be admitted that the finding of the learned District Judge is vague. He finds that the breach occurred "some time between June and December 1917." Now in a contract which fixes the date for performance the due date is, as a rule, ascertainable. We agree that in the present instance the due date was the actual date of arrival in Karachi with an allowance of such reasonable time as would enable the Railway receipt and invoices to reach Delhi from Karachi. In order to ascertain the due date under this contract, therefore, all that has to be seen is when the goods arrived at Karachi and then to allow a period of 10 to 14 days (which we consider reasonable) for the transmission of the necessary documents from that port to Delhi. It appears that while the bulk of the shipments for November lot 3 goods had reached Karachi by the middle of May 1917, one portion of the relevant shipment did not reach that port till the 19th of November 1917. It has been contended by Mr. Jagan Nath that inasmuch as the contract was one to be performed in its entirety, the due date for the performance of this contract would not be earlier than the 1st of December 1917. On the other hand, Mr. Sardha Ram urged that in the plaint itself the plaintiffs had averred that the contract had been broken in July or in September and that inasmuch as, admittedly, 19 bales of the shipment in question had reached Karachi by the middle of May 1917, the 1st of June 1917 should be the date both for the purposes of limitation and for assessment of damages. After a careful consideration it seems to us that Mr. Jagan Nath's contention must prevail. No goods had been appropriated to the contract and we think that in this case so long as any goods deliverable under

the contract had still to reach Karachi, the due date had not arrived. It is true that in the plaint the cause of action is said to have arisen somewhere between July and September, but it is also clear that the plaintiffs were leaving this matter for the decision of the Court. We, therefore, dismiss this appeal.

Turning to the cross-objections, we find that illustration (c) to s. 75 of the Indian Contract Act does not apply to the bale to which the learned District Judge has applied it. Clearly the contract was broken by the firm of Phul Chand *qua* this bale and the plaintiffs are, therefore, entitled to damages. The rate at which the damages for this bale are to be assessed should be the same as that for the other bales. The learned District Judge fixed Rs. 5-4-0 as the rate at which he assessed the damages *qua* six bales, but we are unable to hold that this figure is correct. In this case we consider the due date was not earlier than the 1st of December 1917. There appears to be no material on the record from which the rate at that date could be deduced, and we gather from the judgment of the Trial Court that no sale appears to have taken place on the 1st of December 1917. The market-rate at the end of October 1917 has been found to have been Rs. 5-14-0 and we think that, having regard to all the circumstances of this case, it would be reasonable to fix that amount as the rate at which the damages should be assessed. At this rate the damages payable for one bale came to Rs. 271-14-0. Multiplied by 8 the total comes to Rs. 2,175. The plaintiffs, however, only claim Rs. 1,875 and we, therefore, accept the cross-objections and grant the plaintiffs a decree for Rs. 1,875 with costs on that amount throughout. We do not think that the circumstances require us to allow any interest on this amount.

N. H.

*Appeal dismissed.***BOMBAY HIGH COURT.**

CIVIL EXTRAORDINARY APPLICATION

No. 164 of 1924.

July 2, 1925.

Present:—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Coyajee.

B. S. JORAPUR—APPLICANT

versus

VENKATESH BALVANT JOSHI—

OPPONENT.

Provincial Insolvency Act (V of 1920), s. 56—Bombay

*High Court Manual of Circulars, Ch. XXIII, r. 16—
Insolvency—Receiver—Remuneration, rate of—Portion
of amount realised paid to mortgagee, effect of.*

Under r. 16 of Ch. XXIII of the Manual of Circulars issued by the Bombay High Court the remuneration of a Receiver appointed under the Provincial Insolvency Act, other than an Official Receiver, must be in such proportion to the amount of the dividends distributed as the Court may direct, provided that it does not exceed 5 per cent of the amount of dividends. Where, however, the property sold is subject to a mortgage and a portion of the amount realised is payable to the mortgagee, the remuneration of the Receiver should be fixed with reference to the amount of the dividends distributed after deducting the amount of the mortgage and not with reference to the total amount realised.

Application against the decision of the District Judge, Bijapur, in Miscellaneous Appeal No. 14 of 1923, reversing an order of the First Class Subordinate Judge at Bijapur.

Mr. Nilkant Atmaram, for the Applicant.

Mr. R. A. Jahagirdar, for the Opponent.

JUDGMENT.—The remuneration of Receivers, other than Official Receivers, under the Provincial Insolvency Act must be fixed under r. 16 of the Ch. XXIII of the Manual of Circulars issued by the High Court, which directs that the remuneration of Receivers, other than Official Receivers, shall be in such proportion to the amounts of the dividends distributed as the Court may direct provided that it does not exceed five per centum of the amount of dividends.

In this case the Subordinate Judge awarded the Receivers remuneration at the rate of five per cent. on the whole amount realised by them. The greater portion of that amount was payable to a mortgagee. Therefore, the balance available for paying dividends to creditors was under Rs. 25,000. It is clear, therefore, that the order of the Subordinate Judge directing payment to the Receivers at the rate of five per cent. on the whole amount realised was not authorized by the rule and the District Judge was right in holding that the rule should be followed, and that the percentage could only be allowed on the dividends distributed. In any event, it is difficult to see how it could be said that the District Judge who was following the procedure laid down in the High Court Circulars was wrong, or that his decision is not in accordance with law. The Rule will, therefore, be discharged with costs.

Z. K.

Rule discharged.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1055 of 1924.

May 15, 1925.

Present:—Mr. Justice Fforde.

SAWAN SINGH—APPELLANT

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), s. 145—Previous statement of witness—Statement, use of, to discredit witness.

A previous statement of a witness made before a Magistrate who first started to try the case cannot be used to discredit the evidence given by the witness at the eventual trial before another Magistrate, unless the statement has been brought into evidence after cross-examination.

Criminal appeal from an order of the Magistrate, First Class, Kasur, dated the 18th November 1924.

Dr. Nand Lal, for the Appellant.

JUDGMENT.—The appellant Sawan Singh has been convicted under s. 366, Indian Penal Code, of having taken part in the abduction of Musammatt Sham Kaur, and has been sentenced to seven years' rigorous imprisonment with three months' solitary confinement.

The case against this appellant depends entirely upon his identification by Musammatt Sham Kaur and by the brothers, Jiwan Singh and Khewan Singh. According to the prosecution evidence there is no doubt that Musammatt Sham Kaur was abducted on the occasion in question and was forcibly kept in the custody of her abductors for about 22 days. During this time she could not have failed to have the faces of her captors well-impressed upon her memory. She stated in the witness-box that the man whom she took to be the appellant had sound eyes, whereas the appellant is blind in one eye. She also stated that Sawan Singh who took part in the abduction was not the appellant, though he resembled him. The only other witnesses for the prosecution in this case are the brothers, Jiwan Singh and Khewan Singh. Jiwan Singh declared that he knew the appellant before and that he was present at the abduction, and he identified him in Court. Khewan Singh is not so definite in his evidence. He merely says that Sawan Singh and six others came to his house and forcibly dragged the woman away. He does not state that Sawan Singh, who, he alleges, took part in the abduction, is the appellant. He does not appear to have been asked to identify the appellant in Court, and no evidence of identification, beyond

the statement of Jiwan Singh, has been given by the prosecution.

The learned Trial Judge refused to accept the evidence of Musammatt Sham Kaur, as he considered that she "has probably been won over." He appears to have contrasted the evidence given by her before him with a statement which she is alleged to have made before Mr. Sant Ram who started to try the case. The learned Trial Magistrate quite rightly held that this previous statement could not be given in evidence for the prosecution, but he seemed to think that he was justified in using it for purpose of discrediting the evidence which the witness gave before him. In this he is clearly wrong. The Crown could have asked leave to treat Musammatt Sham Kaur as an hostile witness, if the Court had a reasonable belief that she was not speaking the truth, but no such application was made; nor was Musammatt Sham Kaur cross-examined upon her previous statement. The previous statement, therefore, has not been brought into evidence on cross-examination, and the Trial Magistrate was wrong in using material which has in no way been made evidence, for the purpose of contradicting the sworn testimony before him. The previous statement not having been made evidence, and not being on this record, I cannot take it into consideration.

From the evidence which is before me I cannot hold that the prosecution have established the presence of the appellant at the abduction and I must accordingly accept his appeal, set aside the conviction and sentence imposed by the Trial Court and direct that he be set at liberty.

N. H.

Appeal accepted.

PATNA HIGH COURT.

CRIMINAL REFERENCE No. 51 OF 1925.

July 27, 1925.

Present:—Mr. Justice Sen.

MAHARI DHANGAR—PETITIONER

versus

BALDEO NARAIN—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 192, 204—Case made over to Magistrate for disposal, effect of—Magistrate directing Police to put up charge-sheet, validity of—Issue of process against accused—Procedure.

A complaint under s. 420 of the Penal Code was sent by a Sub-Divisional Magistrate to the Police for

investigation and report. The Police made a report that the case was maliciously false and also filed a complaint for the prosecution of the complainant for an offence under s. 211 of the Penal Code. The complainant thereupon put in a petition impugning the Police report and praying for an enquiry by a Judicial Officer. The Sub-Divisional Magistrate passed an order on this petition in the following words:—"Seven witnesses are present. To Mr. Q. for disposal." On the matter coming up before Mr. Q. the latter did not examine any of the witnesses but after looking through the papers directed the Police Investigating Officer to submit a charge-sheet. The Sub-Divisional Officer thereupon passed an order re-calling the case from the file of Mr. Q. and making it over to another Magistrate with certain instructions as to how he should proceed:

Held, (1) that the order passed by the Sub-Divisional Officer making over the case to Mr. Q. for disposal was one under s. 192 of the Cr. P. C., whereby the whole case was transferred to Mr. Q. and that it was, therefore, competent to the latter to pass an order in the case summoning the accused to appear before him;

(2) that, therefore, the Sub-Divisional Officer's subsequent order re-calling the case from the file of Mr. Q. and making it over to another Magistrate was not justified;

(3) that Mr. Q.'s order directing the Police Investigating Officer to submit a charge-sheet was also without authority and should be set aside, leaving it to Mr. Q. to issue process against the accused in the usual way.

Criminal reference made by the Sessions Judge, Purnea.

Mr. B. P. Jamuar, for the Petitioner.

Mr. S. Saran, for the Opposite Party.

JUDGMENT.—This is a Reference by the learned Sessions Judge of Purnea. It appears that on the 3rd December 1924, one Mahari Dhangar filed a complaint before the Sub-Divisional Officer of Purnea in respect of an offence under s. 420 of the Indian Penal Code. The Sub-Divisional Officer examined the complainant and passed an order in these terms:—"Examined complainant. The offence disclosed is cognizable. Sub-Inspector, Kazanchi Hat Police Station to investigate and report by 17th December 1924." The Police submitted a final report stating that the case was maliciously false and filed a complaint for the prosecution of the complainant under s. 211 of the Indian Penal Code. It is to be noted that the Sub-Divisional Officer did not take cognizance of the case under s. 211 of the Indian Penal Code but merely asked the accused to show cause on the 27th January 1925 why he should not be prosecuted.

At the same time the complainant in the case under s. 420 of the Indian Penal Code put in a petition impugning the Police report and praying for an enquiry by a Judicial Officer. This petition is under the law a complaint. The complainant was directed to adduce evidence on

the 10th February 1925. His witnesses, however, were not present on that day and he prayed for time. The case was thereupon adjourned to the 19th February 1925 on which date seven of the witnesses were present. The Sub-Divisional Officer on that day passed the following order:—

"Seven witnesses were present, To M. Fakhrul Hasan Qadri for disposal."

Mr. Qadri did not examine any of the witnesses, being of opinion that it would be a waste of time to do so. But on looking into the Police report and hearing the Pleader of the complainant he directed the Investigating Officer to submit a charge-sheet in the case on the 12th March 1925.

On the 12th March 1925 the Sub-Divisional Officer passed the order which has been recommended for revision by this Court. By that order the Sub-Divisional Officer purported to re-call the case from the file of the Deputy Magistrate, Mr. Qadri, and make it over to another Deputy Magistrate, Mr. Duff, with certain instructions as to how he should proceed. The order of the Deputy Magistrate, Mr. Qadri, directing the Police to submit a charge-sheet is also recommended for revision. The ground upon which such recommendation is made is that by his order dated the 12th March 1925 transferring "the case" to Mr. Qadri for disposal the whole case under s. 420 of the Indian Penal Code was transferred for disposal and the transfer must be deemed to have been made under s. 192. In that view the Deputy Magistrate, Mr. Qadri, had full seisin of the case and if he found that there was a *prima facie* case he had the right to issue summons against the accused. As regards the order of the Deputy Magistrate upon the Police to submit a charge-sheet it is stated that the Deputy Magistrate was not competent to make such an order and, therefore, it is recommended that this order too should be set aside.

It is, however, contended by learned Counsel appearing against the letter of reference that the Sub-Divisional Officer's explanation should be accepted to the effect that all that Mr. Qadri was asked to do was to enquire and report as to whether the Police report that the complaint was maliciously false was true or not. The substantive case under s. 420 of the Indian Penal Code remained on the file of the Sub-Divisional Officer and was not transferred to Mr. Qadri at all. Various argu-

ments have been advanced on this theory but it is unnecessary to enter into a consideration of the arguments as the meaning of the order dated the 12th March is quite plain on the face of it. It is not proper to decide this matter on the explanation submitted by the Sub-Divisional Officer and specially in view of the fact that the terms of the order itself are quite clear. They show that the order was under s. 192 and that the whole case was transferred. Mr. Qadri, therefore, had full seisin of the case and the Sub-Divisional Officer could not re-call the case for the reasons shown in the order or transfer it to another Deputy Magistrate, much less with instructions as to how he should deal with the case. In my opinion the view taken by the learned Sessions Judge is sound. The Reference is accepted and the order of the Sub-Divisional Officer dated the 12th March 1925 as well as the order of the Deputy Magistrate asking for a charge-sheet from the Police are set aside.

Z. K.

Reference accepted.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 739 OF 1924.

(CRIMINAL REVISION PETITION No. 621 OF 1924.)

April 17, 1925.

Present:—Mr. Justice Devadoss.

In re KUPPA MUDALI AND OTHERS—

ACCUSED Nos. 1 TO 7—PETITIONERS.

Criminal Procedure Code (Act V of 1898), s. 360 (1) —Depositions to be read immediately—Provisions, whether mandatory—Non-compliance—Illegality.

The terms of s. 360 (1) of the Cr. P. C. being mandatory, any violation or departure from the practice or procedure enjoined upon the Court is not merely an irregularity which can be cured but an illegality. It is not a compliance with the section for the Magistrate to examine a number of witnesses and ask them to be in a room and then have the depositions read over to them later in the day. Such a procedure is altogether illegal.

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise the judgment of the Court of Session of the Salem Division, in Criminal Appeals

Nos. 69 and 68 of 1924, preferred against that of the Court of the Sub-Divisional First Class Magistrate, Sankari, in C. C. No. 28 of 1924.

Dr. Swaminathan and Mr. A. V. K. Krishna Menon, for the Petitioners.

The Public Prosecutor, for the Crown.

ORDER.—This is an application to revise the order of the Sessions Judge of Salem. The point urged on behalf of the petitioners is that the depositions of witnesses were not read over to them as soon as the examination was over. In other words, the terms of s. 360 of the Cr. P. C. were not complied with. Report was called for from the Magistrate who tried the case, and in his report he says: "In cases where the depositions are long and would take a considerable time of the Court if they were then and there read over and interpreted to the witnesses, what is done is to keep all the witnesses aside as soon as each of them is examined so as not to give them an opportunity to mingle with those that are not examined and the place so allotted is within the view of the accused and their Pleader. The depositions of these witnesses are read over and interpreted to them after the work in connection with the case for the day is over." This practice, though it may facilitate the work of the Court is not one which is sanctioned by s. 360 (1) of the Cr. P. C. Clause (1) of s. 360 reads thus: "As the evidence of each witness taken under s. 356 or s. 357 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his Pleader, if he appears by Pleader, and shall, if necessary, be corrected." The direction here is mandatory and not directory. As each witness, evidence is completed it should be read over to him in the presence of the accused or his Pleader. It is not proper for the Magistrate to examine a number of witnesses and ask them to be in a room and then have the depositions read over to them. The learned Public Prosecutor contends that this is only an irregularity and not an illegality and it is not shown that the accused have been prejudiced by such a procedure being adopted. This is not merely an irregularity. I hold it an illegality for, the terms of the section being mandatory, any violation or departure from the practice or procedure enjoined upon the Court is not merely an irregularity but an illegality. By having recourse to this practice the witness whose evidence was

taken, say at 11 o'clock, or who closed his evidence at 12 o'clock, and whose evidence is being read over to him at 5 o'clock, after the day's work is over, might be able to improve upon his evidence and try to get his evidence corrected. It is not also fair to an honest witness not to have his deposition read over soon after he made it, for, if the Magistrate has incorrectly recorded the deposition and if it is read over to the witness some hours after, the question would arise whether the witness is correct in his statement that he did not make such a statement but some other statement and whether the correction should be accepted or not. It is, I think, fair both to the witness as well as to the Magistrate who takes down the deposition as well as to the accused to have the deposition read over as soon as the examination of the witness is over. It would avoid a conflict between any recollection of the accused's Pleader, the recollection of the prosecuting Counsel and the recollection of the Court as well as the recollection of the witness, seeing there are four different persons to be considered in this connection, I think the provision of s. 360 (1) is not only a salutary provision but is a provision intended for furtherance of justice. That being so, the procedure adopted by the Magistrate is an illegal procedure and I have no other course but that of setting aside the conviction and directing the Magistrate to re-try the case.

V. N. V.
S. D.

Conviction set aside:

LAHORE HIGH COURT.

CRIMINAL REVISION No. 391 OF 1925.

April 21, 1925.

Present:—Mr. Justice Harrison.

WISHNU RAM—PETITIONER

versus

EMPEROR—RESPONDENT.

*Criminal Procedure Code (Act V of 1898), s. 195—
Claim disallowed by one Court—Fraudulent decree
obtained from another Court—Court, which can start
proceedings.*

Where a person after having a claim disallowed in one Court, obtains an *ex parte* decree in respect of the same from another Court, the institution of the second suit, and the obtaining of decree by fraudulent means, cannot be held to be an offence committed in relation to proceedings in the first Court, so as to enable it to take action under s. 195, Cr. P. C. The

action to be regular should be taken by the second Court, or by the Court to which both the Courts are subordinate.

Criminal revision from the decision of the District and Sessions Judge, Dera Ghazi Khan, dated the 31st January 1925.

Mr. M. L. Puri, for the Petitioner.

JUDGMENT.—The facts in this case are that Wishnu Ram instituted a suit for Rs. 113 in the Court of Sheikh Abdul Ali. He obtained a decree for Rs. 44 and the suit regarding the remainder of the claim was dismissed. He then proceeded to present a fresh plaint in the Court of the Khosa Tamundar for recovery of two out of three items which had been disallowed and obtained an *ex parte* decree. The judgment-debtor brought these facts to the notice of the original Court which took action under s. 195, and made a complaint in writing under s. 210, Indian Penal Code. The appeal was presented to the District Judge and was dismissed. The question is whether the institution of the second suit and the obtaining of a decree by fraudulent means, if proved, can be held to be an offence committed in relation to proceedings in the first Court. It is, of course, true to say that the dismissal of the claim in the first Court led to the prosecution of the second plaint in the sense that it preceded the prosecution, and that had the result of the first suit been a complete victory for the plaintiff, nothing more would have happened. At the same time, I think, it would be straining the meaning of the words of the section to hold that the bringing of the second suit related to the previous proceedings in the sense in which those words are used in s. 195. The action, to be regular, should have been taken by the second Court or by the Court—whether it be that of the Senior Sub-Judge or of the Sessions Judge—to which they are both subordinate.

I accept the application for revision and quash the proceedings hitherto taken.

N. H.

Application accepted.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 683 OF 1924.

(CRIMINAL REVISION PETITION No. 579 OF 1924).

March 18, 1925.

Present:—Mr. Justice Devadoss and
Mr. Justice Wallace.BALIJEPPALLI SESHAYYA—PETITIONER
versusBALIJEPPALLI SUBBARAYUDI alias
SUBBA RAO—RESPONDENT.*Criminal Procedure Code (Act V of 1898), ss. 190, 195, 200, 470—Complaint, what should contain—Fabrication of false evidence, complaint of—Notice to accused.*

A complaint ought to contain particulars of the offence with which a man is charged. Therefore, no enquiry should be started on a complaint which does not give sufficient particulars of the offence with which the accused is charged.

In respect of a complaint under s. 193, Penal Code, the false statement should be set out in detail. It should not be left to the Trying Court to find out what statements are false and what statements are not false.

Before taking action against a person for fabrication of false evidence, it is necessary that he should be given an opportunity to substantiate his allegations.

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise an order of the Court of the Session of the Kistna Division at Masulipatam, in Criminal Miscellaneous Petition No. 9 of 1924 (Proceedings of the Joint Magistrate, Narasapur, in Miscellaneous Case No. 31 of 1923).

Mr. C. Rama Rao, for the Petitioner.

Mr. Ch. Raghava Rao, for the Respondent.

The Public Prosecutor, for the Crown.

ORDER.—This is an application to revise the order of the Sessions Judge of Kistna. The contention of Mr. Rama Rao for the petitioner is that no appeal lay from the order of the Joint Magistrate as no complaint had been made by him. We have sent for the complaint; and from it it appears that he complained of an offence under s. 193 of the Indian Penal Code against four persons. The complaint does not give the particulars of the offence, nor does it mention the offence which each of the accused persons is stated to have committed. A complaint ought to contain particulars of the offence with which a man is charged. Though in the Indian procedure, there is no such thing as a regular indictment as in the English procedure, yet a complaint ought to contain sufficient particulars as to the offence with which a man is charged, and in the case of an offence under s. 193 a complaint ought to mention the particulars,

for s. 193 consists of two parts, one relating to false statements and the other to the fabrication of the false evidence. If it is a false statement that is complained of, then the false statement should be set out in detail. It should not be left to the Trying Court to find out what statements are false and what statements are not false. A complaint should always contain sufficient materials to enable the Trying Court to proceed to trial without going through a lot of records for the purpose of finding out whether certain statements made by the accused persons are true or not. The complaint being a very unsatisfactory one, we do not think it proper to interfere with the order of the Sessions Judge. The Sessions Judge has set aside the order of the Joint Magistrate and has directed him to withdraw the complaint on the ground that he did not give an opportunity to the persons against to prove their case in respect of the alleged fabrication of false evidence. Before taking action against a person for fabrication of false evidence, it is necessary that he should be given an opportunity to substantiate his allegations. In this case, this course was not adopted by the Joint Magistrate, and though the offences which the respondents are said to have committed are serious offences, we are not disposed to set aside the order of the Sessions Judge and to restore that of the Joint Magistrate for the simple reason that the complaint is a very unsatisfactory one; and it is not proper that an enquiry should be started on a complaint which does not give sufficient particulars of the offence with which the respondents are charged.

We decline to interfere in revision with the order of the Sessions Judge and dismiss the petition.

V. N. V.

S. D.

Petition dismissed.

PATNA HIGH COURT.

CRIMINAL APPEAL No. 65 OF 1925.

June 4, 1925.

Present:—Justice Sir B. K. Mullick, Kt.,
and Justice Sir Jwala Prasad, Kt.RAM PERSHAD TEWARI AND OTHERS—
APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 210

Sessions case—Committing Magistrate, duty of—Criminal trial—Prosecution failing to prove story set up—Acquittal.

Where in a criminal trial the prosecution fails to make out the case set up by it the accused are entitled to an acquittal. [p. 664, col. 2.]

In a Sessions case it is not sufficient for a Committing Magistrate to say that a *prima facie* case has been made out and thus to relieve himself of further responsibility in the case. If the Police has not sent up all the material witnesses, it is the Committing Magistrate's duty to examine them himself in order to determine which side is speaking the truth. [*ibid.*]

Criminal appeal from a decision of the Sessions Judge, Saran, dated the 25th March 1925.

Messrs. S. P. Varma and B. P. Jamuar, for the Appellants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.

Mullick, J.—About 6 A. M. on the 21st November last Ram Bodhan in the course of a quarrel in his village received an injury on the head from the result of which he died at 2 o'clock on that night in the hospital at Chapra. Within four hours of the assault his son Awadh Bihari lodged an information before the Sub-Inspector of Mirzapur *thana* which is about seven miles away stating that early in the morning a buffalo belonging to the appellant Kuldip had trespassed into the mustard field of his father and that his father had seized the buffalo for the purpose of impounding it. Kuldip came and protested and there was then a struggle. The appellant Ram Prasad, who is the brother, and the appellant Nathuni, who is the nephew of Kuldip, were standing by with *lathis* and came to the assistance of Kuldip. The result was that Ram Bodhan was struck by Ram Prasad and Nathuni on the head five or seven times. Awadh Bihari, who was in his house 63 paces off, came up running and Kuldip gave him a thrust with the spear head of his *lathi* in the forearm. Thereupon the appellants went home with the buffalo and Ram Bodhan was carried home by his relatives and by prosecution witness Ram Parsan Ojha. That was the story put forward by Awadh Bihari in his first information to the Police.

At or about the same time that Awadh Bihari lodged his information, the appellants Ram Prasad and Nathuni also appeared at the *thana* and laid a counter-information to the effect that at 6 A. M. that morning the wife of Ram Prasad had had a

quarrel with the wife of Ram Bodhan in a *rahar* field to the east of Ram Prasad's house and that Ram Bodhan, Awadh Bihari, and Awadh Bihari's brothers Mahadeo and Sita Ram and Ram Bodhan's brother Jeo Bodhan, had come to the place with *lathis* and that when Ram Prasad and Nathuni interfered to protect Ram Prasad's wife, they assaulted Ram Prasad most severely. Nathuni was also alleged to have been assaulted at the same time. Strangely how Ram Bodhan and Awadh Bihari came by their injuries was neither asked nor explained.

After recording the two informations, the Sub-Inspector sent Ram Bodhan, who had been brought on a stretcher by Awadh Bihari, to the Chapra hospital. He also sent Awadh Bihari, Ram Prasad and Nathuni to the same place. The Sub-Inspector arrived at the place of occurrence on the evening of the same day. On the following morning he began an investigation, but it does not appear that he did anything substantial. At 10 A. M. he received news that Ram Bodhan had died in hospital the previous night. But although the case had thus assumed a graver aspect he did not consider it his duty to make any serious investigation and he left the village that night. On the 23rd or 24th he did not go to the village at all and I must express my surprise that in a case of this description where there was a complaint and a counter-complaint and where everything depended upon a speedy investigation for ascertaining which side was telling the truth, the Police took no action whatever for two days. However, on the 25th November the Sub-Inspector returned and took up the investigation in earnest. In the result he decided upon sending up the appellants for trial and upon keeping the counter-case pending till the disposal of this case.

Now the case must be decided upon the evidence adduced for the prosecution. The defence have called no evidence and have as usual run a grave risk in not doing so; but it seems hopeless to impress upon those, who are accused of serious charges in the Sessions Court, that it is necessary when they have a counter case to give some substantive evidence in support of it and that it is generally most dangerous for them to rely on the chance of finding discrepancies and loopholes in the prosecution evidence. However, it is fortunate for the

appellants in this case that there are circumstances in the prosecution evidence which induce us to hold that the real assault took place not under a *mohua* tree near the mustard field but near the well to the east of Ram Prasad's house as alleged by the defence.

The prosecution witnesses are first of all a man named Bansi. He states that he was going out for a necessary purpose early in the morning and he saw the assault. On the morning of the 22nd when the Sub-Inspector took up the investigation he declined to make any statement whatsoever though pressed to do so. He did not show the Sub-Inspector the *mohua* tree where drops of blood were found on the 25th November by the Sub-Inspector. It is strongly contended on behalf of the prosecution that the presence of these two blood stains at that place conclusively establishes the truth of the prosecution story. But the unfortunate part of it is that Bansi did not at the earliest moment disclose this important piece of evidence before the Police. On the contrary the Sub-Inspector states that Bansi and Awadh Bihari's brother Mahadeo and the appellant Kuldeep went with the Sub-Inspector to the well and there pointed out large patches of blood on the ground and that they allowed the Sub-Inspector to take it as admitted that the well was the place where the fatal assault was committed. In these circumstances it is impossible to accept Bansi's present statement that nothing took place at the well and that Ram Bodhan and Awadh Bihari received their injuries near the *mahua* tree. The distance between the two places is not less than 97 paces and there can be no ground for contending that the places were so close that the discrepancy was not considered by Bansi to be material.

The next witness for the prosecution is Ram Parsan Ojha. This witness states that he also was going out for a necessary purpose and when he was at a distance of 15 or 16 *laggas* from Ram Bodhan he saw Ram Prasad and Nathuni striking him four or five times on his head with their *lathis*. He says that Ram Bodhan spun round on receiving the first blow and that the other blows were delivered after he fell. According to him Awadh Bihari arrived after his father fell and received his injury because he remonstrated.

The remaining eye-witness is a Rajput

named Kali Singh. Now this man states that he was coming from his village which is to the north of Nautan to fetch some labourers whom he wished to employ. He also corroborates Ram Parsan; but it is evident that he and the other two witnesses have attempted in the Sessions Court to make a much more definite case against Ram Prasad than they did before the Police. They now state that they are confident that Ram Prasad struck the fatal blow; but before the Police they were not quite clear that Ram Prasad struck the fatal blow and the suggestion then made was that Nathuni and Ram Prasad were responsible jointly for the injury from which Ram Bodhan died.

In the case of Ram Parsan and Kali Singh, the same difficulty arises as to the occurrence at the well. They ignore all knowledge of any assault at that place and it is clear that they cannot be accepted as impartial witnesses who have come forward to tell the whole truth. Evidence has been given that on the 17th November Awadh Bihari had impounded two cows belonging to Kuldeep and that on the 21st October Awadh Bihari's brother Sitaram had impounded another cow belonging to Kuldeep. An attempt was made to show that the poundkeeper was perjuring himself, but I do not think that attempt has succeeded. In my opinion the learned Judge was right in accepting the allegation that the feelings between the parties had been strained for some time and that shortly before the occurrence Awadh Bihari's family had twice seized Kuldeep's cattle and impounded them. That, however, was not the immediate motive for the occurrence of the 21st November.

The question then is whether we are to accept the story told by Ram Prasad in the counter-information. It is obvious that there was no delay in putting forward this story, and, reading the account, it seems to me to be a much more natural one than that told by Awadh Bihari himself and to be more consistent with the circumstances proved in this case. The allegation is that 2½ years ago Ram Prasad was suspected of an intrigue with one of the daughters of Ram Bodhan in consequence of which he had to go away to Calcutta. He had returned from Calcutta three months before the occurrence, but the old feud was still continuing and on the

morning in question a sudden quarrel broke out between the wife of Ram Bodhan and the wife of Ram Prasad. I do not think a story of this kind would have been easily invented having regard to the fact that the appellants are *Brahmins* by caste. Awadh Bihari himself and as the other prosecution witnesses stoutly deny that Awadh Bihari had a sister called Sudama and that any such intrigue was ever suspected. He maintains that he had two sisters both of whom died 8 or 10 years before the occurrence. The concoction of a story of this kind requires time and as there was no delay at all in going to the Police, I think on the whole that it furnishes a better explanation for the assault than that put forward by the prosecution. That being so, the question is whether the blood patches near the well were the result of a fight as alleged by the defence. On this point we have the fact that Ram Prasad had no less than 11 injuries, 3 of which were lacerated wounds. His nose appears to have been very severely damaged and the other two lacerated wounds must have also bled considerably. Nathuni had three injuries, one of which was a lacerated wound, and although it had been contended by the Crown that the above injuries were not sufficient to cause copious bleeding, I think the evidence establishes that the blood marks at the well were due to Ram Prasad's and Nathuni's injuries.

On the other hand it is in evidence that Ram Prasad died of a fracture of the skull and that there was no external wound from which any blood could have flowed. The only injury on his side from which blood could have come was Awadh Bihari's which was a trifling one and which certainly could not have produced the copious patches which the Sub-Inspector found near the well. On the 25th November two small spots of blood under the *mahua* tree were pointed out to the Sub-Inspector. They were about the size of a 4 anna bit each and the earth was scraped up and sent to the Chemical Examiner and the report is that they were caused by human blood. But it has to be remembered that on the 22nd November when the Sub-Inspector first came to the village Bansi did not point either the place or the marks to him and in the circumstances the suggestion that the blood was subsequently put there for the purpose of creating evidence should, I think, be accepted. There-

fore we have now the position that while the account given by the defence has much to support it, the evidence for the prosecution is so deficient that it cannot be safely accepted for the purpose of convicting the appellants. If the prosecution case is substantially true, then they have only themselves to thank for its failure.

In this connection I think it necessary to point out that it was the duty of the Committing Magistrate to make some investigation into the truth of their story before he committed the appellants to the Sessions Court. It is not sufficient for Committing Magistrates to say that a *prima facie* case has been made out and thus to relieve themselves of further responsibility. If the Police did not send up all the material witnesses, it was the Committing Magistrate's duty to examine them himself in order to determine which side was speaking the truth. Here two clear cut cases were put forward by the respective sides, and from the Police diaries we find that there were apparently independent witnesses to support the account given by the appellants and the learned Magistrate might with very little trouble have reached the conclusion that it was advisable to try the counter-case first and to keep the present case pending. If that procedure had been adopted, the appellants would either have been discharged or committed for trial with all the material evidence at the service of the Sessions Court.

Therefore, in these circumstances being unable to say that the case put by the prosecution is a true account of the manner in which Ram Bodhan came by his injuries I think there must be an acquittal.

The learned Judge has set out the various submissions made to him at great length, but he has not met them by an adequate discussion of the evidence nor referred to the discrepancies between the depositions and the statements before the Police, nor has he considered the question whether having suppressed a material part of the prosecution story the eye-witnesses on whom he relies can be trusted in respect of the assault upon Ram Bodhan. He thinks, and evidently the assessors also think so, that the assault took place in both places. But of this there is no evidence at all and we cannot proceed upon mere conjecture.

The result, therefore, is that the convictions and the sentences will be set aside and

the appellants will be acquitted and set at liberty.

Jwala Prasad, J.—I agree.

Z. K.

Convictions set aside.

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION No. 735
— OF 1924.

December 19, 1924.

Present:—Sir Victor Murray Coutts-Trotter, Kt., Chief Justice, and

Mr. Justice Srinivasa Iyengar.

M. SANYASAYYA NAIDU AND OTHERS—
ACCUSED NOS. 5, 2 AND 3—RESPONDENTS
versus

THE PUBLIC PROSECUTOR—PETITIONER.

*Criminal Procedure Code (Act V of 1898), s. 497—
Bail—Jurisdiction of Court to order re-arrest of
accused—Principles governing grant of bail.*

Under sub-s. (5) of s. 497 of the Cr. P. C. a Court has ample jurisdiction in the exercise of its discretion to order the re-arrest of any person out on bail, if it feels that the circumstances warrant or demand such a course. [p. 665, col. 2.]

On an application for bail, the Court is not called upon to conduct a preliminary trial of the case and consider the probability of the accused's guilt or innocence. It would be entirely exceeding its function if it did that in any detail; but it may incidentally have to look at the weight of the evidence against the accused as a necessary part of its proper function, that is, to enquire whether the giving of the bail as opposed to the arrest of the accused might lead to a real danger of his absconding and not appearing to take his trial or whether there is any real reason to suppose that he is likely to tamper with the witnesses who would be called against him. [p. 665, col. 2; p. 666, col. 1.]

Petition praying that for the reasons stated therein in the affidavit filed therewith the High Court will be pleased to revoke the bail granted to the respondents herein by the order of this Court, dated the 15th December 1924, and made in Criminal Miscellaneous Petition No. 722 of 1924 and remand them to custody pending their trial in Sessions Case No. 41 of 1924 on the file of the Court of Session of the Vizagapatam Division.

Mr. K. S. Krishnaswami Iyengar, for the Accused.

The Public Prosecutor, for the Crown.

JUDGMENT.

Coutts-Trotter, C. J.—In this case five persons were charged with the attempted murder of the Sub-Collector. The accused applied for bail and ultimately bail was granted on the information then

before him by my learned brother in this Court. It was first argued that under the Code there was no power inherent in this Court to revise any such grant of bail. I have never been able to see the difficulty. Section 497 (1) of the Cr. P. C. runs as follows:—

“When any person accused of any non-bailable offence is arrested or detained without warrant by an officer-in-charge of a Police Station, or appears or is brought before a Court, he may be released on bail.”

That is what happened here. By sub-s. (5) of that section the Courts therein described “may cause any person who has been released under this section to be arrested and may commit him to custody.” In the face of that, the argument that there is no power in this Court, whatever change of circumstances may be proved before it, to revise the order granting bail seems to be absolutely untenable. I hold that we have ample jurisdiction to exercise our discretion and order the re-arrest of any person out on bail, if we feel the circumstances warrant or demand such a course.

In this case we are concerned with three men; one is the 5th accused about whom most of the argument has been addressed to us. He is a retired Inspector of Police and he is alleged to have taken part in this very serious offence of attempted murder. The 3rd accused is his son-in-law, also a man in an important position which he has forfeited; he was in the position of village Munsif. The 2nd accused is the son of the 5th and, in the absence of anything brought to our notice, we think that on the security which has been ordered, he may be allowed to be at liberty till the trial.

The principles which govern the granting of bail, I think, are not really doubtful. The Court is not called upon to conduct a preliminary trial of the case and consider the probability of the accused's guilt or innocence. It would be entirely exceeding its function, if it did that in any detail; but it may incidentally have to look at the weight of the evidence against the accused as a necessary part of what I conceive to be its proper function, that is, to enquire whether the giving of the bail as opposed to the arrest of the accused might lead to a real danger of his absconding and not appearing to take his trial or whether there is any real reason to suppose that he is likely to tamper

with the witnesses who would be called against him. In this case much has been said on the latter ground and it is suggested that a retired Police Inspector and a deposed village Munsif are people who would be in a strong position to influence witnesses and make them resile from their testimony. I do not wish to put it on that ground; I think it is safer to put it on this ground that here are two men of importance in their own walk of life charged with a very serious offence and that it is more than possible that they may take advantage of a release on bail to abscond and fail to take their trial. It is not to be overlooked that the hardship to which they are subject which, of course, is a matter which should weigh very greatly with any Court considering a question of this kind is not a very great one because their trial is fixed to take place not later than the 5th of January 1925. Had it been a question of waiting in jail for months pending the trial, speaking for myself, I might have come to a different conclusion but this is a short time, and I understand that the prisoners are given every opportunity in the prisons of this country, as they are in prisons in England, of seeing legal advisers, giving them full instructions and consulting them. In any case I should like to say that I trust the Jail Authorities in this case will give these prisoners the fullest opportunity and the fullest latitude to take any legal advice they may require. On the grounds I have given, I think this is a case where good cause has been shown for not allowing these men to be on bail, for a very short time must elapse between now and their trial.

The order will be that they be arrested. The bail bonds with regard to the 3rd and the 5th accused, if executed, will be cancelled.

With regard to the 2nd accused the order will stand and I think one may not inappropriately remark that the 2nd accused will have ample facilities for being in constant communication with the 5th accused.

Srinivasa Iyengar, J.—I agree.

V. N. V. *Bail order revoked in part.*
Z. K.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 639 OF 1924.

April 24, 1925.

Present:—Mr. Justice Krishnan.

RAMALINGA IYER—COMPLAINANT—
PETITIONER

versus

BUDDA VARADARAJULU IYER AND
OTHERS—ACCUSED—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 345—Composition of offence, what is—Agreement to refer to arbitration, whether amounts to composition—Compromise of civil and criminal cases, difference between.

The compounding of an offence supposes an agreement by which the parties have settled their differences and in the more usual acceptation of the term implies that the prosecutor has received some consideration or gratification for dropping the prosecution. At any rate the arrangement must be one by which the parties have settled their differences and not a mere arrangement to settle the disputes in future as the result of some action either by themselves or by the arbitrators and some decision arrived at by themselves or by third parties. [p. 667, col. 2.]

The mere signing of an agreement to refer the subject-matter of certain criminal proceedings to arbitration does not amount to a composition of the offence under s. 345, Cr. P. C., and does not oust the jurisdiction of the Magistrate to try the case. [p. 667, col. 1.]

A *muchilika* is only one step towards the composition of the offence between the parties. It is only if the *muchilika* is carried out and according to its terms an award is arrived at, that there would be a complete composition in the case. Till that is done, the mere agreement or *muchilika* is only a preliminary step towards composition and not the composition itself. [p. 667, col. 1.]

Criminal cases do not stand on the same footing as civil cases in the matter of settlement. A criminal case is not a matter between parties as a civil case is. A Magistrate is not bound to recognize a reference to arbitration and wait for the arbitrators to make the award though it will be reasonable to do so. If he does not choose to wait he will not be doing anything illegal. But if he chooses to wait and then there is an award, that award may amount to a compounding of the offence in question and if it is an offence compoundable under s. 345, effect will be given to such compounding. But till the actual compounding takes place the Magistrate is not bound at all to stay his hands but may go on with the trial of the case. [p. 667, col. 2.]

Murray v. Queen-Empress, 21 C. 103; 10 Ind. Dec. (N. S.) 701, relied upon.

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise an order of the Court of the Sub-Divisional First Class Magistrate, Salem, in Calendar Case No. 30 of 1924, dated the 30th June 1924.

Mr. N. C. Vijiaraghavachariar, for the Petitioner.

Mr. Salem Ramasami Iyer, for the Respondents.

ORDER.—In this case a complaint was

filed by one Ramalingier who is the petitioner before me against a number of accused for defamation and the case was tried by the Sub-Divisional Magistrate of Salem. After the charge had been framed in the case against the accused, the Magistrate dismissed the complaint on the ground that the offence had been compounded. It is contended before me that the Magistrate was in error in thinking that there was any completed composition of the offence in the case. What happened was that some mediators advising the parties induced them to enter into a *muchilika*. The terms of the agreement are set out by the Magistrate in his order. It says "we agree that you, the *panchayatdars* should inquire into all our disputes, namely, (1) the one in O. S. No. 53 of 1923 on the file of the Second Additional District Munsif, Salem, (2) the one in O. S. No. 211 of 1922 on the file of the Principal District Munsif, Salem and (3) the one in C. C. No. 30 of 1924 on the file of the Sub-Divisional Magistrate, Salem" that is this case. The arbitrators are asked to make inquiries in regard to these cases and pass a decision within 15 days. No doubt this *muchilika* is signed by both the parties. As a matter of fact no arbitration took place in accordance with it and no award has been passed by the arbitrators. But it was argued before the Sub-Divisional Magistrate that the very signing of the *muchilika* amounted to a composition of the offence under s. 500, Indian Penal Code, which was being tried by him and that his jurisdiction was ousted and that he was bound to act under s. 345, Cr. P. C., and pass an order of dismissal. It seems to me that the Sub-Divisional Magistrate has taken wrong view of the position altogether in accepting that argument. The *muchilika* was only one step towards the composition of the offence between the parties. It is only if the *muchilika* is carried out and according to its terms an award is arrived at that there will be complete composition in the case. Till that is done, the mere agreement or *muchilika* is only, as has been argued before the lower Court, a preliminary step towards composition and not the composition itself. There is nothing whatsoever in the *muchilika* to show that the parties intended that the mere signing of it was to have the effect of compounding the offence. They expected the arbitrators to act and to make an award in 15 days and on that award being made no doubt the criminal case will be treated as

compounded; but till that is done, I cannot see how the case can be treated as compounded at all. As put by Mr. Justice Trevelyan in *Murray v. Queen-Empress* (1), "the compounding of an offence supposes an arrangement by which the parties have settled their differences and in the more usual acceptance of the term implies that the prosecutor has received some consideration or gratification for dropping the prosecution." At any rate the arrangement must be one by which the parties have settled their differences and not a mere arrangement to settle the disputes in future as the result of some action either by themselves or by the arbitrators and some decision arrived at by themselves or by third parties. In this case till action is taken by the arbitrators and some decision is arrived at by them it is not possible to hold that the parties settled their differences. There is no question here of two tribunals carrying on the trial of the same case at the same time. The Magistrate had granted an adjournment for 15 days and he was not going on with the case. If within that time the award had been passed, no doubt there would have been a proper composition, of the case but no such award having been passed the arbitration failed and there was nothing more to be done than for the Magistrate to go on with the case. It must be remembered that criminal cases do not stand on the same footing as civil cases in the matter of settlement. A criminal case is not a matter between parties as a civil case is. It seems to me that a Magistrate is not bound to recognise a reference to arbitration and wait for the arbitrators to make the award though it will be reasonable to do so. If he does not choose to wait he will not be doing anything illegal. But if he chooses to wait and then there is an award, that award may amount to a compounding of the offence in question and if it is an offence compoundable under s. 345 effect will be given to such compounding. But till the actual compounding takes place the Magistrate is not bound at all to stay his hands but may go on with the trial of the case himself. In the present case, as I have said already, there is nothing in the *muchilika* to show that the mere giving of the *muchilika* was to be treated as compounding the offence. In these circumstances I must set aside the order of

(1) 21 O. 103; 10 Ind. Dec. (N. S.) 701.

the Magistrate and direct him to take the case on to his file and go on with the trial of the case from where he left it off and complete it without further delay.

V. N. V.

S. D.

Order set aside.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 289 OF 1925.

June 15, 1925.

Present:—Mr. Justice Broadway.

Mehr NUR MOHAMMAD—COMPLAINANT

—PETITIONER

versus

NUR MUHAMMAD AND OTHERS—ACCUSED—

RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 439—Acquittal, revision against—High Court, interference by.

The High Court will not interfere with orders of acquittal in the exercise of its revisional jurisdiction, unless there are very special circumstances calling for interference.

Sergeant Saunderson v. Mr. Wilson, 10 P. R. 1900 Cr. and *Emperor v. Achhar Singh*, 81 Ind. Cas. 547; 5 L. 16; 25 Cr. L. J. 931; (1924) A. I. R. (L.) 451, referred to.

Criminal revision from an order of the Sub-Judge, Multan, dated the 22nd October 1924.

Mr. Abdul Aziz, for the Petitioner.

Dr. Nand Lal, for the Respondents.

JUDGMENT.—This is a petition under s. 439 of the Cr. P. C. in which I am asked by the petitioner to set aside an order of the learned Sessions Judge of the Multan Division acquitting the respondents of charges under ss. 302, 307, 148, Indian Penal Code.

I have been taken through this judgment by Mr. Abdul Aziz for the petitioner and Dr. Nand Lal for the respondents, and have come to the conclusion that this petition must be dismissed.

The judgment shows that the learned Sessions Judge has considered carefully all the questions arising in the case. After giving due weight to all the evidence on the record he has come to the conclusion that the story for the prosecution was not true but that the correct version was that given by the respondents and he has further come to the conclusion that in using a gun Nur Mohammed Hiraj was acting in self defence. There can be no doubt, in my opinion, that on the findings arrived at, the conclusions are correct. Further it has been repeatedly laid down that this

Court will not interfere with orders of acquittal in the exercise of revisional jurisdiction unless there are very special circumstances calling for interference. In this connection reference may be made to *Sergeant Saunderson v. Mr. Wilson* (1) and *Emperor v. Achhar Singh* (2).

After giving due weight to Mr. Abdul Aziz's arguments I am unable to see any special circumstances which would warrant my departing from the established practice of this Court in such matters. I, therefore, dismiss this petition.

N. H.

Petition dismissed.

(1) 10 P. R. 1900 Cr.

(2) 81 Ind. Cas. 547; 5 L. 16; 25 Cr. L. J. 931; (1924) A. I. R. (L.) 451.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 756 OF 1924.

(CRIMINAL REVISION PETITION No. 683 OF 1924.)

April 24, 1925.

Present:—Mr. Justice Krishnan.

NARAYAN REDDY AND OTHERS—ACCUSED

—PETITIONERS

versus

ENUMULA BOJAMMA—COMPLAINANT

—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 350—“De novo trial,” meaning and object of.

A *de novo* trial means a new trial from the very beginning of the case. The object of granting a *de novo* trial is to enable the Magistrate who hears the case to see the way in which the witnesses give evidence before him, to mark their demeanour, and thereby to be in a position to judge of their credibility. That object is lost if the witnesses are not examined again but are only allowed to be cross-examined by the accused. Such a course is not in accordance with the provisions of s. 350, Cr. P. C.

Hnin Yin v. Than Pe, 44 Ind. Cas. 337; 9 L. B. R. 92; 19 Cr. L. J. 321; 11 Bur. L. T. 58 and *Sobh Nath Singh v. Emperor*, 12 O. W. N. 138; 6 Cr. L. J. 431, relied upon.

Even if no objection is taken to the course of merely allowing the witnesses to be cross-examined further, still the trial is vitiated.

Sobh Nath Singh v. Emperor, 12 O. W. N. 138; 6 Cr. L. J. 431, relied upon.

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Dharmavaram, in Criminal Appeal No. 20 of 1924, preferred against the judgment of the Court of the Stationary Sub-Magistrate, Kadiri, in C. C. No. 141 of 1924.

Messrs. *Imamuddin* and *Rafuddin*, for the Petitioners.

The Public Prosecutor, for the Crown.

ORDER.—In this case an unfortunate error has crept in the procedure which has vitiated the trial. It resulted from the too frequent transfers of the Magistrates concerned in this case. The First Magistrate that tried the case framed the charge when he was transferred. When another Magistrate took up the case, an application was made to that Magistrate to order a trial *de novo* under s. 350, proviso (a) and that Magistrate ordered a *de novo* trial accordingly. But, before the trial began, that Magistrate was also transferred, and a Third Magistrate, a new man, was appointed as the Sub-Magistrate of the place when he took up the case for trial, his attention was drawn to the order passed by his predecessor granting a *de novo* trial; but instead of granting a *de novo* trial, what he did was merely to re-call the prosecution witnesses and give leave to the accused's Vakil to cross-examine those witnesses. This is not the meaning of 'de novo' trial. *De novo* trial means a new trial from the very beginning of the case. The object of granting a *de novo* trial is to enable the Magistrate who hears the case to see the way in which the witnesses give evidence before him, to mark their demeanour, and thereby to be in a position to judge of their credibility. That object is lost if the witnesses are not examined again but are only allowed to be cross-examined by the accused. Such a course is not in accordance with the provisions of s. 350, and in two cases to which my attention has been drawn, their Lordships have set aside the trial and ordered a new trial under similar circumstances: see *Hnin Yin v. Than Pe* (1) and *Sobh Nath Singh v. Emperor* (2). In the latter case their Lordships of the Calcutta High Court went to the length of holding that even if no objection was taken to the course adopted of merely allowing the witnesses to be cross-examined further, still the trial is vitiated. Here apparently the accused wanted to have the witnesses examined from the very first but that was not allowed by the Magistrate. This error in the procedure has vitiated the trial. I am, therefore, constrained to set aside the convictions of the accused in this case and direct them to be re-tried for the offences charged against them.

(1) 44 Ind. Cas. 337; 2 L. B. R. 92; 19 Cr. L. J. 321; 11 Bur. L. T. 58.

(2) 12 C. W. N. 138; 6 Cr. L. J. 431.

The papers will be sent to the Stationary Sub-Magistrate, Kadiri, for re-trial of the case.

V. N. V.

S. D.

Re-trial ordered.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 98 OF 1925.
(CRIMINAL REVISION PETITION No. 90 OF 1925.)

March 27, 1925.

Present:—Mr. Justice Devadoss.

MR. E. C. KENT—PETITIONER

versus

MRS. E. E. L. KENT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 488—Maintenance of wives and children—Rs. 100, whether can be awarded to each wife and child—"In the whole," meaning of—Alimony, grant of, by English Court, whether ousts jurisdiction of Magistrate under s. 488.

Under s. 488, Cr. P. C., every wife and every legitimate child and every illegitimate child can be awarded upto Rs. 100 provided the husband or the father has the means to pay the amount. The words "Rs. 100 in the whole" in the section do not mean that a Magistrate cannot award more than Rs. 100 in all for the support of the wife and the children whatever their number. What the words mean is that only a sum of money not exceeding Rs. 100 should be ordered to be paid and no other payment either in the shape of fees or medical expenses, etc., should be ordered to be paid. [p. 671, cols. 1 & 2.]

All that has to be proved in order to give jurisdiction to a Magistrate under s. 488, Cr. P. C., is that the child is unable to maintain itself and that the father neglected or refused to maintain it, and in the case of the wife that the husband refused or neglected to maintain her. Even a grown up child, if unable to maintain itself, is entitled to get maintenance from the father if he has the means. [p. 671, col. 2.]

In re Parathy Valappil Moiddeen, 21 Ind. Cas. 469; 25 M. L. J. 355; 14 M. L. T. 223; (1913) M. W. N. 997; 14 Cr. L. J. 597 and *In the matter of the petition of W. B. Todd*, 5 N. W. P. H. O. R. 237, followed.

That there has been no neglect to maintain the wife and children is a question of fact. But a mere offer to maintain is not sufficient. [*ibid.*]

The existence of an order for alimony by the English Divorce Court is not sufficient to oust the jurisdiction of a Magistrate under s. 488, Cr. P. C., since a mere order for maintenance is not equivalent to maintaining the wife. [p. 672, col. 1.]

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise an order of the Court of the District Magistrate, Civil and Military Station, Bangalore, in Mis. C. C. No. 18 of 1924.

Mr. Mockett, for the Petitioner,

The Public Prosecutor and Mr. Thornton, for the Respondents.

ORDER.—This is an application to revise the order of the District Magistrate, Civil and Military Station, Bangalore directing the petitioner to pay Rs. 300 a

month under s. 488 of the Cr. P. C. The petitioner is a well-to-do planter who neglected to maintain his wife and two children. The wife made an application to the District Magistrate and he has passed the order which is sought to be revised.

The first contention on behalf of the petitioner is that under s. 488 the Magistrate has jurisdiction to award only Rs. 100 in all for the support of the wife and the children. Mr. Mockett who appears for the petitioner relies upon the words "Rs. 100 in the whole" and argues that the Magistrate cannot award more than Rs. 100 in all for the support of the wife and the children and that the award by the Magistrate of Rs. 300, Rs. 100 for the wife and Rs. 100 for each of the children is *ultra vires*. Clause (1) of s. 488 reads as follows:—

"If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, etc., may, on proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding one hundred rupees in the whole, as such Magistrate thinks fit."

To contend that when a woman makes an application for herself and for her children she could only be given Rs. 100 for the maintenance of herself and of her children whatever be their number, is opposed to the clear wording of the section. If the petitioner's construction of the section is correct, it would amount to this; if a person has an illegitimate child and an application is made under this section and Rs. 100 is awarded to that child and if that person afterwards refuses to maintain his wife and his legitimate children, the wife and the legitimate children would have no remedy against him, for the sum of Rs. 100 has already been awarded for the support of the illegitimate child, and no further order can be made on behalf of the wife and legitimate children as no Magistrate can award more than Rs. 100 for all the persons whom he is bound to maintain.

This section was enacted to suit Indian conditions. A Muhammadan can legally marry four wives, at the same time supposing he neglects or refuses to maintain one wife and her children and supposing she obtains an order under this section

and gets Rs. 100 and if he afterwards refuses or neglects to maintain any of the other wives and children they would be helpless, and if he refuses to maintain all the four wives at the same time, is it to be said that the section requires that all the four wives should apply by a joint petition for payment of maintenance to them and their children. Supposing a European has legitimate children by a deceased wife, and children by a living wife and also illegitimate children, supposing the illegitimate children obtain an order for their maintenance and the Magistrate directs the payment of Rs. 100 for their maintenance and if the man after sometime refuses to maintain his legitimate children by the deceased wife, are they to be without any remedy? And still further, if he refuses to maintain his wife and legitimate children are they to be without any remedy? I think the contention that a person can only be ordered to pay Rs. 100 for the support of his illegitimate children, for the support of the living wife and her children is, on the face of it, an untenable one.

Mr. Mockett relied upon the summary jurisdiction of Magistrate's Act, 58 & 59 Vict. Chap. 39, s. 5, cl. (c) and contended that the sum awardable under that section was for the maintenance of the wife and the children with her, and a Magistrate has no power to award more than £2 a week. Section 5, cl. (c), gives the Court of summary jurisdiction power to make an order among other things for the legal custody of the children under 16 years of age, and an order for the maintenance under cl. (c) which is as follows:—"A provision that the husband shall pay to the applicant personally, or for her use, to any officer of the Court or third person on her behalf, such weekly sum not exceeding £2 as the Court shall, having regard to the means both of the husband and the wife, consider reasonable." There is no provision in this section for the payment of any amount for the maintenance of any child unable to maintain itself. But the Justices in considering what amount should be awarded to the wife may take into consideration what would be required for the maintenance of the child or children in the custody of the wife. The maximum is fixed at £2 a week as the object of the Act is to give relief to the wife. There are other enactments like the Bastardy Act

and the Poor Law Act under which a father could be made to pay maintenance for his illegitimate and legitimate children.

The case of *Hill v. Hall* (1) does not help the petitioner. Sir Francis Jeune, President of the Probate Division observes as follows at page 142*: "Therefore, the whole sum ordered is to be paid to the applicant personally. There is in the Act no express power to order that sums shall be paid for children, even the children of his (the husband's) own marriage. But, in considering what amount should be ordered to be paid by the husband, if the Justices were right in taking into account the expenses of maintaining any child or children of the marriage, they would be equally justified in taking into account the expenses in respect of children whom the husband, under the Poor Law at any rate, was legally liable to maintain, and they were right in ordering such amount to be paid—as only it could be paid—to the wife." 58 & 59, Vict. Chap. 39 was specially enacted for giving speedy relief to married women who on account of desertion or neglect on the part of their husbands to maintain them, have to seek speedy remedy for provision for maintaining themselves. That Act is not similar to s. 488 which specially provides for the maintenance of "wife and child legitimate or illegitimate, which is unable to maintain itself."

In considering what amount should be paid for the wife it need not be taken into consideration whether she has children to be maintained or not. The position of the husband and his means and the position of the wife alone should be considered. In the case of each child the needs of the child should be considered. The words "in the whole" mean that only a sum of money not exceeding Rs. 100 should be ordered to be paid and no other payment either in the shape of fees or medical expenses, etc., should be ordered to be paid; nor can the Magistrate order the husband to provide a house for the wife. It is to prevent the Magistrate making an order that the husband should pay so much for the schooling of the children, or so much for clothing or so much for medical expenses and so on, that the

words "in the whole" have been put into the section. The Magistrate can only order one sum not exceeding Rs. 100 to be paid for the wife and for each of the children unable to maintain itself.

The section speaks of "wife or his legitimate or illegitimate child" and does not speak of "wife and child." The words have to be given their plain meaning. To construe the words as meaning wife and children is opposed to all rules of construction. If a man has the luxury of more wives than one, his liability to maintain them is not lessened thereby. Every wife and every legitimate child and every illegitimate child could be awarded upto Rs. 100 provided the husband or the father has the means to pay the amount.

The contention that s. 488 is modelled on the lines of 58 & 59 Vict. Chap. 39 s. 5 cannot hold water. Section 488 of the Code of 1898 is not a new provision enacted in 1893. The same provision was found in the Code of 1882 and the Codes of 1875 and 1872 and in Act XXV of 1861, s. 316 contained a provision corresponding to that of s. 488, cl. (1). All that has to be proved in order to give jurisdiction to a Magistrate under s. 488 is that the child is unable to maintain itself and that the father neglected or refused to maintain it, and in the case of the wife that the husband refused or neglected to maintain her. Even a grown up child if unable to maintain itself, is entitled to get maintenance from the father if he has the means: *vide In re Parathy Valappil Moideen* (2) and *In the matter of the petition of W. B. Todd* (3).

The next contention urged by Mr. Mockett is that there has been no neglect to pay for the maintenance of the wife and children. This is a question of fact and the learned Magistrate has found that the petitioner herein has neglected to maintain his wife and children. A mere offer to maintain them is not sufficient, and Mr. Mockett has admitted that nothing has been paid for the maintenance of the wife and children for at least some years. There is nothing in this contention.

The third contention raised by Mr. Mockett is that there is an order of the Probate, Divorce and Admiralty Division of the High Court in England whereby

(1) (1902) P. 140; 71 L. J. P. 81; 66 J. P. 344; 50 W. R. 400; 86 L. T. 597; 18 T. L. R. 393.

*Page of (1902) P.---[Ed.]

(2) 21 Ind. Cas. 469; 25 M. L. J. 355; 14 M. L. T. 223; (1913) M. W. N. 997; 14 Or. L. J. 597.

(3) 5 N. W. P. H. O. R. 237.

the petitioner is directed to pay his wife so much alimony per month, and it is seriously urged before me that this order is a bar to an application under s. 488 of the Cr. P. C. It is admitted that the wife finds it impossible to execute the order for alimony against the petitioner who is a planter in the Mysore State. Whether the order is executable or not is immaterial for the present purpose. The section gives jurisdiction to the Magistrate to award maintenance if he is satisfied that a person has neglected or refused to maintain his wife or child. The existence of the order is not sufficient to oust the jurisdiction of the Magistrate for a mere order for maintenance is not equivalent to maintaining the wife; and the order whatever may be its force or nature, cannot take away the Magistrate's jurisdiction so long as the husband neglects or refuses to maintain the wife.

Reliance was placed upon *Craxton v. Craxton* (4), where Bargrave Deane, J., observed: "There can be no desertion in law when a suit is pending, once the Divorce Court is seized with the matrimonial suit. Justices have no right to interfere in the matter. . . Here the President had actually made an order, how then can the justice claim to overrule it." In that case an order for alimony had been made by the President of the Probate Division and the Justices could not, therefore, pass an order under the Summary Jurisdiction Act. That case has no application to the present, for the proceedings in the Probate Division do not control the jurisdiction of a Magistrate in India.

As I have already observed, if it is proved to the satisfaction of the Magistrate under s. 488 that the husband has neglected to maintain his wife, the Magistrate has jurisdiction to order the husband to pay for the maintenance of his wife. In this case the order for alimony is unexecutable. Even if held to be executable, I am of opinion that so long as the husband does not maintain the wife either by payment of alimony or otherwise, the Magistrate's jurisdiction to order him to pay maintenance is not taken away.

The case of *In re Subbaramakkammah* (5) does not help the petitioner. In that case a decree for monthly allowance or maintenance had been obtained in the High Court and that decree was in force and the wife

could not get a further and separate order for maintenance from the Magistrate. The case would be different if the execution of the decree for maintenance had become barred or had become unexecutable. This was distinctly held so far back as 1872. In a case of *John Meiselback* (6), a Bench consisting of Sir Richard Couch, C. J., and Ainslie, J., held that a decision of the Civil Court refusing to enforce a contract or agreement against a man for the maintenance of a woman cannot conclude either the woman from applying or a Magistrate from making an order under s. 316 of the Cr. P. C., for the maintenance of their illegitimate daughter. The learned Chief Justice observed: "The proceeding in the Civil Court was of a different nature: it was founded on an alleged contract, and the decision of the Civil Court, even if it had not proceeded, as it appears to have done, on the law of limitation, would not have concluded the woman from applying under s. 316 of the Cr. P. C., for the maintenance of the illegitimate daughter. The only question in this case is whether the matter was so put before the Magistrate that he had jurisdiction to make the order under s. 316 for the maintenance of the illegitimate daughter. She stated in her petition that both she and the daughter were starving and required maintenance, and she asked for a sum to be paid for maintenance. The Magistrate had power to make an order for the maintenance of the daughter." Under s. 316 of Act XXV of 1861 (now s. 488) the only questions were whether the child was a child of the man and whether he had neglected to maintain the child, and on these facts being found, the Magistrate had jurisdiction to pass an order even though there was a previous contract between the man and the woman for payment of maintenance.

Considering the position of the parties, the order for payment of Rs. 100 to each of the persons wife and two children is eminently a just order, I dismiss the petition with costs of the counter-petitioner.

Counsel's fee Rs. 100.

V. N. V.

S. D.

(6) 17 W. R. Cr. 49.

Petition dismissed.

(4) (1907) 71 J. P. 399; 23 T. L. R. 527.

(5) 2 Weir 615.

CALCUTTA HIGH COURT.APPEAL FROM APPELLATE DECREE No. 2673
OF 1922.

April 24, 1925.

Present :—Mr. Justice Suhrawardy and
Mr. Justice Duval.MOHINI MOHAN SAHA CHOWDHURY
AND OTHERS—PLAINTIFFS—APPELLANTS
versusMEAJAN AND OTHERS—DEFENDANTS—
RESPONDENTS.*Landlord and tenant—Co-sharers—Suit by one co-sharer to recover rent of entire holding, maintainability of—Person interested in particular area of holding, whether co-sharer.*

A holding cannot be split up or sub-divided without the consent of the tenant and a tenant has a right to insist that his holding should be kept intact in the state in which it was first created. There is, however, nothing to prevent a co-sharer landlord from bringing a suit for the entire rent of the holding with a prayer that out of the entire rent decreed he may be allowed to recover his share of the rent, provided he makes the other co-sharers parties to the suit. [p. 673, col. 2; p. 674, col. 1.]

So far as a tenant is concerned he is liable to pay rent for the entire holding to the persons who have got the superior interest, although as between themselves the co-sharers are entitled to make a division of area and of the rent. [p. 674, col. 2.]

A person who has got an undivided share in the holding as well as a person who has become interested in a particular area of the holding are both co-sharers in the holding and are entitled to maintain a suit to recover the entire rent of the holding making the other co-sharers parties to the suit. [ibid.]

Appeal against a decree of the Subordinate Judge, First Court, Backerganj, dated the 8th of July 1922, affirming that of the Munsif, Second Court at Patuakhali, dated the 15th of June 1921.

Babus Shib Chandra Palit and Bhagirath Chandra Das, for the Appellants.

Babu Trailokya Nath Ghose, for the Respondents.

JUDGMENT.—The suit out of which this appeal arises is based upon the following facts. There were five plots of land which were settled at a consolidated *jama* with the tenant-defendants by the *pro forma* defendants who claimed an exclusive title to the lands. The plaintiffs thereupon brought a suit against the *pro forma* defendants and the tenant-defendants claiming exclusive title to the land and for *khas* possession. The suit was decreed in the plaintiffs' favour in the first Court and their title to the lands was declared, but their claim for *khas* possession was refused. The *pro forma* defendants preferred an appeal against that decision;

and in the Appellate Court the plaintiffs and the *pro forma* defendants came to a compromise under which the plaintiffs got three of the plots and the two remaining plots remained the property of the *pro forma* defendants. The tenant-defendants were parties in the suit as well as in the appeal, but they were not parties to the compromise. Under the compromise the plaintiffs were to get Rs. 10 per year as rent, the entire rent being Rs. 15 for the five plots.

Thereafter the plaintiffs brought a suit against the tenants in which they claimed rent at Rs. 10 per year on account of the three plots in accordance with the compromise above referred to. That suit was dismissed as not maintainable on the objection of the tenants that the plaintiffs were not entitled to a portion of the rent and the tenancy could not be sub-divided without their consent.

The plaintiffs have brought the present suit for the entire rent of the *jama* making all the co-sharers parties with the prayer that out of the entire rent decreed they may be allowed to recover their share of the rent at the rate of Rs. 10 per year. The Courts below have held that the present suit is also not maintainable. So the plaintiffs have appealed to this Court.

It appears that the Courts below have not appreciated the scope and the frame of the present suit and were led away by considerations which did not really arise in the present suit. The learned Subordinate Judge thinks that the effect of a decree in this suit would be splitting up of the defendants' tenancy and this could not be done on the authority of the case of *Ruheemuddy Akun v. Poorno Chunder Roy Chowdhry* (1) on which he relies. That case, apparently, has no bearing on the present question. There the lands were let out by four agreements being thus constituted into four different holdings. The plaintiffs brought five suits against the tenants, thus converting four holdings into five, and it was held that this they could not do. The principle upon which that decision was based is now well-settled, that a holding cannot be split up or sub-divided without the consent of the tenant and a tenant has a right to insist that his holding should be kept intact in the state in which it was first created.

The real question in this case is whether the plaintiffs are entitled in the circumstances above set forth to maintain this action. That a co-sharer has a right to bring a suit for the entire rent by making his co-sharers parties to the suit is a question which cannot now be discussed being settled by several decisions of this Court which were accepted and approved by the Judicial Committee in the case of *Pramada Nath Roy v. Ramani Kanta Roy* (2). This is a general right which is conferred upon a co-owner irrespective of the special provisions of the Bengal Tenancy Act. This is exactly what the plaintiffs have done in the present case. They have brought the suit as co-sharers with the *pro forma* defendants for the entire rent and prayed that their share of rent might be decreed to them.

This raises a further question whether the plaintiffs can be called co-sharers in the common sense of the words. The learned Vakil for the respondents has argued that a co-sharer is a person who has got an undivided share in the entire holding and a person who has got a divided share or the entire interest in a definite portion or area of a holding is not a person who is a co-sharer. No authority has been cited before us in support of that proposition. But there is an authority in support of the contrary view in *Ishwar Chunder Dutt v. Ram Krishna Dass* (3). In that case the Full Bench held that a sale of a share in a tenure does not of itself effect a severance of the tenure or an apportionment of rent, but if the purchaser of a share desires to have such an apportionment he is entitled to enforce it and in laying down this proposition the learned Judges held that there was no difference between a case when a tenure was severed by different portions of its area being sold to different persons from that where it is sold to different persons in undivided shares. This decision is an authority for the view that a person who has got an undivided share in the holding as well as a person who has become interested in a particular area of the holding is entitled to maintain a suit for apportionment of rent.

(2) 35 C. 331; 12 C. W. N. 249; 35 I. A. 73; 7 C. L. J. 139; 10 Bom. L. R. 66; 18 M. L. J. 43; 3 M. L. T. 151 (P. C.).

(3) 5 C. 902; 6 C. L. R. 421; 3 Shome L. R. 132; 2 Ind. Dec. (N. S.) 1182.

This view is in consonance with common sense. So far as the tenants are concerned they are liable to pay rent for the entire holding to persons who have got the superior interest. In the present case, for instance, it is not denied that the tenants are liable to pay rent to the plaintiffs. As between co-sharers themselves there is no doubt a division of area and the rent. But so far as the tenants are concerned the holding is an undivided one and all the persons who are interested in the different areas comprising the holding are joint landlords in respect of the tenancy. We have been referred to several cases where it has been held that a co-sharer is not entitled to maintain a suit for his share of the rent without suing for apportionment. These cases have no bearing on the facts of the present case.

We are accordingly of opinion that the view taken by the Court below is indefensible and that the appellants are entitled to maintain the present suit. In the above view this appeal is allowed. The decrees of the Courts below are set aside and the case remitted to the Court of first instance for trial on the merits. The appellants are entitled to the costs of this appeal. The costs of the Courts below will be at the discretion of the Trial Court.

Z. K.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 90 OF 1924.

August 20, 1925.

Present :—Mr. Simpson, A. J. C.
JAI KARAN SINGH—PLAINTIFF
 —APPELLANT

versus

Musammatt UMRAI KUNWAR AND
OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Construction of document—Deed conveying full proprietary rights to widow—Estate taken.

If a deed purports to convey full proprietary rights to a Hindu widow it will be construed to convey such rights to her unless there is something in the context or surrounding circumstances to qualify such a meaning. It is not so qualified by the mere fact that the transferee is a widow. [p. 675, col. 2.]

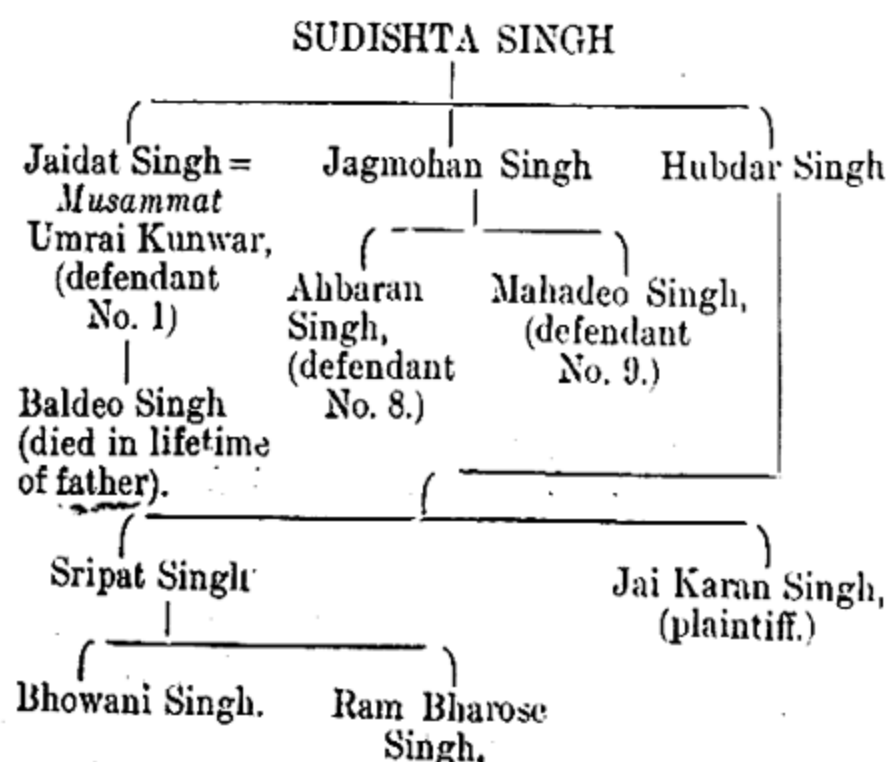
Surajmani v. Rabi Nath Ojha, 25 A. 351; A. W. N. (1903) 66 and *Surajmani v. Rabi Nath Ojha*, 30 A. 84; 5 A. L. J. 67; 7 C. L. J. 131; 35 I. A. 17; 12 C. W. N. 231 (P. C.), referred to.

Second appeal against a decree of the District Judge, Fyzabad, dated the 24th November 1923, upholding that of the Subordinate Judge, Fyzabad, dated the 14th June 1923.

Mr. Anant Prasad Nigam, for the Appellant.

Mr. A. P. Sen, for Respondents Nos. 1, 5 and 7 to 9.

JUDGMENT.—This is a second civil appeal. The following is the pedigree—



The suit was brought by Jai Karan Singh, for a declaration that a mortgage-deed and a deed of gift executed by Musammat Umrai Kunwar will not be binding after her death on the reversioners of her husband. The defence was that Musammat Umrai Kunwar was full owner of the property, and did not hold as a Hindu widow. Her rights are based upon a deed Ex. A-1, dated 16th May 1908. This is a deed of partition stamped and registered. The parties to it are Jai Karan Singh, along with Musammat Jannu Kunwar, the widow of Sripat Singh, as guardian of her two sons Bhowani Singh and Ram Bharose Singh, making up the first party. The two sons of Jagmohan Singh, Ahbaran Singh defendant No. 8 and Mahadeo Singh defendant No. 9 making up the second party, and Musammat Umrai Kunwar, who is described as the wife of Jaidat Singh deceased, making up the third party. These are all described as co-sharers, and they proceed to divide up the property among themselves. Paragraph 11 confers on each of them the fullest right of ownership. There is nothing in any part of the document on which it is possible to found a distinction between the right acquired by Musammat Umrai Kunwar and the right acquired by

Jai Karan Singh himself or any of the male co-sharers. This being so, it is not possible to cut down the rights of Musammat Umrai Kunwar. The old idea, expressed, for example, in *Surajmani v. Rabi Nath Ojha* (1), has been distinctly disapproved of when that case was appealed to the Privy Council in *Surajmani v. Rabi Nath Ojha* (2). The true doctrine is that if a deed purports to convey full proprietary rights to a Hindu widow it will be construed to convey full proprietary rights to her, unless there is anything in the context or surrounding circumstances to qualify such a meaning. It is not so qualified by the mere fact that she is a widow. This being so, the decision of the Court of Trial, that plaintiff's suit must be dismissed, which was confirmed by the First Court of Appeal, is correct, and plaintiff's second appeal which is now before me must be dismissed with costs.

Z. K.

Appeal dismissed.

(1) 25 A. 351; A. W. N. (1903) 66.
(2) 30 A. 85; 5 A. L. J. 67; 7 C. L. J. 131; 35 I. A. 17; 12 C. W. N. 231 (P. C.).

CALCUTTA HIGH COURT.

CIVIL RULE No. 343 OF 1925.

April 30, 1925.

Present :—Mr. Justice Cuming.

SARBA SUNDARI (BAXI) DASSI—
PETITIONER

versus

PANCHANON RAY—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. IX, rr. 4, 5—Absence of petitioner on date of hearing—Dismissal of petition for default—Opposite party not served, effect of—Dismissal, whether can be set aside.

Where a petitioner has failed to appear on the date fixed for the hearing of his petition, r. 5 of O. IX of the C. P. C. has no application. The fact that the summons had not been served on the opposite party is no ground for setting aside an order of dismissal for default passed owing to the absence of the petitioner on the date of hearing. [p. 676, col. 1.]

Rule against an order of the Court of the Sub-Judge at Assansol, in Re-hearing Case No. 60 of 1924 arising out of Mis. J. Case No. 30 of 1924.

Mr. S. C. Bose (with him Babu Narendra K. Bose) for Babu Karunamoy Ghose, for the Petitioner.

Babu Joytish Chandra Sarkar, for the Opposite Party.

JUDGMENT.—The facts of the case out of which this Rule arises are as follows:

The petitioner obtained a money-decree against the opposite party and in execution of this decree certain properties belonging to the judgment-debtor opposite party were put up to sale and purchased by the petitioner decree-holder on the 26th March 1924. On the 25th April 1924, the opposite party put in an application under O. XXI, r. 90, C. P. C., for setting aside the sale and various dates were fixed for the hearing of the case the last date fixed was the 21st June 1924. On that date the applicant judgment-debtor the opposite party was not present and the application was dismissed for default. On the 18th July 1924 the judgment-debtor opposite party put in an application under O. IX, r. 4, C. P. C., for setting aside the order of dismissal, the ground apparently being that he was unable to be present on account of the illness of his mother and of himself. The learned Subordinate Judge entirely disbelieved the story of his mother's illness as explaining the reason why he could not be present and held that he had failed to establish sufficient excuse for his absence and his application under O. IX, r. 4, C. P. C., was rejected. The Court then proceeded to deal with the matter on a ground which had not been raised by the judgment-debtor himself but apparently was raised by the Court, namely, that as the summons on the decree-holder auction-purchaser had been returned unserved the Court could not, under such circumstances, dismiss the application but that it should have dealt with the matter under O. IX, r. 5, C. P. C., and should have waited for one year from the date of the return made to the Court by the officer and if the petitioner did not within that time apply for fresh summons the Court could then dismiss the application. It is rather difficult to understand under which rule and Order the Subordinate Judge had proceeded. Order IX, r. 5, has no application to a case where the plaintiff has failed to appear; and the fact that the summons was returned unserved on the auction-purchaser opposite party, was no ground for setting aside the order of dismissal for default of the judgment-debtor. Under what section the learned Judge proceeded it is difficult to understand. He states that "by virtue of an inherent power of that Court to rectify its mistakes".

But as a matter of fact there was no mis-

take to rectify. It appears to me that the Court acted entirely without jurisdiction in setting aside the order, having found that the judgment-debtor did not come within the scope of O. IX, r. 4, the section which provides for restoration of a case dismissed for default. As far as I can see the Subordinate Judge had no jurisdiction. The order of the Subordinate Judge complained of is set aside and this Rule is made absolute with costs, the hearing fee being assessed at one gold *mohur*.

Z. K.

Rule made absolute.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 68 OF 1925.

May 18, 1925.

Present:—Sir Sydney Robinson, Kt., Chief Justice, and Mr. Justice Brown.

ALLY MOOLLA INDUSTRIAL CORPORATION, LTD.—APPELLANT

versus

M. A. ESMAIL—RESPONDENT.

Contract Act (IX of 1872), s. 30—Wagering contract

—Agent, whether can recover expenses or commission

—Forward contracts, whether wagering contracts.

Where a plaintiff, on behalf of the defendant, has entered into gambling transactions with third parties, the defendant is bound to make good the losses incurred in those transactions to the plaintiff and pay the commission. [p. 677, col. 2.]

The fact that the defendant is a Limited Company would not disentitle the plaintiff to recover, where he has entered into the contracts under arrangement with the manager of the Company, apparently acting in exercise of the powers vested in him. [p. 678, col. 1.]

The fact that forward contracts are made in the rice trade is not one, which of itself indicates anything at all. No doubt such contracts must, in the nature of things, be speculative to a large extent. But the fact that they are speculative does not render them wagering contracts, and there can be no wagering contract where there is not an intention common to both parties that the dealing should be by way of wager or gambling in differences. [*ibid.*]

Bhagwandas Parasram v. Burjorji Ruttonji Bomanji, 44 Ind. Cas. 284; 42 B. 373; 45 I. A. 29; 23 M. L. T. 203; 34 M. L. J. 305; 4 P. L. W. 220; 16 A. L. J. 241; 27 C. L. J. 358; (1918) M. W. N. 315; 22 C. W. N. 625; 20 Bom. L. R. 561; 7 L. W. 577; 11 Bur. L. T. 211 (P. C.), referred to.

Appeal against a decree of the Original Side of the Court in C. R. No. 93 of 1923.

Mr. Clifton, for the Appellant.

Mr. Cowasjee, for the Respondent.

JUDGMENT.—This was a suit on a promissory-note for Rs. 1,75,000. The de-

fence was that the transactions for which this promissory-note was given were wagering contracts in rice, and, a further defence was put forward, that the promissory-note had been fully satisfied by payment on the 4th December 1922. An amended plaint was filed to explain this alleged payment, in which it was set out that on that date the Corporation's rice manager sent the plaintiff two cheques amounting in all to Rs. 1,75,000, and demanded from him his cheque for the same amount. The plaintiff, having satisfied himself that the two cheques would be honoured and having cashed them, gave his own cheque for Rs. 1,75,000. This was cashed, but paid, not into the Corporation's account but into the account of the Corporation's Managing Agents, Messrs. Henry F. Elliott (India), Limited. There is little or no explanation of this somewhat extraordinary incident, and we are not concerned with it in this appeal.

The facts are not in dispute. The Corporation intended to undertake very large dealings in rice, and they were anxious that this fact should not be known because of the effect it might have on the market. It was, therefore, arranged by Mr. Elliott, the head of the Managing Agents' firm, who was also the Chairman of the Corporation, that the plaintiff should lend his name and enter into contracts on behalf of the Corporation, receiving a commission of Rs. 30 per thousand bags bought or sold. This arrangement was made in the presence of Mr. Evans, who was managing the Rice Department of the Corporation. Accordingly, in December 1920, the plaintiff began to enter into contracts in his own name, but really on behalf of the Corporation, who had undertaken all responsibility in connection with them.

The contracts for deliveries in January were met, and the plaintiff was paid his commission. The contracts to be settled in February were met, but there was a balance of Rs. 1,75,000 due to the plaintiff as his commission. For this, the promissory-note in suit was given. The contracts for the next few succeeding months were also met, and the plaintiff's commission was paid.

The procedure was that the plaintiff should obtain offers and submit the proposed contracts for the approval of Mr. Evans. If Mr. Evans approved, the plaintiff would enter into the contracts and send

them to Mr. Evans, accompanied by confirmation slips. Mr. Evans would keep the contracts and return the counterfoils of the confirmation slips to the plaintiff. A long number of these confirmation slips have been filed in the case.

At the time the issues were fixed, the only point raised was whether these contracts were wagering contracts. There was no allegation as to Mr. Evans' authority to enter into such contracts; but it was apparently urged that the plaintiff and Mr. Evans were aware that the contracts were intended to be only gambling contracts in respect of differences, of which the Corporation was wholly ignorant.

The learned Judge held that Mr. Elliott was not only the Chairman of the defendant Corporation, but a partner in the firm of the Managing Agents. He held that, though large purchases and sales were contracted for, in no single instance was delivery taken or given, and that the milling notices were only issued in the case of 18,000 bags. He held that the plaintiff acted in these transactions as agent of the defendants and on their behalf paid the money which he now claims. He then referred to authorities which held that, where a plaintiff, on behalf of a defendant enters into gambling transactions with third parties, the defendant is nevertheless bound to make good the losses incurred in those transactions to the plaintiff and pay the commission claimed. One of those authorities was an authority of the late Chief Court in which it was held that a broker could, notwithstanding the fact that the contracts, were wagering contracts, and that he knew them to be of that nature, recover the brokerage due to him. These facts are all admitted.

It is admitted that, had the plaintiff been acting on behalf of a private person, he would be entitled to recover; but it is urged that he was acting on behalf of a Limited Company, and it is argued that this being so, it was his bounden duty to assure himself that the Corporation were aware of these transactions, and that, they being wagering contracts, he was bound to satisfy himself by enquiry that Mr. Evans was authorised by the Corporation to enter into such wagering contracts.

It is urged that even if the plaintiff originally contemplated genuine rice transactions, the nature, the quantity and the speculative character of the transactions

were such as to leave no doubt in his mind that they were purely wagering contracts, that he should, therefore, have obtained the authority of the Corporation and that not having done so, and such speculative contracts being wholly outside the ordinary scope of the business of a rice trading Corporation, he is not entitled to recover.

The fact that forward contracts are made in the rice trade is not one, which of itself indicates anything at all. No doubt such contracts must, in the nature of things, be speculative to a large extent. But the fact that they are speculative does not render them wagering contracts, and there can be no wagering contract where there is not an intention common to both parties that the dealing should be by way of wager or gambling in differences. This was pointed out by their Lordships of the Privy Council in the case of *Bhagwandas Parasram v. Burjorji Ruttonji Bomanji* (1).

There is no proof that the plaintiff and the persons with whom he contracted on behalf of the Corporation intended that there should be no deliveries, or that these were wagering contracts pure and simple. The learned Judge held that it was immaterial whether the contracts were in fact wagering contracts or not, as that would not affect the plaintiff's right to recover moneys that he had paid in connection with such contracts on behalf of the Corporation, or disentitle him to his commission.

It is now urged that it is essential, as the Corporation is a Limited Company, that the question whether these contracts were wagering contracts should be decided. We are entirely unable to accept this argument.

The arrangement with the plaintiff was made with a Director of the Corporation, apparently acting in exercise of the powers vested in him.

Forward purchases and sales are within the every day business of such a Corporation, and there was nothing to put the plaintiff on enquiry nor was there any reason why he should have made any enquiry even if he became aware that there was no intention on the part of the Corporation to give or take deliveries. He was an agent merely lending his name to contracts which were all approved by

the Corporation's manager, who would presumably be authorised to enter into such contracts.

We agree, therefore, that it is unnecessary for the Court to have decided the question whether these contracts were wagering contracts or not, and that the plaintiff is entitled to recover.

The decree of the Court below will be confirmed and the appeal dismissed with costs throughout.

N. H.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 2898 OF 1924.

June 6, 1925.

Present:—Mr. Justice Zafar Ali.

HEM RAJ AND OTHERS—DEFENDANTS—
APPELLANTS
versus

NIHAL SINGH AND OTHERS—PLAINTIFFS
AND DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151—Evidence Act (I of 1872), s. 167—Inadmissible evidence, decision based on—Remand, power of.

Where an Appellate Court has relied for its decision upon a document which is inadmissible in evidence, a Court of Second Appeal would be justified in remanding the case for decision to the Appellate Court with a direction to exclude that document from its consideration. [p. 679, col. 1.]

Sumitra Kuer v. Ram Kair Chowbey, 57 Ind. Cas. 561; 5 P. L. J. 410; 1 P. L. T. 702; (1921) Pat. 17, relied on.

Appeal from a decree of the District Judge, Rawalpindi, dated the 29th August 1924.

Dr. Nand Lal, for the Appellants.

Mr. Shamair Chand, for the Respondents.

JUDGMENT.—The only point urged by the Counsel for the appellants in this second appeal is that the judgment of the lower Appellate Court is vitiated by admission of inadmissible evidence and should be set aside on that ground and that the case should be remanded for fresh decision.

Before the present civil litigation there had occurred a criminal case between these parties and the Magistrate had in that case inspected the spot and recorded a note as to what he saw there. This note was not proved but the learned District Judge cited it and obviously on the strength of what was stated therein disbe-

(1) 44 Ind. Cas. 284; 42 B. 373; 45 I. A. 29; 23 M. L. T. 203; 34 M. L. J. 305; 4 P. L. W. 229; 16 A. L. J. 241; 27 O. L. J. 358; (1918) M. W. N. 315; 22 C. W. N. 625; 20 Bom. L. R. 561; 7 L. W. 577; 11 Bur. L. T. 211 (P. C.).

lieved the defendants' evidence, as would appear from the following extract from his judgment:—

"The Magistrate who tried the criminal case inspected the spot on the 7th August 1922 and made a note to the effect that the *haveli* in dispute was a dilapidated one surrounded on all sides by walls; there was a new door way in the western wall and remains of a door on the eastern side. These facts would show that the path in dispute was not an old one. The evidence produced by the defendants for proving that is of no value whatsoever."

The learned District Judge might have come to a contrary conclusion if he had not admitted in evidence this inspection note.

Counsel for the respondents states that the inspection note was admissible if proved and argues by reference to *Kalika Nand Singh v. Shiva Nandan Singh* (1) that the question of proof of a document is a question of procedure which can be waived and was presumably waived by the plaintiffs in the present case because they did not object in time to its being admitted in evidence. But the document was never produced in evidence and so the plaintiffs had no occasion to object to its admissibility. The record of the Trial Court and the Magistrate's note on the former was referred from that record.

As the finding is based on the unproved and consequently inadmissible document the judgment is vitiated thereby and must be set aside as was done in *Ramani Pershad Narain Singh v. Mahanth Adaiya Gossain* (2) and *Sumitra Kuer v. Ram Kair Chowbey* (3). Section 167 of the Evidence Act which is referred by the Counsel for the respondents in the present case is noticed in *Sumitra Kuer v. Ram Kair Chowbey* (3) where it was held that where an Appellate Court has relied for its decision upon a document which is inadmissible in evidence a Court of Second Appeal would be justified in remanding the case for decision to the Appellate Court with a direction to exclude that document from its consideration.

I accordingly accept this appeal and remand the case to the lower Appellate Court for fresh decision in the light of

what has been stated above. The Court-fee on the memorandum of appeal will be refunded. Other costs will abide the event.
N. H. *Appeal accepted.*

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 477 OF 1924.

August 28, 1925.

Present:—Mr. Dalal, J. C.

HAR PERSHAD AND OTHERS—PLAINTIFFS—
APPELLANTS
versus

SHEO SHANKER AND OTHERS—DEFENDANTS
—RESPONDENTS.

Oudh Laws Act (XVIII of 1876), s. 13—Pre-emption—Duty of Court—Determination of market value—Finding of fact.

When the plaintiff in a suit under Ch. II of the Oudh Laws Act alleges that the price stated in the sale-deed is fictitious and the allegation is denied, the Court, under s. 13 of the Act, has not to determine what the price paid for the property actually is but whether the price stated in the deed is fictitious as alleged and, if so, what the fair market-value of the property is. [p. 680, col. 1.]

Wazir Begam v. Mohammad Ishaq Khan, 4 O. O. 158, followed.

Abilakh v. Rabban Singh, 10 O. C. 88, explained.

The question of the market-value is one of fact and cannot be discussed in second appeal. [*ibid.*]

Appeal from the judgment and decree of the Subordinate Judge, Lucknow, dated the 18th July 1924, modifying that of the Munsif, North Lucknow, dated the 22nd March 1922.

Mr. Rajeshwar Prasad, for the Appellant.

Messrs. Bisheshwar Nath Srivastava and Kashi Prasad, for the Respondents.

JUDGMENT.—The plaintiffs in their appeal and the defendants in their cross-objections dispute only the price fixed for pre-emption. The right of the plaintiffs to pre-empt is admitted. The only point of interest is whether the lower Court after coming to the conclusion that three of the items entered in the sale-deed were fictitious should have gone on to consider what the fair market price of the property was. I find that the question is not open to discussion but is covered by a Bench ruling of this Court. Under s. 13 of the Oudh Laws Act, XVIII of 1876, if in a case of sale the Court finds that the price was not fixed in good faith the Court shall fix such price as appears to it to be the fair market-value of the property sold,

(1) 63 Ind. Cas. 625; 3 P. L. T. 149; (1922) A. I. R. (Pat.) 122.

(2) 31 O. 380.

(3) 57 Ind. Cas. 561; 5 P. L. J. 410; 1 P. L. T. 702; (1921) Pat. 17.

These words were interpreted as far back as 1901 in *Wazir Begam v. Mohammad Ishaq Khan* (1) by a Bench of this Court. It was held there that when the plaintiff in a suit under Ch. II of the Oudh Laws Act alleges that the price stated in the sale-deed is fictitious and the allegation is denied, the Court under s. 13 of the Act has not to determine what the price paid for the property actually is, but whether the price stated in the deed is fictitious as alleged, and if so what the fair market-value of the property is. The ruling has been constantly followed in this Court. The learned Counsel for the appellant referred to a decision of one of the Judges of the Bench which decided the case as *Wazir Begam v. Mohammad Ishaq Khan* (1). What was held there was that in a pre-emption suit in the absence of any other evidence the actual price paid is good evidence of the market-value. *Abilakh v. Rabban Singh* (2). This decision supports the decision as *Wazir Begam v. Mohammad Ishaq Khan* (1) and does not give an opinion in conflict therewith because it pre-supposes an inquiry into the market-value of the property even where there is evidence to prove what the actual price paid was. What was decided there was that in case the inquiry regarding market-value resulted in a want of determination of such value the actual price paid may be taken as the market-value. It is certain that in terms of the interpretation of s. 13 made by this Court the duty of the lower Court was not to determine what the price paid by the purchaser was but to determine the market-value.

As regards the market-value the decision is one of fact. Every objection taken by the appellants and by the respondents in this Court has been considered by the lower Appellate Court. It is not as if some point worthy of consideration has been missed out. It is not the province of this Court to examine the reasons given by the lower Appellate Court for accepting or rejecting the contentions of either party. The lower Appellate Court has given reasons for arriving at the finding on the materials before it and this Court will not interfere in second appeal.

I dismiss the appeal and cross-objections with costs.

G. H.

Appeal dismissed.

(1) 4 O. C. 158.

(2) 10 O. C. 88.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 16 OF 1925.
July 15, 1925.

Present:—Sir B. K. Mullick, Kt.,
Acting Chief Justice, and
Mr. Justice Kulwant Sahay.

RADHE LAL AND ANOTHER—PLAINTIFFS
—APPELLANTS

versus

EAST INDIAN RAILWAY AND OTHERS—
DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIX, r. 2—Suit against Railway Company—Description of defendant—Suit filed against Agent, whether competent—Procedure.

Where a suit is brought against a registered Corporation the latter should be described in the plaint by its official name and title. In the case of an unincorporated or unregistered Company the names of the individuals constituting the Company must be given or the ordinary name by which the Company is known and under which it carries on its business should be given. [p. 682, col. 2.]

In the case of a suit against a Railway Company the proper name under which the Company should be sued is the name and the style under which it carries on its business. If a plaintiff deliberately chooses to sue not the Company but the Agent of the Company he cannot by any decree which he obtains in the suit bind the Company. If, however, upon a fair reading of the plaint it is made out that the description of the defendant is a mere error and that the Company is the real defendant then the suit may proceed against the Company. [p. 682, col. 2; p. 683, col. 1.]

Letters Patent Appeal from a decision of Mr. Justice Das, dated the 18th December 1924, setting aside a decision of the Subordinate Judge, Monghyr, dated the 21st July 1924, reversing that of the Munsif, Jamui, dated the 13th December 1923.

Mr. Murari Prasad, for the Appellants.

Mr. N. C. Sinha, for the Respondents.

JUDGMENT.

Mullick, A. C. J.—On the 14th January 1922 the firm of Kalu Ram-Brijmohan of Bombay consigned three bales of cloth by Railway to the firm of Ramlal-Lachman Ram of Shaikhpura in the District of Monghyr. While the goods were in transit the latter firm assigned them to the present plaintiffs Radhe Lal and Ganga Prasad. It is admitted that delivery was to be made at Shaikhpura by the East Indian Railway Company. On the 9th February 1922 the Company in question delivered only one bale and on the 24th October 1922 the plaintiffs lodged a suit before the Munsif of Jamui claiming compensation from the Agent of the East Indian Railway for the loss of the two bales. The firm of Ramlal-Lachman Ram were sued as *pro forma* defendants.

The plaint which was filed on the 24th October was not properly stamped and was returned to the plaintiffs. On the 28th October the plaint was re-filed with a proper Court-fee and was accepted.

On the 21st November 1922 the East Indian Railway appeared and asked for time to file a written statement. Time was granted and the written statement was filed on the 3rd January 1923.

After various adjournments the case was taken up on the 13th December 1923. The defendant Railway then took a new ground and urged that the suit was incompetent against the Agent and that if it was sought to substitute or add the Company the time for doing so had expired. The Munsif accepted this argument and held that the frame of the suit was bad and made a decree in favour of the defendants.

The plaintiffs then went on appeal to the Subordinate Judge of Monghyr who on the 21st July 1924 set aside the Munsif's order and remanded the suit for trial on the merits.

A second appeal was then preferred to the High Court and on the 18th December 1924 Mr. Justice Das disagreeing with the Subordinate Judge restored the order of the Munsif and dismissed the suit.

The present Letters Patent appeal is against the order of Mr Justice Das.

The learned Judge relying on the decisions in *Sinehi Ram-Bihari Lal v. Agent, East Indian Railway Co.* (1) and *East Indian Railway Co. v. Ram Lakhan Ram* (2) held that this was a case brought against the Agent of the Railway and not the Railway Company and that the plaintiffs were not entitled to any relief against the Company, and the learned Judge laid down his view of the law in the following words:—"In my opinion when there were two known persons in existence and the plaintiff brings the suit against one of them and afterwards applies to have the other brought on the record as a defendant on the ground that he all along intended to sue the other and that in substance he sued the other, and no question of representation arises in the case, it is impossible to maintain the view that the case is one of mis-description." There is no reason for dissenting from this state-

ment of the law. It has been accepted in other cases and also recently in *Agent Bengal Nagpur Railway v. Behari Lal Dutt* (3). The question now before us depends not upon the correctness of the proposition as stated above but upon its application to the facts of this case. Was the suit against the Railway in substance or not? If it was a suit against the Agent then obviously no relief can be given against the Railway Company but the point is whether upon a consideration of the plaint and the circumstances of the case it is possible to hold that in truth and substance the plaintiff sued not the Agent as a designated person but the Railway Company as a corporate body. That is a question of fact and must be decided upon the evidence in the case. The decision in the other cases cannot, therefore, be any guide. Now the view that the learned Subordinate Judge took in appeal was that the suit was in substance one against the Railway and that it was competent to proceed. This is a finding of fact which is conclusive in second appeal but it is urged on behalf of the respondent before us that there is no evidence to support it. It is necessary, therefore, for us to see whether there was any evidence upon which the learned Judge was competent to come to the conclusion that this was really a case of mis-description.

In order to a finding upon this point it is necessary to see what the plaintiffs did. In their plaint they describe the first party defendant as the "Agent of the East Indian Railway." In para. 5 they state that the two bales were lost when in the custody of the defendant first party. In para. 6 they state that they made the demand to the Agent. In the relief portion they pray for judgment against the defendant first party as "Agent of the East Indian Railway Company." In their application of the 24th October 1922 asking for issue of process they describe the defendant not as Agent but as the East Indian Railway Company. In filing the deficit Court-fee with their plaint on the 28th October they again repeat this description.

Let us now see what the defendant did. The defendant who appeared on the 21st November 1922 was not the Agent but

(3) 90 Ind. Cas. 426; 29 O. W. N. 614; (1925) A. I. R. (O.) 716; 53 O. 783.

(1) 61 Ind. Cas. 125; 2 P. L. T. 679.

(2) 78 Ind. Cas. 312; 3 Pat. 230; (1924) Pat. 9; (1925) A. I. R. (Pat.) 37; 6 P. L. T. 415.

the Company. The defendant who filed the written statement on the 3rd January was again not the Agent, but the Company and no objection was taken to the competency of the suit until the 12th December 1923. It is pointed out by the appellant that if that ground had been taken at the earliest moment the error could easily have been remedied within the period of limitation which appears to have not expired till about February 1923. In reply it is urged on behalf of the respondent that para. 1 of the written statement does take the objection. That paragraph runs as follows :—That the suit as framed is not maintainable." It is clear, however, from the fact that the Railway Company appeared on the 21st November and also filed a written statement that this objection had reference not to the designation of the defendant but to other grounds upon which the suit of the plaintiffs was liable to fail.

Let us next see what the Court did. In the order sheet it describes the suit as one between Radhe Lal, plaintiffs and the East Indian Railway Company and others defendants. On the 21st November 1922 the Court accepts a petition from the Railway Company for time and on the 3rd January 1923 it accepts the written statement not from the Agent but from the Company. It is true that process was issued upon the Agent but that was clearly in consequence of the provisions of s. 140 of the Indian Railways Act.

It is clear, therefore, that the plaintiffs the Company and the Court till the 13th December 1923 all thought that the suit against the Agent was but against the Railway Company.

Is this, therefore, a case in which the plaintiffs have deliberately chosen to proceed not against the principal but his servant? Clearly the plaint differs from that in *East Indian Railway Company v. Ram Lakhan Ram* (2) for here in the prayer portion the plaintiffs claim against the defendant first party as Agent and they make it clear that they desire to proceed against the corporation and not against the Agent in his personal capacity.

In my opinion the facts of this case are such that the decision in *East Indian Railway Company v. Ram Lakhan Ram* (2) has no application.

There was evidence on which the Subor-

dinate Judge could find that this was a case of mis-description and his finding is conclusive.

The appellant also urges that the Munsif's orders of the 21st November 1922 and of the 3rd January 1923 are really orders substituting the Railway Company as a defendant in the suit. Order I, r. 10 of the C. P. C. would, therefore, apply and no question of limitation would arise. It is true that no formal amendment of the plaint was made. This should have been done but the omission was an irregularity and I do not think it vitiates the order of the Subordinate Judge.

With regard to the general question as to what is the correct way of designating the defendant in a claim against a Railway Company the point has been argued but it is unnecessary to deal with it in detail.

The C. P. C. of 1882 and the present Code both contemplate that a registered corporation should be described by its official name and title. In the case of an unincorporated or unregistered Company the names of the individuals must be given or the ordinary name by which the Company is known and under which it carries on its business. There are companies constituted by Statute which are permitted to sue or be sued in the name of an officer or trustee. As to this class provision is made in s. 435 of the Code of 1882 but O. XXIX of the present Code of 1908 is silent. The omission, however, is remedied in the Appendix to the Code which makes it clear that this class of Company may be sued through the designated officer. Therefore, in the case of the East Indian Railway the proper name under which the Company should be sued is the name and style under which it carries on its business. A suit against the Agent would be incompetent and would fix no liability upon the Company. The Company has no registered office in India but the Indian Railways Act provides that an officer named the Agent may be appointed in India upon whom service may be made of all notices and processes addressed to the Company. The appointment of such an officer, however, does not in any way relieve the plaintiff of the duty of suing the proper person and of correctly describing him.

If a plaintiff deliberately chooses to sue not the Company but the Agent he cannot by any decree which he obtains in the suit bind the Company. If, however, upon a fair reading of the plaint it is made out that the

description of the defendant is a mere error and that the Company is the real defendant then the suit may proceed against the Company.

Here the Railway did in fact appear and conducted the cases till the 12th December 1923 on the footing that they were the real defendants in the suit.

In these circumstances the judgment of the learned Judge of this Court must be set aside and the appeal must be decreed with costs. The order of the Subordinate Judge will be restored and the case will proceed to trial as directed by him.

Kulwant Sahay, J.—I agree.

Z. K.

Appeal accepted.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND APPEAL No. 2950 OF 1924.

May 5, 1925.

Present:—Mr. Justice Jai Lal.

SHER KHAN—DECREE-HOLDER—APPELLANT

versus

PRABH DAYAL OTHERS—

VENDEES—RESPONDENTS.

Res judicata—Decision on point of law—Decision, whether binding in same proceeding.

When a definite decision has been given between the parties to any proceeding on any matter in controversy, and such decision purports finally to adjudicate on such matter, it is not competent to the same Judge or his successor-in-office to set aside the decision, notwithstanding that the decision is on a point of law. Section 11, C. P. C., does not apply to such a case; but the binding force of such a decision depends on general principles of law. [p. 684, cols. 1 & 2.] *Rameshwar Singh v. Hitendra Singh*, 81 Ind. Cas. 576; 47 M. L. J. 286; 5 P. L. T. 491; 20 L. W. 456; 35 M. L. T. 182; 26 Bom. L. R. 1153; 29 C. W. N. 413; L. R. 5 A. (P. C.) 175; 22 A. L. J. 968; 40 C. L. J. 431; 3 Pat. L. R. 180; (1924) A. I. R. (P. C.) 202; 1 L. C. 457 (P. C.), relied on.

Miscellaneous second appeal from an order of the District Judge, Jhelum, dated 29th August 1924.

Lala Jagan Nath, for the Appellant.

Dr. Nand Lal, for the Respondents.

JUDGMENT.—One Sardar Khan instituted a suit for possession by pre-emption of 2 *kanals* of land against Prabh Dayal, vendor and Shiv Ram and Bhagwan Das, vendees, and obtained a decree on payment of Rs. 510 after deducting his costs. After Sardar Khan had deposited the amount in Court he transferred the decree to Sher

Khan, appellant. Sher Khan attempted to execute this decree and claimed that he was entitled to the possession of the buildings which stood on the land. A counter application was presented by the judgment-debtors objecting to the execution of the decree by Sher Khan on the ground that a pre-emption decree was not transferable. The Subordinate Judge dismissed the application of Sher Khan for execution of the decree holding that it was not transferable and that in any case he was entitled to possession of two *kanals* of vacant site only. Sher Khan appealed to the District Judge who held that the decree was merely for possession of the land and not for the possession of the buildings on the land. It may be mentioned that the land sold to the vendees was 2 *kanals*, 6 *marlas*, that Sardar Khan by mistake sued for pre-emption in respect of 2 *kanals* only and that consequently the decree was for possession of 2 *kanals* only. It also appears that before the suit was instituted the vendees had started building on the land and an injunction was claimed by the plaintiff to restrain them from doing so. On this ground it was claimed by the learned Counsel for the appellant that the land on which the buildings had been constructed was the subject of the suit. The District Judge held that during the trial of the suit the defendants had expressly invited the attention of the plaintiff to the mistake in the plaint as to the area of the land in suit, that the plaintiff did not choose to amend his plaint and that, therefore, he could not be given more than 2 *kanals* of land and further the District Judge seems to have held that such land only could be given to the decree-holder on which no building stood. As regards the objection by the judgment-debtors that the decree was not transferable, the learned Judge held that it was not transferable, and in doing so he followed a ruling of this Court *Mehar Khan v. Ghulam Rasul* (1), but differed from the decision, dated the 24th April 1922, of his predecessor-in-office given between the parties in a previous application made by Sher Khan for execution of this decree in which a similar objection had been raised by the judgment-debtors and had been disallowed by the learned District Judge who had held that the decree in question was transferable.

(1) 64 Ind. Cas. 191; 2 L. 282; 3 L. L. J. 553; (1922) A. I. R. (L.) 300.

It is contended before me on behalf of the transferee Sher Khan that the decision of the learned District Judge in the former proceedings was *res judicata* and that in any case the learned District Judge was not, on general grounds, entitled to set aside the order of his predecessor-in-office. He also contended that the ruling relied upon by the learned District Judge was distinguishable from the present case because here the amount ordered to be paid by the pre-emptor had actually been paid in Court and, therefore, the title of the pre-emptor to the property in suit and to execute the decree had become perfect which was not the case in the reported case. It is not necessary for me to consider this point in detail in view of my decision on the objection as to the competency of the learned District Judge to set aside the order of his predecessor-in-office.

I am of opinion that the doctrine of *res judicata* as contained in s. 11 of the C. P. C. does not apply to the present case because the operation of that section is expressly restricted to a suit subsequently instituted to one in which the matter in controversy has already been decided: but on general grounds when a definite decision has been given between the parties on any matter in controversy and such decision purports finally to adjudicate on such matter, it is not competent to the same Judge or his successor-in-office to set aside the former decision. The parties, if they consider themselves aggrieved, have their remedy by review or appeal to superior Courts.

On behalf of the respondents it was contended that a decision on a point of law could never be *res judicata* and certain authorities were quoted in support of this contention. I have already stated that it is not strictly on the application of s. 11, C. P. C., that I hold that the learned District Judge was not competent to set aside the order of his predecessor. In *Rameshwar Singh v. Hitendra Singh* (2), their Lordships of the Privy Council re-affirmed the view which they had on previous occasions taken and which may be stated in the following terms:—

That though matters decided between the parties in the same proceeding are not, strictly speaking, covered by the provision

(2) 81 Ind. Cas. 576; 47 M. L. J. 286; 5 P. L. T. 491; 20 L. W. 456; 35 M. L. T. 182; 26 Bom. L. R. 1153; 29 C. W. N. 413; L. R. 5 A. (P. C.) 175; 22 A. L. J. 968; 40 C. L. J. 431; 3 Pat. L. R. 180; (1924) A. I. R. (P. C.) 202; 1 L. C. 457 (P. C.).

of s. 11, C. P. C., as they could not be said to have been decided in a former suit, yet the former decision is as binding between the parties and those claiming under them as an interlocutory judgment in suit is binding upon the parties in every proceeding in that suit, or as a final judgment in a suit is binding upon them in carrying the judgment into execution. The binding force of such a judgment depends not upon s. 11 but upon general principles of law. If it were not binding there would be no end to litigation.

This view had already been expressed by their Lordships in previous judgments which are mentioned at page 293* of the report. I hold consequently that the judgment-debtors were precluded from raising the objection that the decree was not transferable and, therefore, that Sher Khan was not competent to execute it.

The next question is as to the manner in which the decree should be executed. It was not seriously contended before me that Sher Khan was entitled to the possession of buildings on the land in suit, or that he was entitled to more than 2 *kanals* of land decreed to him. The only contention of the learned Counsel was that possession should be given to Sher Khan of a plot of 2 *kanals* of land which may be unencumbered by buildings, and that if possession cannot be given of such land, then the judgment-debtors should be ordered to remove their materials unless they can come to terms with the decree-holder. It was further contended that the judgment-debtors had built on more than 6 *marlas* of land and had chosen the best part of the land for such building and that in giving possession to the decree-holder regard must be had to the quality of the land, in other words, that inferior land should be apportioned between the decree-holder and the judgment-debtors in the proportion between 2 *kanals* and 6 *marlas*. In my opinion this contention of the learned Counsel is correct, and its correctness was not seriously denied by the Counsel for the respondents. I, therefore, order that possession of 2 *kanals* of land be given to Sher Khan, and, if possible with due regard to the quality of land possession should be given to him of one plot which may be unencumbered by building. If, however, he cannot be given possession of one plot with due regard to the quality of the land, then the judgment-debtors should

*Page of 47 M. L. J.—[Ed.]

be ordered to remove their buildings from such portion of the 2 *kanals* of land which may fall to the share of the decree-holder unless they can come to terms with the decree-holder.

I accept Appeals Nos. 2950 and 2951 and pass an order in the terms mentioned above. The appellant will have his costs in both appeals.

N. H.

Appeal accepted.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL

No. 25 OF 1925.

July 10, 1925.

Present:—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Coyajee.
RAMPRASAD SHIVLAL—DEFENDANT—
APPELLANT

versus

SHRINIVAS BALMUKUND—PLAINTIFF
—RESPONDENT.

Limitation Act (IX of 1908), s. 22—Suit against joint Hindu family described as firm—Amendment of title of plaint after expiry of limitation, effect of—Stamp Act (II of 1899), s. 68—Negotiable Instruments Act (XXVI of 1881), s. 118—Hundi—Stamp, necessary—Duty of Court—Practice—Costs, award of, rule applicable to.

The plaint in a suit to recover the amount of a *hundi* described the defendants as a firm but it was subsequently discovered that the defendants were not a firm but a joint Hindu family doing business under the name by which they were described in the plaint. The title of the plaint was thereupon amended by substituting the names of the members of the family for the name of the firm. On the date when the substitution was made the suit had become barred by time:

Held, that there was no addition of parties within the meaning of s. 22 (1) of the Limitation Act but a mere substitution in order to correct a misdescription and that, therefore, the suit was not barred by time. [p. 685, col. 2.]

A minor who is the bearer of a *shah jog hundi* is entitled to maintain a suit to recover the amount of the *hundi*. [*ibid.*]

The Court in determining whether a document is sufficiently stamped for the purpose of deciding upon its admissibility in evidence must look at the document itself as it stands and not at any collateral circumstances which may be shown in evidence. [p. 686, col. 1.]

The provisions of s. 118 of the Negotiable Instruments Act do not affect the question with regard to the admissibility in evidence of a document, which depends entirely upon the document as it stands. [*ibid.*]

The ordinary rule is that costs should follow the event. It is generally necessary that when costs do not follow the event, particular reasons should be given why the ordinary rule should not be followed. [p. 686, col. 2.]

Appeal against the judgment of Mr. Justice Crump.

Sir *Chimanlal Setaliad*, (with him Mr. *Kania*), for the Appellant.

Mr. *Coltman* (with him Mr. *Munshi*), for the Respondent.

JUDGMENT.

Macleod, C. J.—The plaintiff filed this suit to recover the sum of Rs. 15,000 claimed to be due on three *hundis* drawn by the defendants on one *Chhotaram Javer* in Bombay payable to *Shah* which were handed over to the plaintiff. Various objections were raised in the written statement, one of which regarding the non-cancellation of the stamps on two of the *hundis* was successful. The other objections were disallowed, and the Judge passed a decree against the defendant on the third *hundi* for Rs. 5,000.

The same objections have been raised before us. The first objection was that the suit was time-barred. The defendants in the plaint were described as "*Shivlal Ramprasad* a firm doing business as merchants at Ahmedabad," and thereafter, when it was discovered that *Shivlal Ramprasad* was a joint Hindu family doing business under that name, and that the provisions of O. XXX (C. P. C.), would not apply when defendants were members of an undivided Hindu family, the title of the plaint was amended by substituting the names of the members of the family for the firm's name "*Shivlal Ramprasad*."

It was then contended that the provisions of s. 22 (1) of the Indian Limitation Act applied, and that the suit was barred, as the suit must be deemed to have been instituted against the defendants when the plaint was amended. The learned Judge considered, on a review of the authorities, that there was not an addition of parties, but only a substitution in order to correct a misdescription. We need only say that we agree with that finding.

It was next contended that the plaintiff could not sue as he was a minor at the date of the suit. The plaintiff was not a party to any contract on which he is suing. He is suing as the bearer of a *shah jog hundi*. We see no reason why he should not be allowed to sue on such a document. This point does not appear to have been raised in the lower Court.

The next point was that the *hundi* is inadmissible as it is post-dated. The

question of its inadmissibility would arise under the Indian Stamp Act. It is a bearer *hundi* payable on demand, and requires, therefore, an one-anna stamp. But it is said that it was proved that the document was written, not on February 12, the date it bore, but some date in January 1921, therefore, it was not properly stamped and, therefore, it infringed the provisions of s. 68 of the Indian Stamp Act. There is a series of decisions referred to by the learned Judge which show that the Court, in determining whether a document is sufficiently stamped for the purpose of deciding upon its admissibility in evidence, will look at the document itself as it stands, and not at any collateral circumstances which may be shown in evidence. That was held by the Calcutta High Court in *Ramen Chetty v. Mahomed Ghose* (1). The various authorities on the question are also fully considered in *Motilal v. Jagmohandas* (2). We do not think that the provisions of s. 118 of the Negotiable Instruments Act, 1881 affect the question at all with regard to the admissibility in evidence of a document which depends entirely upon the document as it stands.

The next point was that the *hundis* were not drawn on behalf of the joint family firm of the defendants. We entirely agree with the remarks of the learned Judge that that is not an honest defence.

The last question was whether there was any consideration for the *hundi*. That is a question of fact. The learned Judge said:—

"The assets of the old Ahmedabad firm of Raman and Natumalji were in their hands. These include a profit of Rs. 1,26,000, which was available for distribution among the co-parceners. Plaintiff's case is that defendants agreed to pay him this sum of Rs. 15,000 on account of the share which would come to him at the distribution. Similar payments were made by defendants to other co-parceners. I do not for a moment believe that the payment was promised as a loan. The position was that defendants had joint family funds in their hands. They knew that plaintiff's share would amount to more than Rs. 15,000, and they gave the *hundis* in part payment. Indirectly if not directly they were bound to account to plaintiff as to the other co-parceners."

The defendants relied upon the evidence

of Ramprasad Shivilal to show that when he drew the *hundis* it was intended that the money should be advanced to the plaintiff as a loan. But his admissions in cross-examination entirely destroy the effect of what he had said in examination-in-chief. The fact that the plaintiff filed the suit to recover the balance of the share due to him as a co-parcener without mentioning these *hundis*, could not possibly affect the question, because there was no necessity to refer to these *hundis*, as having been dishonoured nothing had been recovered on them.

We think the decision of the Court below was correct and the appeal must be dismissed with costs.

The plaintiff has filed cross-objections against the order as to costs.

The suit was filed on three *hundis*. I have dealt with the objection taken generally to all the *hundis*, which have been disallowed. With regard to two of the *hundis* an objection was taken at the hearing, although no issue was raised thereon, that they were not admissible owing to the stamp not being properly cancelled. The Judge decided that point in favour of the defendants. But in passing the decree for Rs. 5,000 on the third *hundi*, he made no order at all with regard to the plaintiff's costs without giving any particular reasons, except that he said that in the circumstances of the case he would not allow costs. Now the ordinary rule is that costs should follow the event. It is generally necessary that, when costs do not follow the event, the particular reasons should be given why the ordinary rule should not be followed. With regard to the general costs of the action, the plaintiff has succeeded on all the points, which were raised by the defendants against the plaintiff's claim to make them liable on the *hundis*, and as the costs of the suit will be taxed according to the High Court Rules and are not *ad valorem*, the costs in this case are exactly the same whether the suit was filed on one *hundi* for Rs. 5,000 or three *hundis* of Rs. 5,000 each. There are no circumstances in the case which show that the plaintiff was in any way guilty of misconduct which might disentitle him, even if successful, to his costs. The only fact before us is that an objection was taken in Court as to two of the *hundis*, and after argument that objection proved successful. To the extent to which any costs could be

(1) 16 C. 432; 8 Ind. Dec. (N. S.) 285.

(2) 6 Bom. L. R. 699

attributed to that point on which the defendants succeeded, they are entitled to their costs against the plaintiff. We leave it to the Taxing Master to decide what were the costs of the following issue, which I frame as no issue on the question was raised at the trial: Whether two of the suit *hundis* are admissible in evidence owing to the non-cancellation of the stamps? With regard to the rest of the costs, we think that the successful plaintiff in the Court below is entitled to them. He will be entitled to the costs of the cross-objections.

Coyajee, J.—I concur.

Z. K.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE

No. 140 OF 1923.

July 1, 1925.

Present:—Mr. Justice Adami and
Justice Sir John Bucknill, Kt.

G. I. P. RAILWAY CO. THROUGH
ITS AGENT AT BOMBAY—DEFENDANTS
—APPELLANTS

versus

RAMESHWAR PRASAD AND ANOTHER
—PLAINTIFFS—RESPONDENTS.

*Railway Company—Goods consigned for carriage—
Risk-Note Form "B"—Suit to recover damages for
loss of goods—Burden of proof.*

Where a suit is brought to recover damages in respect of loss of goods consigned to a Railway Company for carriage under Risk Note Form "B" the burden lies upon the plaintiff to show that the Railway Company is responsible for the loss of the goods. In such a suit it is open to the Railway Company to admit the loss of the goods and the Company is not in any way bound to prove such loss. [p. 687, col. 2; p. 689, col. 2.]

Appeal from a decision of the District Judge, Saran, dated the 27th November 1922, reversing that of the Munsif, Chapra, dated the 20th January 1922.

Mr. Mohamad Hasan Jan, for the Appellants.

Mr. Sambhu Saran, for the Respondents.

JUDGMENT.

Bucknill, J.—This is a second appeal. The appeal is from a decision of the District Judge of Saran, dated the 27th November 1922, by which he reversed a decision of the Munsif of Chapra, dated the 20th January of the same year.

The appellants are the Great Indian Peninsula Railway Company through its Agent at Bombay; the respondents are Rameshwar Prasad and another. The suit was one of the type with which all the Courts in India are sufficiently familiar, it was for recovery of a sum of money from the Great Indian Peninsula Railway for the price of a bale of cotton goods which should have been delivered to the plaintiffs but which was never delivered to them.

The plaintiffs, in their plaint, after setting out the facts, alleged that they believed that the bale (which was a portion of a consignment of bales) had been lost in transit on account of the gross negligence of the defendants and they claimed that the defendants were bound to indemnify them for the loss. There was no doubt that the consignment of bales of goods was sent from some merchants in Bombay to the plaintiffs who were cloth dealers in Chapra; there is equally no doubt that the goods were delivered to the appellants at Victoria Terminus, Bombay, for carriage under the well-known Risk Note "B." It is also a fact which is common ground that when the goods arrived at Chapra, one whole bale was found missing. Now in answer to the plaintiffs' claim the appellants pleaded firstly that they admitted the loss but that the loss did not occur on their line of Railway; they alleged that they had handed over the goods intact to the East Indian Railway Company which had not been made a party to the suit; in any case they stated further that the loss was not due to the negligence of Railway servants.

Now when the case came before the Munsif, he came to the conclusion that the plaintiffs had entirely failed to prove negligence on the part of the Railway Administration; and he, therefore, held that, on that view of the case, the suit must be dismissed. In this decision he was, of course, following the numerous cases which have been decided in the Courts in India and which are substantially all of one tenor:—namely, that in a suit brought under such circumstances as this suit was brought it is necessary that the plaintiff should show that the Railway Company is responsible for the loss of the goods. The Munsif, however, considered a somewhat curious question which does not seem to have been raised in the pleadings but which appears to have been put forward

in the course of the trial before him. It was suggested by the plaintiffs that the Risk Note was not binding on the parties because it had been in fact signed by some person who had no authority so to do from the consignors in Bombay. The Munsif was of the opinion that the individual who in fact signed the Risk Note had no authority so to do given to him by the consignors; he, therefore, came to the conclusion that, as the Risk Note had not been signed by any person who had authority to do so on behalf of the consignors, it did not bind the parties and that, therefore, presumably the appellant Company was not able to avail itself of any of the exceptions in the Risk Note which purport to exempt the appellant Company from liability under the conditions therein specified.

Now when the case went on appeal to the District Judge, the District Judge came to the conclusions precisely opposite on both these points to those at which the Munsif had arrived. He was satisfied in the first place that the person who did sign the Risk Note clearly had authority from the consignors so to do; although that authority was not an express but an implied one. He, therefore, held that the plaintiffs were bound by it. I might, however, point out that there would still be another objection to the endeavour of the plaintiffs successfully to raise this question. It is quite clear that with regard to the consignment as a whole, the plaintiffs, by accepting a large portion of the consignment, adopted the contract which is contained in the Risk Note "B"; they are, therefore, bound by that contract; and, whether or not the person who signed it had the consignors' authority, the plaintiffs would not be able now to contend that they were or are not bound by the terms of the special contract embodied in that Risk Note. Apart from that, however, there is here also the finding of fact by the District Judge that the individual who signed the Risk Note did have authority from the consignors; this finding is based upon the evidence which was given in the case on behalf of the plaintiffs themselves.

With regard to the other question:—that is to say, whether the plaintiffs had proved (what they were bound to prove if they were to be successful) negligence on the part of the appellants, the District Judge again differed from the Munsif. He came

to the conclusion for certain reasons to which I will refer *seriatim* that the plaintiffs had satisfied him that the loss was really due to the negligence of the appellants. These reasons are three in number; one is that the Company produced no evidence of any kind. I need hardly point out that, according to the authorities both in India and in England and notably in the case decided by the House of Lords in *Smith Limited v. Great Western Railway Company* (1), it is not necessary for the defendant Railway Company in a case such as this to produce any evidence at all. Where a special contract is sued upon by a plaintiff (such as in this suit was sued upon) it is for the plaintiff to show that the Railway Company is liable to him for loss occasioned to the goods which had been carried by the Railway Company on his behalf. This reason, therefore, given by the learned District Judge is not a reason which could be properly held by him as being in any way evidential of negligence on the part of the appellant here. The second reason which he gives is what he refers to as "the admitted facts" in the case. The only admitted facts in the case which are really material were the facts that the consignment was actually made, that the goods were entrusted into the care of the appellant, and that they were lost; there were no other material facts admitted in the case, and, from these facts alone, again the law is clear as laid down in this country and in England that no inference evidential of negligence on the part of the appellant here could possibly be drawn. The third, and undoubtedly the most important, reason which he gives is what he refers to as the "plaintiff's own evidence"; now if the plaintiffs had produced any witness who had been able to prove in any way that there had been any negligence of any kind on the part of the appellant or by their Agents or servants, (for a corporate body can only after all act through its Agents or servants) there is little doubt but that the plaintiffs might have succeeded. It is not sufficient, however, I think for this Court to hold that, merely because the District Judge states that having regard to the plaintiffs' own evidence no other reasonable conclusion can be come to other than that the loss was due to the

(1) (1922) 1 A. C. 178; 91 L. J. K. B. 423; 27 Com. Cas. 247; 38 T. L. R. 359.

negligence of the Company's servants, the matter is by such a statement precluded from being considered in second appeal. In a case such as this it is important to see what in fact was said in evidence by any witness who appeared for the plaintiffs. In this case I fear that what was said by the only witness who appeared for the plaintiffs was in no sense any proof of negligence but only an assertion thereof. The only witness who was called by the plaintiffs merely stated as follows.—"Because the bale has not been delivered to me so I say that it has been lost on account of the negligence of the Railway Companies". (I may say that in the suit as originally brought the Bengal and North Western Railway Company through its Agent at Gorakhpur was a second defendant). I need hardly, I think, point out that a mere assertion of this kind is of no evidential value whatever as proof of negligence on the part of the appellant. If one was to hold that it was, all the difficulties which surround plaintiffs in bringing a suit of this kind, would at once disappear; for all that would be necessary for such to do, in order to throw the whole of the onus upon the defendant Company of bringing itself within the exceptions in the Risk Note "B" which purport to exempt him from liability, would be to make a mere assertion by a witness on behalf of the plaintiffs that he believed that the loss which was admitted was due to the negligence of the Railway Company's servants. I think that it is obvious that such a statement as this is as of little evidential value in this case as are the other two reasons which have been given in the decision of the District Judge. The judicial comments which have been passed not only in this country but also in England upon the difficulties which a plaintiff, who has entered into a contract of the nature of Risk Note "B," encounters, have been severe, and, if I may say so well founded. But such strictures on a Railway Company hardly properly lie within the domain of the Courts; for it is, I take it, always open to a person, who wishes to consign his goods for carriage by a Railway, not to enter into a contract such as is set out in the Risk Note "B" which entails upon him such immense difficulties in the event of his wishing to recover from the Railway Company for loss or damage of the goods which he has consigned to it to take to their destination. By this time I think it

ought to be publicly known that it would appear that the onus of proving wilful negligence lies upon the plaintiff who brings the suit for recovery of what has been lost on a Railway Company's lines if he sues upon the special contract which is embodied in the Risk Note "B." It has been suggested that in this particular case the mere admission by the Railway Company of the loss is not sufficient to prove that loss; and reference was made to a case decided by a Bench of the Bombay High Court [*Ghelabhai Punsiv. East Indian Railway Company* (2)] in which their Lordships thought that a mere admission by a Railway Company in their favour that the goods were lost was not sufficient to prove that the goods had been in fact lost. I need only point out that this case was decided before the case in the House of Lords to which I have already referred. There the matter is fully dealt with and I think that an admission of loss must be regarded as a position which it is open to the defendant Railway Company to take up. After all it does not appear to me that it is necessary for a person to give strict proof of what he himself admits. All the points in the present appeal have been recently dealt with by Mullick, J., and myself in the case of *G. I. P. Railway Co. v. Jitan Ram-Nirmal Ram* (3).

Under these circumstances, and I must confess with some sympathy for the respondents, I feel that the only possible course in this case is that the appeal must be allowed and the suit dismissed.

There will be no order as to costs.

Adami, J.—I agree.

Z. K.

Appeal allowed.

(2) 63 Ind. Cas. 241; 45 B. 1201; 23 Bom. L. R. 525.

(3) 72 Ind. Cas. 440; 4 P. L. T. 173; (1923) Pat. 82; 1 Pat. L. R. 169; (1923) A. I. R. (Pat.) 285; 2 Pat. 442.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL
No. 12 OF 1925.

July 8, 1925.

Present:—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Coyajee.
DAYARAM SURAJMAL—PLAINTIFF—
APPELLANT

versus

CHANDULAL DAYABHAI AND OTHERS
—DEFENDANTS—RESPONDENTS.

Stamp Act (II of 1899), ss. 12, 17, 47—Hundi bearing

uncancelled one anna stamp—Date written across stamp by drawee—Hundi, whether duly stamped.

A hundi chargeable with the duty of one anna was presented for payment bearing an uncancelled one anna stamp and the drawee when making the payment wrote across the stamp the date of the payment:

Held, (1) that the writing of the date across the stamp which had not been cancelled at the time of the making of the hundi did not have the effect of converting the hundi from an unstamped document into a stamped document and that the provisions of s. 47 of the Stamp Act had no application to the case;

(2) that consequently the hundi continued to be an unstamped document and that no suit could be brought on the basis of it.

Mr. Coltman (with him Mr. M. J. Mehta), for the Appellant.

Sir Chimanlal Setalvad, for the Respondents.

JUDGMENT.—The plaintiff alleged that he was a holder in due course of a *shah jog hundi* for Rs. 900, dated February 10, 1922, drawn by one Jaggannath Gordhandas of Poona on Joraji Deoraj, the second defendant Firm of Bombay, in favour of Venkatesh Ramchandra Shivnoor of Belgaum. The plaintiff transmitted the said hundi from Gulberga to his branch firm at Secunderabad. In the course of transmission to Secunderabad the said hundi was stolen by some person not known to the plaintiff. It then came into the hands of the first defendant firm, who presented it for payment to the drawees, the second defendant firm. The first defendant received payment from the second defendant. The plaintiff claimed that the first defendant had no title to the hundi, and that the first defendant was bound to pay the same with interest as moneys had and received for and on behalf of the plaintiff. The plaintiff further submitted that the second defendant firm was not entitled to pay the amount to the first defendant firm as they had no title to the same. The plaintiff, therefore, prayed that the defendants be ordered to pay to the plaintiff the sum of Rs 1,035 with interest on Rs. 900 at the rate of nine per cent. per annum from October 10, 1923, till judgment, and costs of the suit.

We are not concerned with any other issues which were raised at the trial, except the issue whether the hundi was properly stamped. The Judge found on this issue that the instrument was unstamped, and, therefore, was inadmissible in evidence. The plaintiff's suit was then dismissed.

According to the evidence the hundi bore an uncancelled one anna stamp when it came into the hands of the first defendant firm. It was not, therefore, duly stamped at the time of execution. Under s. 12 (2) of the Indian Stamp Act:—

"Any instrument bearing an adhesive stamp which has not been cancelled so that it cannot be used again, shall, so far as such stamp is concerned, be deemed to be unstamped."

Under s. 17:—

"All instruments chargeable with duty and executed by any person in British India shall be stamped before or at the time of execution."

There is one exception provided by s. 47 of the Act which enables certain documents chargeable with the duty of one anna, if unstamped, to be stamped at a later date. Section 47 says:—

"When any Bill of Exchange, promissory note or cheque chargeable with the duty of one anna is presented for payment unstamped, the person to whom it is so presented may affix thereto the necessary adhesive stamp, and, upon cancelling the same in manner hereinbefore provided, may pay the sum payable upon such bill, note or cheque, and may charge the duty against the person who ought to have paid the same, or deduct it from the sum payable as aforesaid, and such bill, note or cheque shall, so far as respects the duty, be deemed good and valid."

If the second defendant firm, when the hundi was presented, had affixed the stamp and cancelled it, then the hundi would have been considered with regard to the payment of duty, a good and valid document. The evidence shows that some time on February 12, when the hundi was paid by the second defendant firm, Nagardas, a partner in the first defendant firm, noticing that the stamp on the hundi had not been cancelled, wrote across it the date "February 12, 1922." That would not, according to the provisions of the Act, make a document, which up to that time had been unstamped, stamped.

It is clear, therefore, that there has been no attempt whatever to comply with the provisions of s. 47 of the Act, and the document still continues to be unstamped. We think then that the decision of the Judge was right and the appeal must be dismissed with costs.

Z. K.

Appeal dismissed.

PATNA HIGH COURT.APPEAL FROM APPELLATE DECREE No. 128
OF 1923.

July 10, 1925.

Present:—Mr. Justice Adami and
Justice Sir John Bucknill, Kt.
HARO MANDAL—APPELLANT

versus

DHIRANATH DAS AND OTHERS—
RESPONDENTS.*Limitation Act (IX of 1908), Sch. I, Art. 14—
Santhal Parganas—Death of proprietor—Settlement of
lands by prodhan—Heir of deceased, objection by,
dismissal of—Suit for declaration—Limitation.*

On the death of a Hindu widow who had succeeded to the estate of her husband in the Santal Parganas the Sub-Divisional Officer passed an order that as no heir of the deceased was traceable the *prodhan* might settle the lands according to the village Record of Rights. The *prodhan* subsequently reported that he had settled the lands with certain persons and on that report the Sub-Divisional Officer recorded an order "File." The heir of the deceased subsequently appeared and filed an objection but his claim was rejected and an order was passed that he should go to the Civil Court and that if he succeeded in establishing his claim he would be entitled to get possession of his land. Shortly thereafter the heir who had filed the objection died and his sons filed a suit for a declaration that they being the next reversioners of the deceased widow were entitled to get the lands left by her and that the defendants with whom the lands had been settled by the *prodhan* were not entitled to retain the lands under the guise of a settlement at *fouti*. This suit was filed more than a year after the date of the order rejecting the objection filed by the plaintiffs' father:

Held, that the suit was not one for setting aside the order of the Sub-Divisional Officer and was consequently not governed by Art. 14 of Sch. I to the Limitation Act. [p. 692, col. 2.]

Appeal from a decision of the District Judge, Dumka, dated the 6th November 1922, confirming that of the Subordinate Judge, Gonda, dated the 25th May 1922.

Mr. S. N. Bose, for the Appellant.

Mr. Janak Kishore for Mr. Dinesh
Chandra Varma, for the Respondents.**JUDGMENT.**

Adami, J.—This second appeal comes from the *Santhal Parganas*. It appears that one *Musammatt Sahodramani* succeeded to the properties of her husband, that is to say 63 *bighas* 16 *kathas* in village Sour Pachisa. Shamlal Mandal the *prodhan* of the village was her *bhoulidar* and in Mr. Wood's Settlement in 1873 and Mr. Craven's Settlement in 1879 Sahodramani and Shamlal were recorded jointly for the lands; but an entry was made that Shamlal was the *bhoulidar*. In the Settlement of 1908 the Settlement Officer refused to record Shamlal as having a joint interest on the ground

that the interest of any reversioners there might be would be prejudiced. Then Sahodramani and Shamlal put in a petition of compromise before the Settlement Officer asking that they might be jointly recorded, but this was refused in 1909. On appeal the order of the Settlement Officer was affirmed on the ground given by the Settlement Officer. Thus Sahodramani was alone recorded in the Settlement of 1908; she remained in possession till January 1916 when she died. On her death Rako Mandal son of Shamlal, who had succeeded as *prodhan* declared that Sahodramani had died issueless and without heirs and, therefore, the *jote* was *faut ferari* and asked to be allowed to re-settle it with some *raiya* of the village. The Sub-Divisional Officer remembered what had happened in the settlement proceedings and ordered an inquiry to be made as to the whereabouts and existence of Jhumak, the brother of Sahodramani's husband, who had put in an objection during the settlement proceedings. A peon was sent out to report if Jhumak existed and whether Sahodramani had left any one else claiming to be her heirs. The peon came back and reported that he could not find Jhumak or any heir of Sahodramani. On the 17th November 1916 the Sub-Divisional Officer passed the following order:—

"Read the peon's and *chaukidar*'s report. They failed to trace out any heir of the deceased *ryot*; the *prodhan* may settle the land according to the village Record of Rights; any one aggrieved by his action may come up to Court with an objection".

As a matter of fact Jhumak was at Bousi a village only eight miles from Sour Pachisa. Rako Mandal, however, reported on the 5th of January 1917 that he had settled the lands with the defendants Mohan Lal Mandal, his nephew, and Haro Mandal his brother. On that report the Sub-Divisional Officer recorded the order "File" on the 11th January 1917.

On the 11th May 1917, Jhumak Das, having heard what had happened, came forward and filed an objection but it was rejected, and he then filed another objection which was again rejected on the 23rd August 1918 on the ground that as Jhumak had been absent from the village and had no lands there, r. 27 of the *Santhal Rules* would apply to the effect that in the settlement of *fouti* lands a resident *jamabandi*

raiyat should be preferred to an heir of the recorded *raiyat* living miles off from the village in which the land was situate. The order of the Settlement Officer on the 23rd August 1918 was to the following effect:—

"As already ordered Jhumak Das should go to the Civil Court to establish his claim to get the land as legal heir of the deceased recorded *raiyat*, Musammatt Sahodramani, and that if he succeeds he would be entitled to get possession of the land on payment of whatever sum the settlement takers may be found to have actually paid to the *prodhan* as arrear rents for the holding. I may note here that the defendants Mohan Lal Mandal and Haro Mandal had been allowed settlement of the *jote* on condition that they paid up the sum due as arrears which amounted altogether to Rs. 778-11-6 and this sum was paid by them to the *prodhan*.

Jhumak Das died in 1919 before he could move the Civil Court, and it was not until the 31st August 1921 that his sons, the present respondents filed the suit out of which this second appeal arises.

The plaintiffs in this suit prayed for a declaration that they, being the next reversioners of Musammatt Sahodramani, were entitled to get the lands left by her, and that the defendants were not entitled to retain the property under the guise of its settlement at *fouti*. They asked also for a declaration that the order of the 17th November 1916, allowing the *prodhan* to settle the land was obtained by fraud since the land was not *fouti*. Thirdly, they asked that the order of the 23rd August 1918, passed by the Sub-Divisional Officer, in Revenue Miscellaneous Case No. 302 of 1916-1917, should be set aside, and they asked that they should be given possession of the lands in suit without being required to pay any rent to the *prodhan*, who, with the other defendants, had been in possession throughout.

The Trial Court found that the plaintiffs had proved that their father Jhumak was the reversionary heir of Musammatt Sahodramani, and after his death they were the next reversioners. It was found, too, that Jhumak Das was the brother of Sahodramani's husband.

The question whether the suit was barred by Art. 14 was considered by the Subordinate Judge and he held that that Article would not apply, as the success of

the plaintiffs in the suit was not contingent on the setting aside of the order passed by the Sub-Divisional Officer.

He decided that the payment of Rs. 778-11-6 by the defendants to the *prodhan* was proved, and considered the contention that r. 27 of the Attestation Rules would prevent settlement with Jhumak or his heirs. The Subordinate Judge held that r. 27 could not operate to change the order of succession laid down by the system of law and religion to which a family belongs. He found that the plaintiffs were entitled to recover possession without further payment to the defendants. He, therefore, decreed the plaintiffs' suit.

The learned District Judge has upheld the Subordinate Judge on every point and dismissed the appeal which was brought before him.

The only points brought before us in second appeal are the point of limitation and the point of the liability of the plaintiffs to re-pay the defendants the sum of Rs. 778-11-6 which the defendants paid to the *prodhan*.

It is strenuously contended before us that Art. 14 of the Schedule to the Limitation Act barred the suit, since it would be necessary to set aside the orders of the Sub-Divisional Officer before the plaintiffs could recover possession.

The learned District Judge has dealt with this contention and overruled it. The learned Vakil relies on the cases of *Parbati Nath Dutt v. Raj Mahan Dutt* (1), *Ganesh Shesho Deshpande v. Secretary of State for India* (2) and *Raghunath Prasad v. Kaniz Rasul* (3) also on the case of *Nagu v. Salu* (4).

Now, if in the present case it would be necessary, in order to allow the plaintiff to succeed, to set aside any order of the Sub-Divisional Officer, there is no doubt that Art. 14 would apply. But in the present case the relief sought is primarily a declaration that the plaintiffs are entitled to succeed Musammatt Sahodramani as her next reversioners, and for such a declaration the setting aside of the order of the Sub-Divisional Officer would not be necessary. It is true that the third relief asked for by the plaintiffs is the setting aside of the order of the

(1) 29 C. 367; 6 C. W. N. 92.

(2) 57 Ind. Cas. 587; 44 B. 451.

(3) 24 A. 467; A. W. N. (1902) 116.

(4) 15 B. 424; 8 Ind. Dec. (N. S.) 289.

Sub-Divisional Officer; if the first relief is granted, the third relief would not be required and then, if we examine the order of the Sub-Divisional Officer made on the 23rd August, 1915, which I have cited above, it is clear that there is no final order and the plaintiff was told that, if he succeeded in obtaining a decree establishing his claim to get the land as legal heir, he would be entitled to get possession of the land on payment of whatever sum had been paid by the defendants. Therefore, it is quite clear that there would be no necessity to set aside the order of the Sub-Divisional Officer, for the suit is really a compliance with the order; nor would it be necessary to set aside the order of "File," passed when the *prodhan* reported that he had settled the *jote* with the defendants. The plaintiffs having obtained a decree declaring their title would enter on the land as heirs of Sahodramani. Therefore, I think, that the learned District Judge was quite correct in refusing to set aside the decree of the lower Court on the ground of limitation.

There is another view which might be taken also, and that is, that in the plaint the plaintiffs asserted fraud, and though there is no distinct finding as to fraud in the judgments of the lower Courts, the tenor of those judgments is to show that Rako Mandal, the *prodhan*, acted somewhat fraudulently in allowing the existence of Jhumak to be concealed. If there were fraud found, then the question of limitation would not come in; but it is unnecessary to consider this view of the question.

The only point in which I would differ from the learned District Judge is with regard to the payment of Rs. 778. The reason given by the lower Courts for refusing to order payment of this amount by the plaintiffs is that the defendants, during the years they have been in possession, have been able to obtain profits from the land exceeding in value the amount of Rs. 778 paid by them. I do not think that this is the right view to take. The Courts below in fact have entered into the question of mesne profits, and have set off those mesne profits against the payment. In their plaint para. 18, the plaintiffs state that they will bring a separate suit for mesne profits and they do not ask in the present suit for mesne profits. If there is to be a set off that set off should be in the suit for mesne profits. It is not open to the Courts in the present suit to reckon what the mesne

profits are and to set them off against the Rs. 778. It seems to be assumed, too, that the Rs. 778 went into the hands of the *prodhan*; the amount represented the arrears due and would have to be paid to Government by the *prodhan*. It is only right, in my opinion, that the plaintiffs should re-pay to the defendants, when they recover possession, this sum of Rs. 778-11-6 paid towards arrears by the defendants, and I would, therefore, modify the decree of the lower Courts to this extent that it be declared that the plaintiffs are entitled to recover possession of the lands on their payment to the defendants of the sum of Rs. 778-11-6 within a period of six months from this date. To that extent the decree of the lower Courts will be modified. Each party will bear its own costs in this Court.

Bucknill, J.—I agree.

Z. K.

Decree modified.

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL No. 248 OF 1924.

April 24, 1925.

Present:—Mr. Justice Carr.

U THA NYO—APPELLANT

versus

MG. KYAW THA AND ANOTHER—

RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 105—Registration Act (XVI of 1908), ss. 2, 17—Burma Registration Directions—"Lease", meaning of—Agreement by tenant to cultivate land—Registration.

An agreement executed by a tenant only, agreeing to cultivate land and to pay rent, is not a "lease" under s. 105, Transfer of Property Act, because the document, being not executed by the lessor, the landowner, cannot transfer any right in the property within the definition as given in the section. [p. 694, col. 1.]

Direction 46 (d) (i) in the Burma Registration Directions has no application to such a document as the above. The document, however, is a "lease" within the wider definition given in s. 2 of the Registration Act, and is compulsorily registrable if it falls under s. 17 of the Act. [p. 694, col. 2.]

Appeal against a decree of the District Court, Thaton, in O. A. No. 4 of 1924.

Mr. Ba Thein, for the Appellant.

Mr. R. M. Sen, for the Respondents.

JUDGMENT.—This was a suit for rent of paddy land. The plaintiff claimed under an agreement, which has been marked Ex. A, but is filed in the process file, which was, he alleged, executed by the three defendants. The rent fixed was 350 baskets of paddy.

The first defendant filed a written statement confessing judgment. A decree has since been passed against him on this and he is not a party to this appeal.

The second defendant denied execution of the agreement and the third defendant did not appear at all. The case was fixed for hearing and one of the defendants appeared, but no evidence was taken and the suit was dismissed on the ground that Ex. A was compulsorily registrable and, therefore, could not be admitted in evidence and that the agreement could not be proved.

So far as regards the 2nd and 3rd defendants, this decision was upheld by the District Court, which, however, gave a decree against the 1st defendant on his confession.

The only question now for decision is whether this document required registration.

The document is of a kind very common in Burma, and which is usually called a lease. It is, however, an agreement executed by the tenants only, who agree to cultivate the land and pay the rent, and also agree to certain other conditions.

A "Lease" is defined in s. 105 of the Transfer of Property Act, which reads as follows:—

"A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms....."

It is quite clear that the document now in question is not a lease within this definition. It is not executed by the lessor, the land-owner, and, consequently, it cannot transfer any right to the property. It is in fact merely an agreement to cultivate and pay rent. The document, therefore, does not come within the provisions of the Transfer of Property Act at all and

it is unnecessary to consider those provisions further.

The Registration Act, however, in s. 2 (7) says:—"Lease includes a counter-part, *kabuliyat*, an undertaking to cultivate or occupy, and an agreement to lease." This document, therefore, comes within the definition of a lease, for purposes of the Registration Act, as being an undertaking to cultivate or occupy. But whether registration is compulsory or not depends on s. 17. Section 17 (d) provides that leases of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent are compulsorily registrable, provided that the Local Government may exempt certain kinds of leases.

Now, the present document, considered as a lease, does not fall within this clause, for it is not for a term exceeding one year. So far, therefore, s. 17 does not require it to be registered.

The only other clause which might apply is cl. (d), and that could only apply if the instrument purported, or operated, to create a right or interest in immoveable property of the value of Rs. 100 and upwards. This condition, as I have pointed out above, is not fulfilled by the present document.

I can, therefore, see no sufficient reason for holding that this document required registration.

The Courts below have acted, in part, on Direction 46 (d) (i) of the Registration Directions. This embodies a ruling by the Inspector General of Registration. This Direction says:—"A lease for agricultural purposes for a year or less must be made by oral agreement with or without delivery of possession or by a document either registered or unregistered; but when the value of the right created is Rs. 100 or upwards, if there is a document, it must be registered."

As regards leases within the definition in the Transfer of Property Act, I express no opinion as to the correctness or otherwise of this ruling; but it appears to me to be quite wrong in respect of a document, such as that now under consideration which is not, strictly speaking, a lease at all, but is a lease within the wider definition in the Registration Act.

I have been referred also to an unpublished judgment of this Court in Special Civil Second Appeal No. 274 of 1921. In that case a document of a kind similar to the

present one was involved, and the learned Judge remarked that it was abundantly clear that it required compulsory registration. He did not, however, give any reasons for this view, and the point, although it was taken up by the appellant in that case, had not been pressed and does not appear to have been fully argued.

I do not consider, therefore, that I am bound by that decision. I hold, therefore, that the document now in question did not require compulsory registration.

The appeal is, therefore, allowed, the judgments and decrees of the Courts below, as regards the two respondents (the 2nd and 3rd defendants) in the suit, are set aside, and the suit is remanded to the Township Court for a decision on the merits as against these two defendants.

The appellant will be given a certificate for the refund of the Court-fees paid on this appeal. The other costs of this appeal will be costs in the suit and, together with the costs in the District Court, will follow the final result.

I would point out to the Township Judge that, although Ex. A does not require registration, it does appear to require to be stamped, but it is unstamped at present. It will be necessary, therefore, for him to decide whether this document requires a stamp and, if so, to require the duty and penalty to be paid before admitting it in evidence.

N. H.

Appeal allowed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 45
OF 1925.

July 13, 1925.

Present:—Sir Norman Macleod, Kt.,
Chief Justice, and Mr. Justice Coyajee.

MUNICIPAL CORPORATION OF
BOMBAY—APPELLANT

versus

RANCHORDAS VANDRAVANDAS—
RESPONDENT.

Land Acquisition Act (I of 1894), ss. 4, 6 (3)—City of Bombay Municipal Act (III of 1888), s. 63 (k)—Compulsory acquisition of land—Declaration by Local Government, whether conclusive as to purpose for which land required—Suit to challenge nature of purpose, whether maintainable—Erection of quarters for Municipal servants, whether public purpose—Erection of shops, effect of.

A declaration by the Local Government under s. 6 (3) of the Land Acquisition Act that a certain piece

of land is required for a public purpose is not conclusive with regard to the character of the purpose for which the land is required and it is open to a person who is likely to be affected by the acquisition of land in pursuance to the declaration to institute a suit to have it declared that the land in question cannot be acquired by compulsion inasmuch as it is not required for a public purpose. [p. 697, col. 2; p. 698, col. 1.]

Under the provisions of s. 63 (k) of the City of Bombay Municipal Act a Municipality is empowered to acquire land for the purpose of building quarters for Municipal servants, as that is a measure likely to promote public safety, health, convenience or instruction. [p. 698, col. 1.]

Where a Municipality determines that a certain measure is likely to promote public convenience within the meaning of s. 63 (k) of the City of Bombay Municipal Act, it is not open to a Court of Law to interfere with the exercise of that discretion. [p. 698, cols. 1 & 2.]

Where a Municipality proposes to acquire a piece of land for the purposes of a school, a play ground, recreation park and for erecting residential quarters for Municipal servants, it cannot be said that the acquisition is not being made for a public purpose merely because as a part of the scheme the Municipality proposes to erect certain shops on a portion of the land to be acquired in order to recoup itself for the expenses to be incurred in connection with the scheme. [p. 699, cols. 1 & 2.]

Appeal against the judgment of Mr. Justice Shah.

Mr. Coltman (with him Mr. Daphtary,) for the Appellant.

Sir Chimanlal Setalvad (with him Mr. Kemp), for the Respondent.

JUDGMENT.—Plaintiffs Nos. 1 to 5 in this suit are the trustees of the Tulsidas Gopalji Charitable Trust. As such trustees they are in possession of certain immovable property which defendants Nos. 2 and 3 desire the Government of Bombay to acquire for them under the provisions of the Land Acquisition Act I of 1894. Plaintiff No. 6 is in occupation of a portion of the property as the lessee from plaintiffs Nos. 1 to 5.

The plan of the land appears at p. 23 of the print. The land marked yellow was acquired by the Corporation in or about the year 1917 for certain purposes including the building of a Primary School. It does not seem, however, that up to now the Corporation has proceeded with the construction of the school. On September 27, 1920, the Municipal Commissioner addressed a letter to the Corporation which appears at p. 23A of the print:—

"I have the honour to refer to Corporation Resolution No. 1609, dated June 14, 1915, approving of the acquisition of a site for the construction of the Primary School at Mazagaon and to state that

after further enquiries the site proposed has been found to be inadequate for the needs of primary education in this locality. On making enquiries as to how this difficulty could be remedied, Mr. Mackison has come to the conclusion that the area in question to the East of Mazagaon Road is at present very badly developed and furnished an opportunity not only for the construction of school accommodation but for development as quarters for Municipal servants and the provision of a public park. I attach a plan No. 67 of August 12, 1920, showing the existing site already acquired for the Primary School, and Mr. Mackison's proposed development. I do not think that this development can be considered to be final, but there is no doubt that an opportunity exists for acquiring land in this locality at a reasonable rate to meet several Municipal needs. The Corporation in their Resolution No. 4775, dated September 15, 1919 have requested us to expedite the submission of proposals for the housing of certain of the Municipal servants. The locality in question would be very suitable. As I have already stated the land is at present very badly developed and the present lease will expire in a few years.

It is estimated that the total cost of the land with the quarters to be constructed thereon will be approximately Rs. 23½ lakhs. From the development as proposed by Mr. Mackison, it is anticipated that it would be possible to provide a public park and the play-ground for the school and still to derive a return of about four per cent. on the capital outlay. The development suggested provides eighty-four shops and one hundred and twenty-six quarters of four rooms each. The area to be acquired is 27,213 square yards which with the area already acquired 2,225 square yards will give a total area of 29,438 square yards. It is estimated that the number of people to be dishoused will be three or four hundred, whereas accommodation would be provided by the proposed development for about 750 people in addition to the school and the park.

As already stated I am not entirely satisfied that the development proposed is the best suited to the locality but I am emphatically of opinion that the land in question should be acquired for development as a Municipal estate comprising a school and a play-ground, quarters

for Municipal servants and a public recreation ground. The details to be laid out can be adequately arranged at a subsequent date after full discussion.

I, therefore, request the sanction of the Standing Committee and the Corporation to the acquisition of an area of approximately 27,213 square yards on the east side of Mazagaon Road between Dockyard Road and Matharpakhady Road and to my making an application to Government for the acquisition under the Land Acquisition Act of the area mentioned above."

The said letter was thereafter referred to, and considered by, the Roads Committee, and eventually the Municipal Commissioner addressed a letter to Government on March 28, 1922, which appears at p. 16 of Part III of the print :—

"I have the honour to state that the Standing Committee have authorized me to apply to Government for the acquisition under the Land Acquisition Act of the property bearing N. S. No. 3607 at Mazagaon and Dock Yard Roads shown in crimson colour on the accompanying plan marked, J. M. F. No. 3607 (in duplicate) in connection with its development as a Municipal estate comprising a school, a play-ground, quarters for Municipal servants, etc.

I request that Government will be pleased to take necessary steps in the matter and place me in possession at as early a date as practicable.

The usual draft notification under s. 4 in duplicate is herewith forwarded."

A notification was thereafter published under the provisions of s. 4 of Act I of 1894. On June 27, 1922, a notification under s. 6 of the Land Acquisition Act was published. The preamble states :—

"Whereas it appears to the Governor in Council that land is required to be taken by Government at the expense of the Municipality of Bombay for a public purpose, viz., the development as Municipal estate comprising a school, a play-ground, quarters for Municipal servants, etc., it is hereby declared that for the above purpose the following plots of land are to be acquired in the aforesaid city of Bombay."

The plaintiffs' Solicitors then wrote to the 1st defendant complaining about the property being acquired by the Municipality "under the guise of a public purpose, not in the interests of the inhabitants of the neighbourhood, but with a view to profiteering." Similar letters were written to

the Corporation and to the Municipal Commissioner. On September 18, 1922, a notice was given that the plaintiffs intended to institute a suit against the Secretary of State for India in Council and the Municipality of Bombay.

On June 21, 1923, the plaintiffs filed this suit praying that it might be declared that all the proceedings taken in connection with the acquisition of the property were invalid and of no effect, and that the defendants, their officers and or agents forthwith pending the hearing of the suit and thereafter permanently be restrained from taking any further steps to acquire possession of the property. The plaintiffs contended that the 2nd and 3rd defendants had no power to acquire the property for the purpose for which they proposed to acquire the same. In particular they had no power to acquire the property for the purpose of "(a) erecting quarters for the accommodation of Municipal servants; (b) erecting shops to be let out on hire for profit; and (c) recoupment of expenses incurred in the acquisition of other land acquired or to be acquired for legitimate purposes."

Defendants Nos. 2 and 3 have put in their written statement, and the real defence to the plaintiffs' claim is contained in para. 10 thereof:—

"Referring to para. 9 of the plaint these defendants without prejudice to the contention contained in para. 9 hereof deny each and every contention contained in the said para. and say that they have power to acquire land for the purposes therein mentioned. These defendants say further that in fact the purposes (b) and (c) mentioned in the said para. are not mentioned in the said declaration which states the purposes for which the said land is required. These defendants deny that they in fact propose to acquire the said land for the said purposes (b) and (c). The erection of shops if within the powers of the 2nd defendants (as they say it is) is merely incidental to the said proposed scheme. These defendants say further that the 2nd defendants would in any event be entitled to use the said land for any purpose for which the Municipal Act authorized its use although such purpose was not that mentioned in the said declaration."

Defendants Nos. 1 and 4 have filed their written statement, their main contention being that by reason of s. 6 (3) of the Land

Acquisition Act, 1894 the said declaration is conclusive evidence that the land is needed for a public purpose and the plaintiffs are debarred from alleging the contrary.

Numerous issues were raised at the hearing. A large number of them were purely on technical points which the defendants might well have conceded. On Issues Nos. 2 and 7, whether the suit was maintainable as against all the defendants, viz., Nos. 1 to 4, the learned Judge held that the suit was maintainable in spite of s. 6, cl. (3), of the Land Acquisition Act; it even seems to have been conceded before the learned Judge by the defendants that the suit was maintainable. However, in any event it is perfectly clear there is nothing in the point.

In *Amulya Chandra Banerjee v. Corporation of Calcutta* (1), a suit was brought for a declaration that the Municipality of Calcutta was not competent, according to law, to acquire certain land in Calcutta, the property of the appellants. The District Judge held that the declaration made by the Governor on September 6, 1915 under the Land Acquisition Act, that the land was required for a public purpose was conclusive against the plaintiffs. On appeal to the High Court a different opinion was expressed by the Judges in appeal. They considered that the declaration of the Governor under s. 6 (3) of the Land Acquisition Act was not conclusive. The case went to the Privy Council, but the point does not appear to have been argued before their Lordships. It may be presumed that it was thought that the point was not worth arguing.

But in *Trustees for the Improvement of Calcutta v. Chanara Kanta Ghosh* (2) the point does seem to have been taken, and at page 506* there is the following passage:—

"Whenever the Local Government does sanction an improvement scheme, there is a duty to announce the fact by notification, and the publication of a notification is conclusive evidence that the scheme has been duly framed and sanctioned. This

(1) 69 Ind. Cas 114; 49 C. 838; 16 L. W. 673; 43 M. L. J. 634; (1922) A. I. R. (P. C.) 333; 27 O. W. N. 125; 21 A. L. J. 27; 37 C. L. J. 67; 31 M. L. T. 155; 49 I. A. 255 (P. O.).

(2) 56 Ind. Cas 32; 47 C. 500; 22 Bom. L. R. 586; 11 L. W. 566; 38 M. L. J. 511; 18 A. L. J. 521; 32 O. L. J. 65; 24 O. W. N. 881; 2 U. P. L. R. (P. O.) 98; 47 I. A. 45 (P. O.).

*Page of 47 C.—[Ed.]

provision does not affect the right of the respondent to institute a suit to have it declared that the Board in framing the scheme acted *ultra vires*, or that the scheme as sanctioned does not authorize the appellants to acquire by compulsion the land in question."

It was open then to the plaintiffs to seek the declaration they ask for in the suit. If the Corporation were not empowered by the provisions of the City of Bombay Municipal Act, 1888, to acquire the land in suit, then the plaintiffs would be entitled to the injunction they asked for. The learned Trial Judge has held that the Municipality were empowered by the provisions of s. 63, cl. (k), to acquire land for the purpose of building quarters for Municipal servants, as that was a measure likely to promote public safety, health, convenience or instruction.

That question also arose in the case just referred to, *viz.*, *Amulya Chandra Banerjee v. Corporation of Calcutta* (1). There the Municipality desired to acquire surplus land for the purpose of erecting, at the expense of a private benefactor, a *dharmashala* for the use of the numerous worshippers resorting at certain seasons of the year to a Hindu temple within the area of the improvement scheme. Their Lordships said (page 814*):—

"The construction and maintenance of a *dharmashala* cannot be said to be ruled out of (s. 14) (xi), which covers 'any other matter which is likely to promote the public health, safety or convenience, or the carrying out of this Act.' This being so, their Lordships would be the last to question the opinion of, or the exercise of discretion by, the Municipality of Calcutta, even if they differed from it, which they certainly do not. The Act by s. 14 and s. 556 has expressly placed the discretion, not with this Board or with a Court of Law, but with the Municipality itself. The Corporation has the power of acquisition of land which may in their opinion be needed for carrying out any of the purposes of the Act."

The grounds on which the Municipal Commissioner considered that the land in suit should be acquired for the purpose of housing Municipal servants appear in his letter of July 23, 1919. See Ex. 1. We agree with the Trial Judge that the building of quarters for Municipal servants should be held to be a measure likely to promote public convenience. In any event if the Municipal Commissioner and the Corpora-

tion think that such measure is likely to promote public convenience, the matter lies within their discretion, and it would not be for a Court of Law to interfere with the exercise of that discretion.

The only other point in the case is whether the fact that the Municipal Commissioner had recommended that a portion of the land so acquired should be built upon not only for the purpose of providing quarters for Municipal servants, but also for providing shops, was a sufficient ground for saying that the whole object of the Corporation in acquiring this land was contrary to the provisions of the Act. The learned Judge on this question said:—

"It is not suggested before me and cannot be suggested that it is open to the Corporation to acquire land to put up shops with a view to earn any dividend or interest on the outlay. It is urged, however, that here the purpose of acquisition is different, and that the putting up of shops is merely incidental to it. After a careful consideration of this argument, I have come to the conclusion that the putting up of eighty-four shops would not be merely an incidental thing. It was a part of the scheme which was supposed to reduce the burden of a heavy outlay in building quarters for Municipal servants and in acquiring the property. Indeed as suggested by the Municipal Commissioner in his letter of September 27, 1920, it may be possible to alter the scheme after the whole land is acquired and even to make it more profitable. But on the record as it stands I am clear that the putting up of eighty-four shops is a substantial part of the development scheme for which this land is acquired. The public body which is given powers to acquire land for the purposes of the Act must be properly confined to the limits of those powers, and cannot be allowed to exceed the same by treating acquisition of land for shops as merely incidental to the main scheme. In other words, when the acquisition of an area is based upon the development scheme which contemplates an appreciable part thereof to be put to use not permissible under the Act, the acquisition cannot be justified. It is possible for the Corporation to require the whole or a part of this area for school, recreation ground and building quarters for Municipal servants so far as they reasonably and *bona fide* require it for those purposes only. But the present acquisition is for the purpose

of developing it as a Municipal estate not only for purposes for which it is permissible to the Corporation to acquire land but also for a purpose for which it is not permissible to the Corporation to acquire any land. It is not possible to say how much of the acquired land would be put to such use. It is sufficient to say that the putting up of shops which could be let to the public on rack rent is a substantial part of the scheme for which the land is required by the Municipality and would take up an appreciable area of the land acquired. No decided cases bearing on this point have been cited before me, and I have to decide the question with reference to this acquisition on the particular facts before me. Whether the shops come in incidentally in the whole scheme or form a real and practical basis of the whole scheme, it is undoubtedly a part, and, in my opinion, a substantial part and by no means a negligible part, of the scheme; and I do not see how under the cover of acquisition for recognized purposes any land could be acquired for a purpose not recognized by the Municipal Act."

The result was that a decree was passed in favour of the plaintiffs, and it was declared that all the proceedings taken by defendants Nos. 2 and 3 in connection with the application of the property in suit were invalid and of no effect, and that defendants Nos. 2 and 3 were restrained permanently from taking any further steps to acquire possession of the property under the declaration dated June 27, 1922.

Now it will be seen from the plan on p. 23 what part of the area to be acquired was intended to be built upon to provide quarters for Municipal servants. It was contended for the appellants that merely because the Municipality had in contemplation the utilization of the ground floor of the premises to be built upon that area as shops, there was no sufficient ground for holding that the Municipality could not proceed with the scheme, and could not be allowed to ask Government to continue the proceedings under the Land Acquisition Act. We cannot agree with the conclusion of the learned Judge that because the Commissioner and the Corporation contemplated building these shops, that was a substantial part of the scheme, or as the learned Judge has in effect held, a part of the scheme, on which the whole of the acquisition proceedings depended, so that

the acquisition of this large area was entirely outside the powers of the Corporation. It may be inferred from the Municipal Commissioner's letter of September 27, 1920, that the rents which were expected to be collected from the tenants of the shops on the ground floor would be higher than the rents of the same premises if they were occupied for living purposes by Municipal servants. But the only result of ground floor premises being occupied by Municipal servants would be that the return on the capital outlay would be less. It is really a matter of administration for the Corporation to decide, when the land has been acquired and the plans for providing quarters for Municipal servants have been made out, whether, a certain portion of the premises can be more conveniently let out for other purposes. That is a matter which has to be decided when the land has been acquired, and the mere fact that the provision of shops is contemplated would not be sufficient, in our opinion, to invalidate the whole scheme.

That really is the main question in the appeal. There is no necessity for us to deal with the other points that arise from the remaining issues which were considered by the learned Judge. There are twenty-four grounds in the memorandum of appeal, and the learned Counsel who argued the case for the appellants has wisely touched upon only those with which we have dealt. It would be better in a case of this description if technicalities were avoided, as much time would be saved thereby.

The appeal will be allowed and the suit dismissed with costs throughout. One set of costs allowed. Cross-objections dismissed with costs. The Taxing Master can tax the costs of Issues Nos. 1, 2, 3, 6 and 7 which are decided against the defendants, and the plaintiffs will be entitled to the costs of those issues.

Z. K.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE

No. 1930 OF 1924.

March 24, 1925.

Present:—Mr. Justice Suhrawardy and
Mr. Justice Duval.NASARUDDIN MANDAL—DEFENDANT
No. 1—APPELLANT*versus*

ANATH NATH CHOWDHURY

AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Bengal Village Self-Government Act (V of 1919), ss. 8, 51, 101 (2) (e)—Local Rules—Civil Procedure Code (Act V of 1908), s. 9—Election, suit to set aside, whether maintainable—Jurisdiction of Civil Court—President of Local Board, election of—Notice of meeting, whether necessary.

Section 51 of the Bengal Village Self-Government Act does not debar a suit contesting the validity of an election in a Civil Court. Such a suit can be heard by a Civil Court under s. 9 of the C. P. C. [p. 701, col. 1.]

The rules framed under cl. (e) sub-s. (2) of s. 101 of the Bengal Village Self-Government Act do not apply to a meeting held under the presidency of a Government Official to elect a President of a newly constituted Union Board. [p. 703, col. 1.]

There is a very considerable difference between the nature of a meeting of members summoned under s. 8 and the rules made thereunder and a meeting of the Board summoned under rules framed under cl. (e), sub-s. (2) of s. 101 of the Bengal Village Self-Government Act. [p. 702, col. 2.]

Appeal against a decree of the Officiating District Judge, Hooghly, dated the 20th of August 1924, reversing that of the Munsif, Second Court, Hooghly, dated the 25th of July 1924.

Babus *Rupendra Kumar Mitter* and *Dharmdas Set*, for the Appellant.Babu *Baranosibashi Mukherjee*, Dr. *Bijan Kumar Mukherjee*, for the Respondents.**JUDGMENT.**

Duval, J.—In this matter the plaintiff-respondent brought a suit to have the election of one Nasaruddin Mandal as President of Bhandarhati Union Board declared void. The facts of this case are as follows and are not disputed. The period of office of the members of this Union having come to an end a fresh election and nomination of members took place and the names of the members elected and nominated were notified in the *Calcutta Gazette* on the 5th March 1924. In accordance with r. 32 of the Rules issued under the Government Notification No. 630, T. L. S. G. of the 13th October 1919, the Magistrate of Hooghly on the 11th March passed an order on the Sub-Divisional Officer to proceed with the elec-

tion of a new President. Under r. 36 of these Rules the members had to elect the new President within one month of the order and on the 17th March 1923, the Sub-Divisional Officer posted notices on the new members and to the old President for service on them, fixing the 26th March as the day on which the members of the Union should elect a President under his Presidentship. The plaintiff, the old President, received these notices on the 19th March and he served them on the members on the 20th and 21st March. On the 26th March, the meeting was held under the Presidentship of the Sub-Divisional Officer. Eight out of the nine members attended the meeting. The one member, who did not attend has also put in an affidavit saying that he was unable to attend for personal reasons and that if he could have attended he would have voted for the defendant. At the election held by the members, five voted for the defendant and three for the plaintiff. No one alleged at the meeting that it was not duly summoned. Thereafter the plaintiff brought the present suit his main contention being that defendant No. 1 was not duly elected because seven days' clear notice had not been given of the meeting for the election. Before he did so, he appealed to the Commissioner who overruled his objection. The case came up before the learned Munsif, who found against the plaintiff and dismissed the suit holding that the election of defendant No. 1 was duly made. In appeal the learned Officiating District Judge of Hooghly has found that as there was not clear seven days' notice before the meeting was held the election is invalid and must be set aside. He has, therefore, issued a permanent injunction restraining the defendant No. 1 from sitting as a President of the Union Board and from taking over office from the old President. Against this order the present appeal is preferred.

In appeal, the following points are raised: *first*; that the Civil Court has no jurisdiction to entertain the suit; *secondly*, that there is no rule prescribing any period of notice to members of the Union Board for the election of a new President; *thirdly*, if r. 8 of the Rules issued under Notification No. 4267 L. S. G. of the 5th January 1920 which requires that at least seven days' notice of all meetings of Union Board shall be given to every member, applies to this meeting also, that the rule is not mandatory

but merely directory and the non-observance of it would not by itself make the election void; *fourthly*, if this rule applies, anyhow the plaintiff cannot raise it as he attended the meeting, raised no objection at the time that the meeting was not duly called but himself offered himself as a candidate for the election. He, therefore, cannot afterwards turn round and say that the whole proceedings are void; *fifthly*; the Civil Court should not set aside the election as any irregularity which occurred did not affect the result.

Now as to the first point, the argument is put before us that in view of s. 51 of the Bengal Village Self-Government Act, 1919, no civil suit would lie in such a matter as this. That section reads thus: "It shall be the duty of all Commissioners, District Magistrates, Sub-Divisional Magistrates, etc., to see that the proceedings of Union Boards are in conformity with law and with the rules in force thereunder. The Commissioner may, by order in writing, annul any proceeding which he considers not to be in conformity with law and with the said rules, and may do all things necessary to secure such conformity." It is urged on behalf of the appellant that in view of this section the Civil Court has no jurisdiction to entertain a civil suit of this nature and reference was made to certain reported cases in support of this contention. Those cases, however, only go so far as to establish that where the Legislature has set up a special Tribunal for the purpose of deciding certain matters, such matters shall be heard by that Tribunal and that Tribunal alone. As I read s. 51, I cannot believe that it was the intention of the Legislature to set up the Divisional Commissioner as the person finally to decide questions of franchise to the annulment of the ordinary Civil Courts' right to decide such questions; and I must hold that this section is not broad enough, any more than s. 120 of the corresponding Village Self-Government Act, 1885, has been held to be, to debar Civil Courts from exercising their ordinary powers in this connection to try all suits under their general power under s. 9, C. P. C., which says, that "the Courts shall have jurisdiction (subject to the provisions contained in the Code) to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. A suit in which the right to property or to an office is contested is a suit of a civil nature not-

withstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies." In this view I must hold that the Civil Court has full power to entertain the suit.

The next question is whether the election is bad because seven clear days' notice (which admittedly was not given) is necessary under the rules for a meeting of the members for the election of a President. Now the rules to which I have referred of the 13th October 1919 lay down the procedure for the election of a President in two contingencies, first, the election of a President at the formation of a new Board which is contained in rr. 32 to 36, the election taking place by virtue of the provisions of s. 8 of the Act and secondly, an election owing to a casual vacancy which might arise by death, removal or resignation of a President during the duration of a Board under s. 17 of the Act, the procedure for the latter being set out in r. 40 of the Rules. In the latter cases the rule is perfectly clear. The new election has to be made at a meeting of the Union Board within a certain period and it is clear that it can only be made at a meeting of the Union Board. The election of a President of the new Board after the election of the members stands on a different footing. The election has to be made at a meeting of the members presided over by the Circle Officer or other officer (in the present case the Sub-Divisional Officer). The Presiding Officer asks each member to record his vote in writing and each of the members voting hands to him a signed voting paper containing the name of the person for whom he votes and the Presiding Officer then declares the candidate for whom there is the largest number of votes to be the President of the Board; or if there is an equality of votes the Presiding Officer gives a casting vote. The section of the Act which refers to the election of the President of the Union Board is s. 8 which reads thus: "Every Union Board shall be presided over by a President who shall be elected by the members of the Union Board from among their own number." Under s. 101 (2) (a) the Local Government has power to make rules generally regulating all elections under the Act. It would appear therefore at first sight that this meeting for the election of a President is different from an ordinary meeting of the Union Board, the regulations of which meetings are prescribed under rules

made under s. 101 (2) (e). The meeting is not convened by the old President or by any member. It is convened by a Government Officer. It is presided over by a Government Officer. The Government Officer has a casting vote and the voting takes place not in the ordinary way by show of hands but by each member individually recording his vote on a piece of paper and handing it over to the President. Section 8 too of the Act does not refer to the President being elected by the Union Board, but by the members of Union Board and it is only by virtue of rules which the Government has made under its power to make under s. 101 (2) (a) that the election is one in which all the members meet in one place and record their votes in writing in the presence of the Circle Officer or other Government Officer. These rules for the election of the Presidents of Union Boards were issued in October 1919. Further rules were issued in January 1920 and these were issued under s. 101 (2) (e) as "rules regulating the conduct of meetings of Union Boards and the method of forming a quorum." It is urged for the respondent that as r. 8 of these rules requires seven clear days' notice to be given, and as seven clear days' notice was not given, and as this is a meeting of the Union Board, the whole election is *ultra vires*. Now the first question is, can these rules which apply to meetings of Union Boards also apply to meetings of members of Union Board called together under statutory rules made under another rule making power for the purpose of electing a President? An examination of these rules shows that the meetings of Union Boards differ largely from the rules made in the previous Notification for the election of a first President of a new Board but are by no means inconsistent with the rule as to the election of a President in a casual vacancy. Thus these rules lay down that meetings shall be held at the office of the Union Board or at such other place as the President determines. Meetings shall be either ordinary or special. Seven days' notice must be given to each member of the Union Board. At special meetings the quorum shall be formed by at least one-half of the number of members. The President or in his absence the Vice President shall preside at every meeting; provided that the provisions of the rule shall not apply to a meeting convened for electing a President or Vice President. There is a

subsequent rule to the effect that if a meeting fails for want of quorum the members shall be informed of the date of an adjourned meeting by a fresh notice and then r. 8 requiring full seven days' notice will not apply.

Now the main question in the second point urged in this appeal is, do these rules at all apply to a meeting convened by the Government Officer for the election of a new President after a general election? It is seen that under r. 40 the election of a President in the case of a casual vacancy must be made at a meeting of the Board, but it does not follow that a meeting for the election of a new President to be elected under s. 8 of the Act rendered with the rules passed under s. 101 (2) (a) of the Act, presided over by and summoned by one who is not a member of the Board is a meeting in which the rules under s. 101 (2) (e) have any application. In my opinion, the rules framed under cl. (e), sub-s. (2) of s. 101 cannot apply to such a meeting. As I have pointed out, there is a very considerable difference between the nature of meetings of members summoned under s. 8 and the rules made thereunder and a meeting of the Board summoned under rules framed by cl. (e) of sub-s. (2) of s. 101, Bengal Village Self-Government. The difference between the nature of these meetings is clear as I have already set out and it appears to me, therefore, that we cannot import the ordinary rules for ordinary and special meetings of a Union Board into the procedure for the election of a new President after a new election. No doubt stress was laid on the provisos to rr. 11 and 12 in the latter rules which say that the provisions of rr. 11 and 12 do not apply to a meeting convened for the election of a President or Vice President. But as I have pointed casual vacancies are to be filled up at ordinary meetings and the proviso is necessary in order to provide that rr. 11 and 12 do not apply to meetings held under r. 40 of the election of a new President in a casual vacancy and for no other purpose. It does not follow that because this proviso (rendered necessary by the wording of the rules promulgated under the earlier rules for the procedure for election in casual vacancies at meetings of the Union Board) finds a place therein, that these rules have any application at all to the meetings held under the presidentship of the Government Officer for the election of a new President.

after a general election; nor indeed can they, for the nature of the two classes of meetings is clearly fundamentally different. A meeting of the Union Board held by virtue of the rules framed under cl. (e) is at the office or such place as the President may appoint. At a meeting after a new election, the President does not appoint the place of meeting for the members who meet to elect a new President; the method of voting at ordinary meetings is entirely different from meetings of the members to elect a President. In the latter case the President has a casting vote only. In ordinary meetings the President as a member has a vote and also his casting vote. The method of election is different. In an election under s. 8 the Government Official has a casting vote. In an election under s. 17 the Presiding Officer as a member of the Board has his vote and also a casting vote. The conclusion, therefore, I can only come to is that, as a matter of fact, r. 8 and other rules relating to meetings under cl. (e) do not govern meetings of the members of the Union Board convened by the Government Officer for the purpose of electing a President after a general election.

Holding this, the further questions as to whether r. 8 is mandatory, whether the plaintiff is debarred by his conduct from contesting this election and whether the Civil Court should set aside the election on such irregularity as a defect of notice alone need not be determined in this litigation. Holding then that there is no time provided by any rule as to the period of notice to be given to the new members to meet and proceed to an election, the only question remaining (there is no other question of irregularity raised before us in the appeal, the other questions having been given up) is whether reasonable notice was given to the members of the Board to meet under the Presidentship of the Sub-Divisional Officer to elect their new President? Now as to this, we have the fact that eight out of nine members attended to elect the President and the remaining one explained why he could not attend the meeting. No one objected at the time of the meeting as to the insufficiency of the notice. A clear majority wished the defendant to be the President; the absence of the ninth member could not have affected the result. A suggestion that a few days' extra time for lobbying or log-rolling would be to the advantage of the old President was mention-

ed but naturally and honorably not pressed by the Vakil of this Court appearing for the respondent. In this view, I hold that the election was validly held with sufficient notice and in conformity with the rules that apply and that the plaintiff, therefore, cannot succeed.

We, therefore, allow this appeal, set aside the decree of the learned Officiating District Judge and restore that of the learned Munsif dismissing the suit with costs of all the Courts.

Let the record be sent down as early as possible.

Suhrawardy, J.—I agree.

Z. K.

Appeal allowed.

PATNA HIGH COURT.

PRIVY COUNCIL APPEAL No. 20 OF 1924.

June 2, 1925.

Present:—Sir Dawson Miller, Kt., Chief Justice and Mr. Justice Macpherson.

THE HON'BLE Maharaja Bahadur KESHUB PRASAD SINGH—DEFENDANT—
APPELLANT

versus

Rai Bahadur HARIHAR PRASAD SINGH
AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Practice—Stay of execution—Costs, execution in respect of, when can be stayed—Patna High Court Rules, Part II, Ch. III, rr. 8, 12—Affidavit, contents of—Source of information, indication of.

It is not the practice of the Court to stay execution for costs except in a case where it is abundantly clear that there will be no chance of recovering the costs if they are allowed to go unprotected to the person entitled to them under the decree which is the subject-matter of an appeal. [p. 704, col. 2.]

When in an affidavit on an interlocutory application the declarant makes a statement of his belief he must, if the facts are ascertained from another person, give such details of such person as are required by r. 8 of Ch. III of the Patna High Court Rules, Part II. If the facts are ascertained from a document or copy of a document then the declarant must state the source from which the document or the copy was procured and must state his belief as to the truth of such facts. [p. 704, cols. 1 & 2.]

Mr. L. N. Singh, for the Appellant.

Messrs. P. C. Manuk, B. B. Lal and S. Dayal, for the Respondents.

JUDGMENT.—This is an application on behalf of the appellant to England asking that the money deposited in Court to set aside a sale in execution of the respondent's decree for costs amounting to Rs. 61,261 should remain in Court pending

the hearing of the appeal to the Privy Council. There was a further execution in respect of an additional sum for costs awarded at a later period amounting to Rs. 31,817. With regard to the first sum the appellant has withdrawn his objection. Therefore the respondent will be entitled to take that sum out of the Court the sale being set aside. With regard to the smaller sum of Rs. 31,817 the execution proceedings have not yet terminated but the appellant contends that the respondent if he receives this money will not be able to re-pay it in the event of the appeal to the Privy Council being successful. In support of that the petition states that the appellant is informed and believes it to be true that the opposite party have not sufficient property over and above the property in dispute which will enable the petitioner to realise his just dues under the decree and costs in case the Privy Council reverses the decree of the High Court. He further says that in the event of the decree being reversed by the Privy Council the petitioner will not be able to realise anything by way of restitution from the opposite party as the petitioner is informed that he has not sufficient property to meet the obligation arising out of the decree in case the High Court's decree is reversed. In that petition the source of the petitioner's information is not stated. The petition, however, is supported by an affidavit signed by one Panchdeo Narayan who describes himself as the *karpardaz* of the petitioner and states: "I am fully aware of the facts stated in the petition. The facts stated in the petition are true to my knowledge" It is very difficult to know exactly what that affidavit is referring to. The facts stated in the petition are that the petitioner has been informed that the opposite party will not be in a position to refund the money if the appeal to the Privy Council should succeed. It may be that the person who swore the affidavit is aware that the petitioner was so informed but that is not sufficient to entitle the Court to act in a matter of this sort. The rules are clearly laid down in the High Court Rules, Part 11, Ch. III, r. 12 which state that when in an affidavit on an interlocutory application the declarant makes a statement of his belief he shall if the facts are ascertained from another person give such details of such person as are required by r. 8. If the facts are ascertained from a document or copy

of a document then he must state the source from which it was procured and shall state his belief as to the truth of such facts. Here the only statement is that the petitioner has been informed of certain things. We are not told where he gets his information and it makes it none the better that somebody has sworn an affidavit saying that the facts alleged in the petition are true. The petition before us and the affidavit are totally inadequate in our opinion to entitle the Court to act in such a case.

But the matter does not rest there for the respondent has himself filed a petition supported by an affidavit in which he states that he has property in Bihar in addition to the property in dispute worth 20 lakhs of rupees and he refers to an admission made by the appellant in 1921 during the course of execution proceedings when the appellant had got a decree from the Trial Court in which the appellant admits that the respondent had at that time property in Bihar worth Rs. 9,85,000. It is quite clear, therefore, that the respondent is not devoid of means and even on the petitioner's own showing he certainly is in a position to restore this sum of Rs. 31,817 if the petitioner should succeed in his appeal to the Privy Council. In our opinion this application should be dismissed with costs.

We wish to add that where a party has been successful in a Court of Appeal and has been awarded his costs it is not the practice of this Court to stay execution for costs except in cases where it is abundantly clear that there will be no chance of recovering the costs if they are allowed to go unprotected to the person entitled to them. This application is dismissed and the order of the 19th May directing that the sum paid into Court should remain there pending the hearing of this application is discharged. The respondent is entitled to his costs of this application. Hearing fee five gold mohurs.

Z. K.

Application dismissed.

PATNA HIGH COURT.

CRIMINAL REVISION No. 110 OF 1925.

June 1, 1925.

Present:—Mr. Justice Sen.

BHABATARAN MAHTO AND OTHERS

—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 34, 149, 325—Unlawful assembly—Rioting—Common intention under s. 34, proof of.

Where in a case in which the accused are charged under s. 325 read with s. 149 of the Penal Code, it is not found possible to bring home the offence to the accused with the aid of the provisions of the latter section, *a fortiori* it would be more difficult to bring home the offence to them with the aid of s. 34 of the Penal Code. In order to bring the accused within the scope of s. 34 it is necessary to come to a definite finding that the accused were acting in furtherance of the common intention of all. [p. 708, col. 2.]

Application in revision against an order of the Sessions Judge, Manbhum, Sambalpur, dated the 7th February 1925, modifying that of the Deputy Magistrate, Purulia, dated the 14th November 1924.

Mr. Atul Krishna Roy, for the Petitioners.

Mr. H. L. Nand Keolyar, Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application in revision by eleven accused who were tried and convicted under s. 147 of the Indian Penal Code. In addition to the order of conviction under s. 147 passed against all the eleven petitioners, petitioner No. 11 has also been convicted under s. 325 of the Indian Penal Code and petitioners Nos. 1, 4, 5 and 6 under s. 325 read with s. 34 of the Indian Penal Code. The following are the undisputed facts of the case: In July 1914 two brothers Dinu and Panu Bagal executed a simple mortgage of their three-annas share in Chitabdi *chak* in favour of Bishto, father of petitioner No. 1. In 1918 Dinu and Panu gave *darmokarrari* lease of certain plots of land in the village to four brothers Sujan, Nitai, Jadu and Ghanu of the prosecution party while some other plots were given in *darmokarrari* to Narsingh, Banimadhab, Panchanan and Shama Charan. Bisto Charan sued on his mortgage aforesaid making Dinu and Panu, the lessees of 1918, parties to the suit. Usual mortgage-decree was passed and in execution of the decree the decree-holder purchased the property. On the 4th July 1913 the decree-holder purchaser, the father of petitioner No. 1, obtained delivery of pos-

session of the property through Court under O. XXI, r. 95 of the C. P. C. The case of the prosecution was that on the 30th June 1924 the petitioners with others went to the disputed land and ploughed it up and destroyed the paddy seedlings sowed by the four brothers Sujan, Nitai, Jadu and Ghanu; that a quarrel and a fight ensued in which the complainants were chased far out of the plot and Sujan up to a *jor* tree and they were there belaboured with the result that Ghanu sustained a fractured leg and Sujan a fractured forearm. The defence was that the petitioners were in possession of the land in dispute. It was the complainants' party that trespassed and upon that the petitioners remonstrated, upon which a quarrel arose and the petitioners felt bound in self defence to resist the invasion of their rights by the prosecution party. The First Court held that the mortgage sale having passed the unascertained 3-annas share of the motgagor did not affect the *raiya*ti possession "in *bhag dakh*al" as they had occupancy rights therein. Hence the complainants had the right to be on the land and they sowed paddy thinking that their possession was not affected. He also found that the story of chase was untrue and that it was subsequently introduced to avoid the consequence of law as to right of private defence of property arising from the fact of delivery of possession through the Court. The learned Deputy Magistrate convicted all the accused under s. 147 of the Indian Penal Code and sentenced them to six months' rigorous imprisonment except Nitai, petitioner No. 8, who was fined Rs. 200. He also convicted petitioners Nos. 1, 4, 5 and 6 under s. 325 read with s. 149 and sentenced them to six months' rigorous imprisonment. He further convicted Iswar, petitioner No. 11, under s. 325 for giving the *lathi* blow to Ghanu and sentenced him to six months' rigorous imprisonment, the sentences to run concurrently. On appeal the learned Sessions Judge of Purulia thought that the occupancy rights of the four brothers had not been established and he came to the conclusion that the auction-purchaser obtained possession from the Court, but the parties not being clear as to their rights, the Bagals continued to be in possession and they cultivated the land in 1923 and harvested the crop. He also found as a fact that the Bagals were the residents of the village; that they re

mained in actual possession inspite of the delivery of possession to the auction-purchaser up to the date of occurrence under consideration, and that in the circumstances set out by the prosecution, the appellants came in force in order to oust the Bagals from possession and themselves re-take possession. He also found that "the details of the prosecution story are hardly challenged at all and are abundantly proved." Upon this altered finding as to possession, the learned Sessions Judge then proceeded to re-consider the sentences. He reduced the sentence passed against the accused under s. 147 to a fine of Rs. 20 each, in default to one month's rigorous imprisonment, except against Jitu, petitioner No. 4, who injured Bhiku Bagalin with *lathi* and who was, therefore, sentenced to one month's rigorous imprisonment. As regards petitioners Nos. 1, 4, 5 and 6, petitioner No. 1 was further fined Rs. 50 and petitioners Nos. 4, 5 and 6 sentenced to two months' rigorous imprisonment, under s. 325 read with s. 34. Petitioner No. 11 was convicted under s. 325 for having fractured Ghanu's leg and sentenced to two months' rigorous imprisonment. So far as the conviction and sentence under s. 147 is concerned, I think that on the findings of the two Courts it is not possible for this Court to interfere in revision. The learned Vakil for the petitioners at first urged that the sentence of one month's rigorous imprisonment on petitioner No. 4 should be set aside as there was no such person as Bhiku Bagalin on the record, but it being pointed out to him that evidently it was a mistake for Bidhu Bagalin he did not press that point. As regards the conviction of petitioner No. 11 under s. 325 I feel that this is concluded by findings of facts. With reference to the conviction and sentence under s. 325 read with s. 34, it is urged that the conviction under s. 325 read with s. 34 is illegal and *ultra vires* and the Trial Court having convicted under s. 325 read with s. 149, the Appeal Court was not entitled to convict the petitioners Nos. 1, 4, 5 and 6 under s. 325 read with s. 34 without coming to a definite finding as to common intention and that in any event separate sentences passed under ss. 147 and 325 read with s. 34 are illegal. Now it is not easy to make out under what circumstances the learned Sessions Judge convicted the petitioners Nos. 1, 4, 5 and 6 under s. 325 read with

s. 34 of the Indian Penal Code. If it is not possible to bring home the guilt to the accused under s. 325 read with s. 149 of the Indian Penal Code one would think that *a fortiori* it would be more difficult to bring home the guilt with the aid of s. 34 of the Indian Penal Code. I find from his judgment that he observes that "the appellants came prepared for a *marpit*. They became an unlawful assembly when they all started to chase the mildly protesting Bagals with the common object of assaulting them". Now, the common object suggested in the passage above quoted is different from the common object charged, *viz.*, that of committing mischief and by criminal force or show of criminal force to take possession of the land in dispute. It has been laid down in various judicial pronouncements that in order to bring the accused within the scope of s. 34, it is necessary to come to a definite finding that the accused were acting in furtherance of the common intention of all. The common object charged in this case being quite different and it being found that conviction would not follow under s. 325 read with s. 149 of the Indian Penal Code, I think a conviction under s. 325 read with s. 34 would be scarcely sustainable without a clear finding that the accused Nos. 1, 4, 5 and 6 were acting in furtherance of a common intention.

In the circumstances, I set aside the order of the learned Sessions Judge so far as it relates to the conviction and sentence of petitioners Nos. 1, 4, 5 and 6 under s. 325 of the Indian Penal Code read with s. 34.

Z. K.

Order set aside.

ODDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 211 OF 1925.

July 11, 1925.

Present:—Mr. Dalal, J. C.

Rai Sahib BISHAMBHAR NATH
TONDON AND OTHERS—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 196A, 234, 239—Conspiracy—Charge of cheating—Forgery

committed to cheat—Object of conspiracy—Abetment of forgery—Sanction of Local Government—Trial for object of conspiracy not within Court's cognizance—Other objects within Court's cognizance—Omission of one head beyond Court's cognizance, whether affects jurisdiction—Agreement between conspirators sufficient for charge of conspiracy—"Former part" in s. 239, meaning of.

Where the object of a conspiracy is to commit forgery there can be no prosecution for such a criminal conspiracy without the sanction of the Local Government under s. 196A of the Cr. P. C. But this is not so, where the main charge is that of cheating, in which it is not necessary at all to mention, as the object of the conspiracy, forgery committed not for its own sake but in order to cheat a person in a way, in which, if he had known the fact, he would not have parted with the money. [p. 708, col. 2; p. 710, col. 1.]

If cheating is carried out by means of forgery it does not follow that the provisions of s. 196A of the Cr. P. C. would apply. For a prosecution of an offence of forgery no sanction is necessary under s. 196A and no distinction can be drawn between the offence of forgery and the offence of abetment thereof. [p. 710, col. 2.]

Where a trial starts for an object of the conspiracy, which is beyond the cognizance of the Court, and other objects of the conspiracy which are within the cognizance of the Court, the omission of the head, which is beyond the cognizance of the Court, cannot affect the jurisdiction of the Court as regards the rest of the charge. [p. 709, col. 2.]

For a charge of conspiracy only an agreement between the conspirators is sufficient, and an accused person can be tried of all other offences committed in the course of the conspiracy even if those offences are more than three. [p. 710, col. 2.]

The expression "former part" in the direction at the end of s. 239 of the Cr. P. C., that "the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges" means the part under the heading "form of charge" prior to the part headed "joinder of charges." Section 234, therefore, will not control the provisions of s. 239 of the Cr. P. C. [p. 711, col. 1.]

In deciding whether a particular series of events do or do not form one transaction within the meaning of s. 239 of the Cr. P. C., the real and substantial test is whether they are so related to one another in point of purpose or as cause and effect or as principal and subsidiary acts, as to constitute one continuous action. Each event must be a link in the chain, and there must be no hiatus or rupture in the sequence. [ibid.]

Empress v. Poresollah Sheikh, 7 C. L. R. 143, *Manavala Chetty v. Emperor*, 29 M. 569; 1 M. L. T. 409; 5 Cr. L. J. 94, *Surat Bahadur v. Emperor*, 81 Ind. Cas. 986; 11 O. L. J. 640; 25 Cr. L. J. 1162; (1925) A. I. R. (O.) 158; 1 O. W. N. 362, distinguished.

Abdul Salim v. Emperor, 69 Ind. Cas. 145; 49 C. 573; 35 C. L. J. 279; 26 C. W. N. 639; (1923) A. I. R. (O.) 107; 23 Cr. L. J. 657, *Pulin Behary Das v. Emperor*, 16 Ind. Cas. 257; 16 O. W. N. 1105; 15 C. L. J. 517; 13 Cr. L. J. 603, *Ram Nath v. Emperor*, 81 Ind. Cas. 714; 22 A. L. J. 1106, 1 L. R. 6 A. 28 Or.; 26 Or. L. J. 332; (1925) A. I. R. (A.) 230; 47 A. 268; *Kohna Ram v. Emperor*, 68 Ind. Cas. 32; 20 A. L. J. 775; 23 Cr. L. J. 493; 4 U. P. L. R. (A.) 162; (1922) A. I. R. (A.) 502; 45 A. 11, *Barindra Kumar Ghose v. Emperor*, 7 Ind. Cas. 359; 37 C. 467; 14 C. W. N. 1114; 11 Cr. L. J. 453, *Amritlal Hazra v. Emperor*, 29 Ind. Cas. 513; 42 C. 957; 19 O. W. N. 676; 21 O. L. J. 331; 16

Cr. L. J. 497 and *Harsha Nath Chatterjee v. Emperor*, 26 Ind. Cas. 313; 42 C. 1153; 21 C. L. J. 231; 16 Cr. L. J. 9; 19 C. W. N. 706, referred to.

Appeal against an order of the Special Sessions Judge, Lucknow, dated the 27th March 1925.

Messrs. J. Jackson, R. F. Bahadurji and Jai Krishna Tondon (with him Messrs. Banwari Shankar, H. C. Dutt, Bisheshwar Nath Mhandro and Radhe Krishna Sirivastava), for the Appellants.

Messrs. H. S. Gupta and Shiva Shankar Nath, for the Crown.

ORDER.—The principal appellant in this case Bishambhar Nath Tondon was a *khazanchi* (treasurer) of the local branch of the Imperial Bank of India. The case for the prosecution is that he wanted to get rich quickly. In this order I shall state the facts as alleged by the prosecution without any indication whether I accept them or not. In this order I am only concerned with the charge on which the appellants were committed. That charge cannot be commented upon until I have stated what the facts, as alleged by the prosecution, are: Like most fools the *khazanchi* thought that if he had ready cash he could invest it in such a way as to increase it enormously. He was, therefore, out to find out means of obtaining cash in hand for the time being hoping that by the time that the cash had to be refunded he would have made much more money by investment, speculation and other gambling transaction. His position as a *khazanchi* gave him opportunities to obtain ready cash. The system of high finance is at the bottom, one of purchase and sale. The business of a Bank is what is called accommodation of merchants. Suppose a merchant in Lucknow has sold 1,000 maunds of wheat at Rs. 5 per maund to a merchant in Calcutta and has to be paid Rs. 5,000. He wants to pay money to the cultivators from whom he made the purchase and at the same time the merchant in Calcutta is not ready to give him the sum of Rs. 5,000 before he has seen the colour of the wheat. To accommodate these parties a Bank comes in. The merchant in Lucknow writes out a *hundi* called in this case a usance bill, requesting the merchant in Calcutta to pay Rs. 5,000 after the lapse of a certain period. The Bank here gives money, which in business parlance is known as discounting the *hundi*. The word discounting means that the Bank deducts a certain amount

out of the money for the help which it has given with ready cash. The merchant here obtains this sum for payment to the cultivators and his profit and by the time the *hundi* is presented in Calcutta possibly the wheat has reached there and the merchant in Calcutta is ready with money to pay the price of the commodity. This is really legitimate business. The *khazanchi* of a Bank is supposed to be acquainted with Indian customers and to know how far they may be trusted to pay up the money given to them by the Bank in discounting the *hundis*. This legitimate means of business may easily lead to illegitimate means to get cash. What the *khazanchi* is supposed to have done is to get cash not for the purpose of accommodation, but for gambling purposes. To take a concrete example: just after the war the exchange with England fluctuated a great deal. Suppose there was a man who believed in luck and thought that if he had a certain amount of money and purchased sovereigns he could after a month get back many more rupees for the same number of sovereigns. Suppose he procured Rs. 10,000 in a particular month on a certain date by discounting a *hundi* for that amount to be paid in Calcutta after a month. Here there is no commodity at the back and no desire for honest business. He may invest it in sovereigns, say at the rate of 2s. and 6d. per rupee. If at the end of the month the exchange goes down to 2 shillings he clears a sum of Rs. 2,500. He pays Rs. 10,000 in Calcutta and has a large profit himself. In the meanwhile, however, if luck does not favour him and the exchange has risen to 3s. 4d. at the time when he has to meet the demand of Rs. 10,000 he will have in his pocket only Rs. 7,500. Such a contingency if he is not ready to give out money of his own can only be met by discounting further bills, on the same fraudulent principle. One can easily see that if the speculation and investment went against the *khazanchi* there will always be a continuous deficit. This continuous deficit will have to be met by fresh bills to be discounted. Such according to the prosecution, has been the case here. It was alleged by the prosecution that the *khazanchi* formed a conspiracy with others to forge bills, to cheat the Bank by means of such forged bills and to embezzle money.

I shall first of all deal with the conspiracy

charge. The charge framed of conspiracy was that between July 1920 and October 1921, at Lucknow, Biswan in the Sitapur District, Calcutta, Cawnpore and other places the appellants agreed with one another and with Bhola Nath Tandon since deceased to do or cause to be done illegal acts. These illegal acts have been detailed in the charge. One was to forge *hundis*, demand drafts, vouchers and letters and to use them fraudulently and dishonestly as genuine knowing or having reason to believe them to be forged. The second object of the conspiracy stated in the charge was to commit criminal breach of trust by criminally mis-appropriating the money of the Bank of Bengal, afterwards the Imperial Bank of India, contrary to a contract expressed or implied as an agent or broker or *khazanchi* in respect of the said money. The third object of the conspiracy was stated to be to cheat by giving false opinions as to the financial position and commercial standing of certain firms and their location and as to the existence of other firms knowing them not to be in existence at all and by starting bogus firms and forging usance bills and demand drafts and verifying the same to be genuine knowing them to be forged, and forging receipts of payees and using the name of genuine firms, and forging *hundis* in their name and forging their signature on vouchers.

Out of the three objects admittedly if the object of the conspiracy is to commit forgery there can be no prosecution for such a criminal conspiracy without the sanction of the Local Government under s. 196A of the Cr. P. C. Offences under ss. 465, 468, 471 are non-cognizable offences and that is why sanction of the Local Government is necessary under cl. (2) of the section. Unfortunately the prosecution omitted to obtain such sanction. This is amazing to me because the prosecution Counsel has told the Court more than once that he moulded the prosecution on the ruling in the case of *Abdul Salim v. Emperor* (1). If that ruling is read, the necessity of sanction for prosecution for a conspiracy to forge documents will be found to be staring in the face of the reader at every page. However the slip may have been made, it has been made and led to considerable difficulty both in

(1) 69 Ind. Cas. 145; 49 C. 573; 35 C. L. J. 279; 26 C. W. N. 680; (1922) A. I. R. (C.) 107; 23 Cr. L. J. 657.

the Sessions Court and here and to a large waste of valuable time.

The Sessions Judge, when his attention was drawn to this want of sanction at a very late stage of the proceedings before him, omitted that object of the conspiracy from the charge that was framed by the Magistrate. It was argued there, and it is again argued here, that this cancellation or omission of a part of the charge necessarily implied a cancellation of the entire charge of conspiracy and that the prosecution should, therefore, fail under that head. It is obvious that if the prosecution fails for criminal conspiracy it must fail of the other charges also because the different appellants have been tried of different charges of abetment of forgery together, because there is the common link between them of the conspiracy. If this common link disappears there could not be a joint trial of different offences committed by different appellants. I have, therefore, to decide a point of importance whether by the omission of one object of the conspiracy from the charge the entire charge of conspiracy fails or not.

No ruling has been discovered by me to meet this case in its entirety. The ruling in *Abdul Salim v. Emperor* (1) does not deal with this matter because in that case the original charge was only of criminal conspiracy to cheat. There was no charge added of a criminal conspiracy to commit forgery and there was no amendment of the charge subsequently. Section 227 of the Cr. P. C. lays down that any Court may alter or add to any charge at any time before judgment was pronounced or in the case of trials before the Court of Session before the opinions of assessors are expressed. In the present case the amendment was made, though very late in the proceedings before the opinions of the assessors were expressed. On behalf of the defence a ruling of the Calcutta High Court under Act X of 1872 was quoted [*Empress v. Porehollah Sheikh* (2)]. It was held there by a Bench of that Court that where an accused person is committed to take his trial on specific charges before the Sessions Court the Judge has no power under s. 446 of Act X of 1872 to expunge a charge before calling upon the accused to plead to it. In the present case, however, a separate charge has not been expunged but one of the objects of

the conspiracy charge has been deleted. Mr. Justice Mukerji of the Calcutta High Court has not approved of this ruling in *Pulin Behary Das v. Emperor* (3). In that case there was an application for the withdrawal of charges under ss. 122 and 123, leaving only a charge under s. 121A. The learned Judge observed at page 1136* of the report. "In my opinion the application for withdrawal of the charges to which exception has been taken ought to have been allowed and the Court had inherent power to make the appropriate order. Criminal Courts, no less than Civil Courts, exist for the administration of justice, and Courts of both descriptions have inherent power to mould the procedure, subject to the statutory provisions applicable to the matter in hand, to enable them to discharge their functions as Courts of Justice."

The present case is not similar to the one of *Manavala Chetty v. Emperor* (4). There the trial began with four charges and it was held by the learned Chief Justice Sir Arnold White that the omission of one charge at a subsequent stage of the proceedings, did not cure the original defect of starting trial for more than three charges. What happened in the present case is that the trial started for an object of the conspiracy which was beyond the cognizance of the Court of Session. At the same time other objects of the conspiracy were within the cognizance of that Court, and I do not think that the omission of one head which was beyond the cognizance of the Court could affect the jurisdiction as regards the rest of the charge.

Surat Bahadur v. Emperor (5) decided by a Bench of this Court was another case quoted on behalf of the defence. In that case one Bhagwati Prasad had been convicted of two offences one of them under s. 474, Indian Penal Code. The charge under s. 474 was framed by the Sessions Judge because in his opinion the accused was committed without the sanction of the Court before whom a particular document was produced and so the commitment under s. 471 was not a proper commitment. This Court held that a Judge's power to alter a charge after commitment was laid down under s. 226 of the Cr. P. C., and was

(3) 16 Ind. Cas. 257; 16 O. W. N. 1105; 15 C. L. J. 517; 13 Cr. L. J. 609.

(4) 29 M. 569; 1 M. L. T. 409; 5 Cr. L. J. 94.

(5) 81 Ind. Cas. 986; 11 O. L. J. 610; 25 Cr. L. J. 1162; (1925) A. I. R. (O.) 158; 1 O. W. N. 362

*Page of 16 O. W. N.—[Ed.]

limited to imperfect or erroneous charges. In the opinion of this Court there was nothing erroneous in the charge under s. 471 in that case and it was exactly the offence for which the Sessions Judge had convicted the accused although to save the technical difficulty he had employed another section, nor was the charge imperfect, a word which implied defect in form. It was held that in altering the charge from ss. 471 to 474 the Sessions Judge had acted without jurisdiction. In the present case there was no alteration of the charge. The two heads of criminal conspiracy for which the charge has been maintained were in the charge and one of the heads of the charge was eliminated. The present case, therefore, is distinguishable from the Bench case of this Court where there was no proper commitment on any charge before the Sessions Court.

Similarly it is not the case here that to avoid the necessity of a sanction resort is had to a different section of the Indian Penal Code. Such practice was disapproved of by the Allahabad High Court in *Ram Nath v. Emperor* (6) and *Kohna Ram v. Emperor* (7). In the present case the main charge is that of cheating. It was not necessary at all to mention forgery as the object of the conspiracy because forgery also was committed not for its own sake but in order to cheat the Bank and obtain money from it in a way in which, if it had known the fact, it would not have parted with the money. There is no attempt here to circumvent the law regarding sanction. The object of the conspiracy as to cheating was also mentioned from the very beginning. The matter would have been different if commitment had been made on a charge of committing criminal conspiracy for the purpose of forging documents and subsequently on discovering that such a charge required sanction another object that of cheating the Bank had been substituted. I hold that the lower Court was justified in omitting one head of the charge of criminal conspiracy and that the entire charge did not fail in consequence.

Along with the charge of conspiracy there are separate charges of abetment of

(6) 81 Ind. Cas. 714; 22 A. L. J. 1106; L. R. 6 A. 25 Cr.; 26 Cr. L. J. 362; (1925) A. I. R. (A.) 230; 47 A. 268.

(7) 68 Ind. Cas. 32; 20 A. L. J. 775; 23 Cr. L. J. 496; 4 U. P. L. R. (A.) 162; (1922) A. I. R. (A.) 502; 45 A. 11.

forgery. The learned Judge of the lower Court has given no reasons why the appellants could not equally well be tried for the offence of forgery along with the offence of the conspiracy. What he has observed in his order of 24th December 1924 is:— "It is also to be noted that the abetment of offence under ss. 467 and 471, Indian Penal Code, does not fall within the scope of s. 196A, cl. (2) like a substantive offence under those sections." The meaning of this sentence it is difficult to understand. For a prosecution of an offence of forgery no sanction is necessary under s. 196A and no distinction can be drawn between the offence of forgery and the offence of abetment thereof.

In this connection the prosecution is on firmer ground. There is a large number of rulings of the Calcutta High Court in support of the view that when there is a charge of conspiracy a prisoner can be tried of all other offences committed in the course of the conspiracy even if those offences are more than three. In *Abdul Salim v. Emperor* (1) already quoted it was held that the charges under ss. 120B and 420 of conspiracy to cheat between certain dates may be legally joined with individual charges of other distinct offences committed in pursuance of the conspiracy by different members of it on different intermediate dates. In support of the view the Bench quoted three previous rulings of that Court. *Barindra Kumar Ghose v. Emperor* (8), *Amritlal Hazra v. Emperor* (9) and *Harsha Nath Chatterjee v. Emperor* (10). In *Pulin Behari Das v. Emperor* (3), Harington, J., observed at page 1110*: "The prisoners were charged under ss. 121A, 122 and 123 of the Indian Penal Code. It was argued that a charge under s. 123 could not be legally joined with one under s. 121A. I do not agree with that contention. The charge under s. 121A is that of conspiring to wage war against the King and to deprive him of the sovereignty of British India and overawe by means of criminal force or show of criminal force the Government of India. Now in furtherance of that conspiracy the persons engaged therein may

(8) 7 Ind. Cas. 359; 37 C. 467; 14 C. W. N. 1114; 11 Cr. L. J. 453.

(9) 29 Ind. Cas. 513; 42 C. 957; 19 C. W. N. 676; 21 C. L. J. 331; 16 Cr. L. J. 497.

(10) 26 Ind. Cas. 313; 42 C. 1153; 21 C. L. J. 201; 16 Cr. L. J. 9; 19 C. W. N. 706.

*Page of 16 C. W. N.—[Ed.]

actively conspire or they may collect arms or they may conceal the existence of the conspiracy from the authorities. All these acts, if done, are in furtherance of the one transaction and, therefore, may clearly be charged against these persons under s. 235 of the Cr. P. C., and the prisoners may be tried at one trial for all these offences." In the same case Mr. Justice Mukerji held that where offences charged were committed in the same transaction within the meaning of s. 239 they may all be tried at the same trial (1136*, column 2). Similarly in the case of *Sanuman v. Emperor* (11), Mr. Justice Stuart observed: "It is not the law that in no circumstances can more than three offences be combined at one trial even if more than three offences have been committed in the same transaction. In deciding whether a particular series of events do or do not form one transaction within the meaning of s. 235 of the Cr. P. C., the real and substantial test is whether they are so related to one another in point of purpose, or as cause and effect, or as principal and subsidiary acts, as to constitute one continuous action. Each event must be a link in the chain, and there must be no hiatus or rupture in the sequence."

Section 239 of the Cr. P. C. as amended on 1st September 1923 lays down that the following persons may be charged and tried together, namely, (d) persons accused of different offences committed in the course of the same transaction. The direction at the end of the section is "and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges." The former part obviously means the part prior to the part headed "joinder of charges." The Chapter XIX "of the charge" is not divided into parts but different subjects have different headings. The first heading is "form of charges" from s. 221 of s. 232 inclusive. Then there is a heading "joinder of charges" and s. 239 falls under this heading. By the former part I understand the meaning to be the part under the heading "form of charge," prior to the part beginning with the heading "joinder of charges." Section 234, therefore, will not control the provisions of s. 239.

There was an ingenious argument ad-

(11) 63 Ind. Cas. 401; 19 A. L. J. 392; 12 Cr. L. J. 641.

*Page of 16 O. W. N.—[Ed.]

vanced by Mr. John Jackson that even the charge as it stands requires sanction because mention is made that cheating was carried out by means of forgery. The charge, however, is of cheating whatever the means may have been employed to effect that cheating. If cheating is carried out by means of forgery it does not follow that the provisions of s. 196A would apply.

Another complaint made was that the charge was vague. In the nature of things a charge of conspiracy would be vague if the defence expects the proof of the conspiracy to be included in the charge. For a charge of conspiracy only an agreement is sufficient, so, in my opinion, it is sufficient to include in the charge the agreement which is alleged to have been arrived at between the conspirators. However, that may be, it cannot be pretended by the defence that any injustice has been done to them. The trial lasted for many months and all the various stages of the conspiracy were unfolded during the trial. It is not submitted here that the defence was in any way confined in meeting the charges disclosed during the trial. It is quite true that an enormous number of documents have been put in by the prosecution and possibly the facts disclosed are bewildering. Personally if I had been running the prosecution I would have either split up the charges into individual charges with short and sharp trials of every one of the appellants separately or confined myself to the one charge of conspiracy without adding individual charges. Another point urged was that the lower Court had held that there were two conspiracies one to cheat and the other between a few members of embezzlement. It was argued that men cannot be jointly charged for two different conspiracies. We have, however, to look at the charges from the point of view of the prosecution and not from the result. The prosecution alleged that there was one conspiracy both to cheat and to commit embezzlement, so the trial as held was for one conspiracy and one conspiracy only. I shall, however, be prepared to do one thing in this appeal. I shall confine my attention entirely to the charge of conspiracy to cheat. I shall order the sentences on the other charges to run concurrently with the sentence of this charge if I hold that the conspiracy is proved; if I hold that the conspiracy is not proved; I

shall further hold that the trial of the other charges was improper of all the appellants jointly when there was not a common thread of conspiracy between them. Confining their attention to this one charge the appellants will be better able to meet the case tried to be made out against them by the prosecution. I may also mention another point. In considering the conspiracy I shall confine myself to facts relating to conspiracy during the period of the charge and not earlier. I hope that thereby the facts to be referred to before the Court will be narrowed. Mr. Bahadurji has already argued before me upon one aspect of the case from the point of view of facts that there was no cheating because the agent well knew what was happening and to establish a case of cheating even against a corporation the prosecution ought to point to one particular person who has been imposed upon. In the light of the observation made by me. I hope that Mr. John Jackson and Mr. Bahadurji will argue the case of their particular clients confining themselves to these two points: (1) Whether a conspiracy to cheat did exist, and (2) whether any of their clients took part in it. Possibly as regards the other appellants, Mr. Vikramajit may desire to argue on the general subject of the existence of a conspiracy. I hope that as regards the other represented appellants the learned Counsel will see their way to confine themselves only to the second point whether their clients were members of the conspiracy or not. After three learned Counsel have addressed the Court on the existence or otherwise of the conspiracy I do not think that anything would be left for other Counsel to argue on the subject. After Mr. John K. Jackson and Mr. Bahadurji have addressed the Court with respect to their own clients Mr. Vikramajit will address the Court, after that Mr. Radha Krishna and Mr. Bisheshar Nath Mahendra and Mr. Bhawani Shankar.

When these arguments are completed Counsel for the Crown will give a reply confining himself only to these two points as to conspiracy to cheat and the persons who were members thereof. There will be a right of reply in the order already mentioned by me.

Z. K.

*Order accordingly.***PATNA HIGH COURT.**

CRIMINAL REVISION No. 240 of 1925.

June 12, 1925.

Present:—Justice Sir John Bucknill, Kt.,

RAMPRIT AHIR AND OTHERS—

PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 147—Attempt by Police to arrest persons not engaged in commission of offence—Resistance to arrest—Rioting, conviction for, legality of.

A party of Policemen, on receiving information that certain persons were waiting near a railway line with the intention of robbing a train, arrived at the scene and found the accused and certain other persons, sitting or roaming about near the railway line. The Police attempted to arrest those present and a fight ensued but the accused were eventually secured and taken to the Police Station. They were subsequently charged with and convicted of an offence under s. 147 of the Penal Code:

Held, that the Police had no justification for attempting to arrest the accused and that consequently in resisting the arrest the accused were not guilty of the offence of rioting. [p. 713, col. 2.]

The detention or arrest of members of the public are not matters of caprice but are governed by and must be conducted upon certain rules and principles which the law clearly lays down. To arrest persons without any justification is one of the most serious encroachments upon the liberty of the subject which can well be contemplated. [*ibid.*]

Criminal revision from an order of the Sessions Judge, Shahabad, dated the 24th April 1925, affirming that of the Magistrate, Arrah, dated the 25th March 1925.

Messrs. P. C. Manuk and B. P. Varma, for the Petitioners.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This was an application in criminal revisional jurisdiction made by six men. They were tried before an Honorary Magistrate of the First Class at Arrah and were convicted by him of an offence punishable under s. 147, Indian Penal Code, and sentenced each to undergo rigorous imprisonment for six months. The applicants appealed to the Sessions Judge of Sahabad, who on the 24th of April last dismissed their appeal and upheld the convictions and sentences. The matter has now come up before me, a rule having been issued by a Bench of this Court on the 14th of May last. The circumstances in the case are very simple although somewhat unusual.

It would seem that some Police received some sort of information that it was likely

that if they, the Police, went to a certain place along the railway line they would discover some people there who, it was said, were probably about to try and rob a train with commendable zeal a party of Police acting upon this information proceeded to the locality indicated and there sure enough they found the applicants and some other men who were, so far as one can gather, sitting or roaming about somewhere near the railway line. It is said that some or perhaps all of them had actually encroached within the fencing or wire which usually runs along the side of the railway marking what I suppose is the railway property; but even if this was so it hardly constitutes an offence for which one would suppose that it was possible for the Police rightly to arrest such individuals. There is no doubt as to what actually took place; when the Police arrived at the place, and I may say that it was at night, they immediately caught hold of these persons who were standing there and endeavoured to arrest them. The applicants and their friends or the persons with whom they were put up a fight; they did not see why they should be arrested; it seems doubtful indeed whether the Police were in uniform and from what I gather they appear to have been in *mufti*; when the applicants were seized by the Police, they fought; it is perhaps not surprising that they did. At any rate the applicants and others were eventually secured and taken to the Police Station. They were then charged with the offence which I have indicated and were convicted and sentenced in the manner to which I have referred.

Now the learned Counsel who has appeared for the applicants points out that it does not seem that the Police had any right to arrest these persons; and the learned Assistant Government Advocate who has appeared in support of the convictions has not been able to disclose any clear indication as to the powers under which it might be suggested that the Police had the right, under the circumstances to which I have referred, to arrest these individuals it may possibly be, although we cannot say with certainty, that the applicants and their friends were at the locality where they were found for some purpose of a criminal nature; on the other hand, we have no authority for assuming that because a party of persons are in a certain

place at a certain time they are simply from those circumstances about to engage in a criminal fact. I must confess that I can see no legal justification for the arrest of these persons by the Police. Whilst I support and shall continue to support to the best of my ability the maintenance of law and order and the powers exercised by the Police when they are properly exercised, I, at the same time, have the utmost respect for the rights of the subject. The detention and arrest of members of the public are not matters of caprice but are governed by and must be conducted upon certain rules and principles which the law clearly lays down. To arrest persons without any justification is perhaps one of the most serious encroachments upon the liberty of the subject which can well be contemplated. In this case, therefore, I have come to the conclusion without the least hesitation that there was no good ground shown for arresting these persons and that the convictions and sentences are bad and must be quashed.

Z. K.

Convictions quashed.

ODDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 94 OF 1925.

July 23, 1925.

Present:—Mr. Wazir Hasan, A. J. C.
RAM CHARAN AND OTHERS—ACCUSED
—APPLICANTS

— *versus* —

EMPEROR—OPPOSITE PARTY.

Public Gambling Act (III of 1867), ss. 3, 4, 5, 6—Cauries, whether instruments of gaming—Cauries found in house on search—Presumption of common gaming house—Intention to pass time—Conviction, whether legal.

Cauries well fall within the definition of instruments of gaming given in the Public Gambling Act. [p. 714, col. 2.]

Where on a search under s. 5 of the Public Gambling Act, *cauries* are found in a house, there is a presumption that the house was used as a common gaming house, and further that the persons found were present there for the purpose of gambling. [*ibid.*]

The presumption raised, however, is rebuttable; and when it is shown that the object of the persons was to indulge in a friendly amusement and to pass time, and the idea of making any gain was entirely foreign to the mind of the entire party, the presumption is rebutted, and the persons cannot be convicted of an offence under ss. 3 and 4 of the Public Gambling Act. [p. 714, col. 2; p. 715, col. 1.]

Criminal revision against an order of the District Magistrate, Lucknow, dated the 13th March 1925, upholding that of the District Magistrate, First Class, Lucknow, dated the 16th December 1924.

Mr. Ali Zaheer, for the Applicants.

The Government Pleader, for the Crown.

JUDGMENT.—This is an application under s. 439 of the Cr. P. C. The applicants are 20 in number. They have been convicted by a Special Magistrate of the First Class, exercising jurisdiction in the City of Lucknow, under ss. 3 and 4 of the Public Gambling Act, 1867. One of the applicants, Chhote Lal, has been sentenced to a fine of Rs. 50 and the other applicants to a fine of Rs. 10 each. The applicants were dissatisfied with the order of the Trial Court and challenged it by an application in revision presented to the District Magistrate of Lucknow. The learned District Magistrate rejected that application. Hence this application before me.

The facts found by the Trial Court are as follows:—

On the night following the 11th November there was a *katha* at the house of Chhote Lal applicant in the early part of the evening. The *katha* was followed by a dinner in the same house. A large number of persons were invited by Chhote Lal both to the *katha* and to the dinner and a large number of persons took part in both. The dinner proceeded for a long time and did not come to an end until sometime between 10 and 11 p. m. In those days a sort of curfew order was in force in the City of Lucknow and, as the learned Magistrate in the Trial Court observes, people were forbidden to go about after 10 p. m. The congregation assembled at the house of Chhote Lal naturally, in the circumstances, prepared itself to pass the night in Chhote Lal's house. At 2 a. m. in the morning the Police made a raid of the house under a warrant issued by a competent Magistrate and arrested the applicants under s. 5 of the Public Gambling Act. Some *cauries* were also found by the Police on the spot but nothing else of any incriminating nature.

It was first contended on behalf of the applicants that *cauries* were not instruments of gaming and reliance was placed upon a decision of Mr. Justice Aikman in the case of *Queen-Empress v. Bhawani* (1). That

decision entirely supports the contention but is no longer good law. By U. P. Act I of 1917 the definition of "common gaming house" in the Act of 1867 was amended and within the substituted definition is included the following:—

"Instruments of gaming include any article used as a means or appurtenance of, or for the purpose of carrying on or facilitating gaming". I have no doubt in my mind that *cauries* well fall within the definition of instruments of gaming as set forth above.

It was next argued that it was not proved that Chhote Lal kept or used the house for any profit or gain, such a proof being necessary to constitute the house a common gaming house within the definition in the Act. It is true that there is no such proof on the record of the case. In answer to this argument the prosecution, however, relies on the presumption raised by s. 6 of the Public Gambling Act. I am of opinion that that presumption is applicable to the facts of the present case. I have already found that the *cauries* are instruments of gaming. It is proved, indeed it is admitted, that they were found in Chhote Lal's house at the time of the Police raid. It is also admitted that Chhote Lal's house was searched under the provisions of s. 5 of the Public Gambling Act. It follows that there is a presumption that Chhote Lal's house was used as a common gaming house and further that the persons found therein were there present for the purpose of gambling. Within the presumption that Chhote Lal's house was used as a common gaming house is included the ingredient that he kept or used the house for profit or gain.

It was lastly urged that the presumption is rebuttable and is rebutted in the present case. That it is rebuttable is not disputed. The real question, therefore, which I have to decide is whether on the facts found the presumption in question is rebutted. I am of opinion that it is. In considering this aspect of the case I take into account the fact that there is no proof on the record that Chhote Lal stood to gain by the recreation in which the people at his house indulged after they had decided to stay in the house over the night. It also follows from the circumstances stated above that there was no intention on the part of those persons to gamble for the purpose of any gain. As observed by Pandit

(1) 18 A. 23; A. W. N. (1895) 13; 8 Ind. Dec. (N. S.) 719.

Kanhaiya Lal, A. J. C., in the case of *Ram Shanker v. Emperor* (2), "their object was merely to indulge in a common friendly amusement" and I may add with a view to pass time and the idea of making any gain was entirely foreign to the mind of the entire party. I, therefore, accept the application, set aside the convictions and sentences of each of the applicants and direct that the fine, if paid, will be refunded forthwith.

N. H.

Application accepted.

(2) 39 Ind. Cas. 331; 20 O. C. 4; 4 O. L. J. 88; 18 Cr. L. J. 494.

PATNA HIGH COURT.

CRIMINAL REVISION No. 296 OF 1925.

July 23, 1925.

Present:—Justice Sir John Bucknill, Kt.,
and Mr. Justice Ross.

Musammât TUNIA—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 193—Perjury—False answers to questions which witness could not have been compelled to answer—Offence.

Where a person answers questions put to him in a judicial proceeding after he has sworn to tell the truth and the answers are not true, he commits perjury; even though the questions which he has answered were such as he could not have been compelled to answer. [p. 716, col. 1.]

Criminal revision from an order of the Sessions Judge, Arrah, dated the 1st June 1925, summarily dismissing an appeal against an order of the Magistrate, Arrah, dated the 30th May 1925.

Mr. P. C. Roy, for the Petitioner.

Mr. Niamutulla, for the Opposite Party.

JUDGMENT.

Bucknill, J.—This was an application made in criminal revisional jurisdiction. It was made by one Musammât Tunia, a young woman, who was convicted by a Magistrate of the First Class at Arrah of an offence punishable under the provisions of s. 193 of the Indian Penal Code, that is to say, with having committed perjury in the course of a judicial proceeding. She was sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs. 200, and in default of payment thereof to serve a further term of two months' rigorous imprisonment. From her conviction and sentence the applicant appealed to the Sessions Judge of Shahabad; but on

the 1st of June last the appeal was dismissed summarily.

The circumstances which have led up to the prosecution of this woman and her conviction are certainly somewhat peculiar. It would seem that at the end of July last year a burglary took place in the house of a lady residing in the town of Arrah. A man named Tara Prasad, who is in the employment of this lady, reported the burglary to the Police; and, upon being asked whether he had any suspicion as to by whom the offence had been committed, he is said to have replied that he thought that it was not improbable that one Ramsakal Singh of Gonouli might have been concerned in the matter. He added that this Ramsakal Singh lived in the same *mahalla* where the burglary had been perpetrated, that his (Ramsakal's) uncle was on bad terms with the lady whose house had been broken into and that Ramsakal himself was the associate of evil persons.

As a result of what had taken place at the Police Station it would seem that on the 27th of August last this Ramsakal instituted proceedings against Tara Prasad charging him with having committed an offence punishable under the provisions of s. 500 of the Indian Penal Code, that is to say, with having committed defamation. Tara Prasad was put on his trial; we are informed at the Bar that he was eventually acquitted. What defence he put forward I do not know; but it would seem that, amongst them, must have been one which contemplated some plea in the nature of justification; for he called as a witness in his defence the applicant here. So far as I can gather his object in calling this woman was to show that she was a woman of easy virtue and had been the kept mistress of the man Ramsakal Singh, and I suppose that it would have been urged that if it could have been shown that Ramsakal Singh had kept company with a woman of ill-repute, the suggestion made by Tara Prasad in the statement which he made to the Police, when reporting the burglary, that Ramsakal was the associate of evil companions might have been held in some measure to be justifiable. Now, when the applicant was put into the witness-box, she does not appear to have realized that it was in no way incumbent upon her to answer any questions which might have reflected upon her own probity or virtue

and it is somewhat remarkable to notice that no attempt at protecting her from having to reply to questions of that nature appears to have been offered to her by the officer who was trying the case. On the other hand it would seem that she was interrogated very fully as to her morality and as to her immoral association with Ramsakal Singh; how such a proceeding could have been allowed unless she had been (which she was obviously not) willing to assist Tara Prasad by blackening her own character, it is difficult to understand. However, the fact remains that she was asked a variety of questions of the character which I have mentioned and that she answered in a manner protective of her own character. There is, however, not the least doubt that a number of her answers were not true; she had been put upon her oath and it is, of course, needless for me to point out that if one answers questions put to one in a judicial proceeding when one has sworn to tell the truth and if one's answers are not true, one commits perjury, whether those questions which one answers are questions which should have been or could have been properly asked. After the applicant had given her evidence, which I may point out was, of course, not in favour of Tara Prasad, she was eventually charged as I have mentioned above, tried, convicted and sentenced. I think that it must be admitted that the circumstances were extremely difficult and painful for the applicant, she was placed in an unenviable position and, no doubt, was completely ignorant of her right to refuse to answer questions which would reflect upon her own character and had the unpleasant alternative either of telling the truth and admitting that she was a loose woman or, as she did, of telling untruths and making herself out better than perhaps she really was.

It is, however, I think, not unimportant to observe the actual averments which were made against her which formed the basis of the charge of perjury brought against her. Although it is true that superficially some of these questions do not appear in themselves to be such as if answered truthfully would have thrown any discredit upon the applicant's character, yet, on further examination, they will all be found to be connected more or less closely with the illicit association which it was being attempted to be proved had

existed between the applicant and Ramsakal Singh. The first untrue statement which she is alleged to have made is that she did not know this man at all. There can be no doubt from the evidence of at least six witnesses and from documentary evidence as well that this was not true. The second statement was that she had never stated that Ramsakal Singh, this particular individual, used to visit her frequently. This again was, undoubtedly, not a true statement. The third statement, in which she is alleged to have perjured herself, was that she denied that the person named Ramsakal against whom and herself a woman named Dularia in 1923 had brought some criminal proceeding was the same Ramsakal as that concerned in the case which was being brought against Tara Prasad. Again there can be no doubt that this statement was not true. The fourth question which she is said to have answered untruthfully was that she denied that when her house had been entered for the purpose of executing some legal purposes Ramsakal had been found there in her company. This, however, again was undoubtedly shown to be a falsehood. The fifth and the last answer which she is said to have made falsely is the point blank avowal that she was not the mistress of this Ramsakal. The Magistrate has stated that the evidence of all the witnesses for the defence and indeed of the main prosecution witnesses shows that this statement was, as he terms it, "a deliberate lie". There can, therefore, be no doubt whatever that this woman in the witness-box made statements which were untrue and which she knew to be untrue. There are, however, obviously reasons for coming to the conclusion that her position was allowed to be one which it ought not to have been allowed to be. I think that she ought to have been informed that it was in no way incumbent upon her to reply to questions her answers to which might, if true, have reflected upon her moral character.

Under these circumstances, although there undoubtedly has been a commission of the offence to which I have referred, it seems to me that the sentence is altogether too severe. We are informed by the learned Advocate who appears for the applicant that the applicant has already served 21 days in jail. I am satisfied, in my own mind, that this is an ample punishment for the offence committed under

the remarkable circumstances to which I have drawn attention. Whilst, therefore, affirming the conviction, the sentence of imprisonment which was passed upon the applicant will be reduced to that period of imprisonment which she has already served. The fine of Rs. 200 will be remitted and if it has already been paid it must be refunded.

Ross, J.—I agree.

Z. K.

Sentence reduced.

RANGOON HIGH COURT. FULL BENCH.

CRIMINAL REFERENCE No. 35 OF 1925.

June 1, 1925.

Present:—Sir Sydney Robinson, Kt., Chief Justice, Mr. Justice Maung Gyi and Mr. Justice Brown.

MA E SEIN—APPLICANT

versus

MG. HLA MIN—RESPONDENT.

Buddhist Law, Burmese—Marriage—Girl under 20 years—Parents, consent of, whether essential.

Under the Burmese Buddhist Law, except in the case of widows and divorcees, a girl under 20 years cannot contract a valid marriage without the consent, either express or implied, of her parents or guardians. [p. 718, col. 2.]

Case-law referred to.

Reference by Mr. Justice U Ba.

Mr. Ba Thein, for the Applicant.

Mr. Davies, for the Respondent.

JUDGMENT OF THE FULL BENCH was delivered by

Robinson, C. J.—The question referred for decision of a Full Bench is: "Except in the case of widows and divorcees, can a girl under 20 years contract a valid marriage without the consent, either express or implied, of her parents or guardians under Burmese Buddhist Law?"

The question is one of very great importance, but it is not one which, to my mind, presents any real difficulty.

In the case of *Queen-Empress v. Ne U* (1), it was held by the Special Court that by Buddhist Law a man cannot contract a valid marriage with the minor without her guardian's consent, and that sexual intercourse with the minor without such consent is 'illicit intercourse' within the meaning of s. 366, Indian Penal Code. That ruling was followed in *King-Emperor v. Nga Po Saw* (2).

In the case of *Crown v. Chan Mya* (3),

(1) S. J. 202.

(2) U. B. R. (1897-1901) Vol. I, 328.

(3) 1 L. B. R. 297.

three questions were referred to a Full Bench: (1) Can a Burmese Buddhist minor girl, under any circumstances, contract a valid marriage without the consent of her guardian? (2) If a Burmese Buddhist girl under 16 years of age elopes with a lover of her own free-will intending to co-habit with him, is the resulting sexual intercourse necessarily illicit? (3) Does s. 366 of the Indian Penal Code apply to a case in which a minor girl, at the time of the kidnapping from lawful guardianship, intends to co-habit of her own free-will with the kidnapper? The last of these three questions was the only one that was necessary for the decision of the appeal. Irwin, J., referring to ss. 21, 22 and 23, Book VI of the Manukye, held that the real test was the intention of the parties, "and that if the girl is steadfastly determined to marry her lover, and he continues of the same mind, the rights of the guardian must give way before accomplished facts." Fox, J., merely concurred; but Thirkell White, C. J., while concurring as to the answer to the third question, declined to express an opinion on the first and second questions. He said that the questions had not been fully argued, and that he would not like to commit himself to an opinion on these important questions of Buddhist Law without hearing arguments on both sides and without a full examination of all the texts bearing on the points. No reference was made in that decision to the *Rajabala* or to s. 28, Ch. VI of the Manukye.

In the case of *King-Emperor v. Nga Ni Ta* (4), Adamson, J. C., held with reference to this question of marriage, "It appears to be the opinion of two of the Honourable Judges of the Chief Court that the test is the real intention of the parties, and that if the intention is to marry, the marriage is an accomplished fact from the date of elopement. I cannot but think that this interpretation of the law would appear to be rather startling to Buddhist parents, and I doubt whether any would be found who would admit it." He pointed out that the provision of the *dhammathats* as regards three elopements is obsolete and would not receive countenance at the present day.

In *King-Emperor v. Nga Nge* (5), Irwin, J., as Judicial Commissioner, adhered to

(4) U. B. R. (1902-03) Vol. I, Penal Code, 15.

(5) U. B. R. (1904-06) Penal Code, 17; 2 Cr. L. J. 476.

the view previously expressed by him in *Chan Mya's case* (3).

I myself in the case of *Maung Chit Pe v. Ma Tin* (6) dealing with the question as to whether the consent of parents is essential to the validity of the marriage of a minor who elopes, doubted the correctness of the decision in *Chan Mya's case* (3).

That decision is thus the only one to support that view of the question.

There are decisions to the contrary, and doubts have been thrown on the correctness of the decision in *Chan Mya's case* (3) on two subsequent occasions.

There is no doubt that the *dharmathas* contain a large number of texts relating to the rights and duties of parents and guardians, and that the control that they exercise over minors is a distinct and marked feature of Burmese Buddhist Law; and to hold that a minor girl could, by the exercise of her unguided impulse by running away with a lover, absolutely set at naught and take no account of the control of her parents or guardians is entirely contrary to a very prominent provision of Burmese Buddhist Law.

The *dharmathas*, no doubt, enjoin upon parents and guardians the necessity to marry minors at the age of 15 or 16 so as to prevent their falling into sin, but they expressly, as it seems to me, maintain the position that even though parents or guardians do not pay any regard to the rule enjoined upon them, it is only when the girl has reached the age of 20 years that she has a right to contract a valid marriage without their consent.

In Ch. VI of s. 33, Kinwun Mingyi's Digest, Vol. II, we find a passage from the *Rajabala*, which runs as follows:—"After her attaining the age of twenty years a woman may marry a man of her choice although her guardians may not approve of the marriage." The reason is that her guardians did not give her in marriage when she arrived at the marriageable age.

None of the authorities that have been quoted have referred to s. 28 of Volume VI of the *Manukye*. It deals with the case of women who are under the protection of their parents; and it provides that "as regards the eight women above noted, if their protectors do not give them in marriage to a proper person and they shall willingly have connection with a young

man, provided they are above twenty years of age, let them have a right to live with the man of their choice. Why is this? because their protector watched them without regard to their desires." Earlier, it lays down as follows: "If carnal knowledge be had of any of these eight classes of women with their consent, there is no punishment in a future state. If the person under whose care they be, shall not give consent, they shall not be claimed as a wife. Why is this? because their protector is not willing."

Having regard to these provisions and having regard to the position accorded to parents and guardians with reference to control over the children, especially in the matter of their marriage, there can, in my opinion, be no doubt that no minor girl under the age of twenty can contract a valid marriage without the consent or against the will of her parents or guardians, or the relation under whose protection she is living.

The 21st section shows that the parents can reclaim the daughter, and that the man with whom she had eloped, even if she had ten children by him, has no right to say that she is his wife; but it is equally clear that the consent of the parents or guardians may be implied, and the lack of it be made good by subsequent conduct.

Thus in the 22nd section it provides that if a minor, who has eloped subsequently returns to the village and lives with the man, and has children by him, openly and to the knowledge of her parents or guardians, and they do not enforce their rights of reclaiming the girl and separating her from the man without unreasonable delay, they no longer have the power of reclaiming the girl. This, no doubt, is that the consent is to be implied from their conduct, and that the consent, though subsequently given or implied, will convert the connection into a valid marriage which the Courts would, no doubt, recognise with effect from the time of that elopement. It may, therefore, be that although there was no valid marriage to start with, the connection may be converted into a valid marriage by the consent, express or implied, of the parents or guardians given to it afterwards.

For these reasons I would answer the question referred in the negative.

N. H. Reference answered in negative.

(6) 8 Ind. Cas. 437; 3 Bur. L. T. 43.

CALCUTTA HIGH COURT.

CRIMINAL REVISION CASE No. 267 OF 1925.

June 12, 1925.

Present:—Mr. Justice Suhrawardy
and Mr. Justice Panton.MAKHAN MAPA—COMPLAINANT—
PETITIONER*versus*MONINDRA NATH BOSE AND
OTHERS—ACCUSED—OPPOSITE PARTY.*Counter-criminal cases—Procedure regulating trial—Counter-cases, whether should be tried simultaneously—Complainant in one counter-case anxious to have his case taken up after disposal of counter-case—Proper procedure.*

The Cr. P. C. being silent as to whether two counter-criminal cases should be tried simultaneously or one after the other, no absolute rule of law can be laid down and each case must be decided according to its requirements. [p. 720, col. 2.]

If the complainant in one of the two counter-cases wishes that his case may be taken up after the case against him has been decided, on the ground that in the case against him a large number of witnesses have been examined and he does not want to be subjected to his adversary's cross-examination in the other case in which he is the complainant, it will serve the ends of justice if the case against him is disposed of first, as it is not fair to force him, so long as he is the accused in one case, to throw himself open to cross-examination in the case in which he is the complainant. [*ibid.*]

Case-law discussed.

Criminal revision against an order of the Additional District Magistrate, 24-Parganas, dated the 30th March 1925, confirming that of the Sub-Divisional Officer, Diamond Harbour, dated the 3rd March 1925.

Mr. Narendra Kumar Basu and Babu Jatindra Nath Sanyal, for the Petitioner.

Babu Santosh Kumar Bose, for the Opposite Party.

Mr. Khondkar, (Deputy Legal Remembrancer), for the Crown.

JUDGMENT.—This Rule has been issued on two grounds; first, why the case should not be transferred from the file of the Sub-Divisional Officer, Diamond Harbour to the file of some other competent Magistrate, and, secondly, why the case in which the petitioner is the complainant should not be postponed pending the hearing of the case in which the petitioner is the accused.

With regard to the first ground, we have gone through all the papers in connection with this litigation which has been hanging for a long time mainly on account of the conduct of the petitioner and we do not think that any ground has been made out for our interference on that ground. The allegations made against the Trying

Magistrate have all been denied; and there is one fact which makes it undesirable that the case should be transferred from the file of the Sub-Divisional Officer. An application was made previously to this Court for the transfer of the case in which the petitioner is the accused from the file of the Sub-Divisional Officer. That application was refused with the result that the case against the petitioner will be tried and is being tried by the Sub-Divisional Officer. It will not be desirable that the case in which the petitioner is the complainant should be tried by another Magistrate.

With regard to the second ground there have been several decisions of this Court which cannot at first sight be easily reconciled. The petitioner and the opposite party have been fighting over a piece of land. There was fight between them on the 22nd November 1924. The opposite party lodged a complaint on that day before the Kulpi Police charging the petitioner and his men with rioting and causing grievous hurt. On the 25th November 1924, the petitioner filed a complaint before the Deputy Magistrate of Diamond Harbour charging the opposite party with the same offence. The matter was sent to the Police for enquiry and it appears that both the cases were sent up by the Police.

It appears that both the cases were fixed for hearing on the 26th February. On that date some witnesses were examined in the case against the petitioner and the case in which the petitioner was the complainant was adjourned to the 3rd March. The learned Trial Magistrate in his explanation submits that the complainants in both cases wanted their cases to be taken up first. As this was physically impossible he took up the case against the petitioner first and as he had no time on that date to take the petitioner's case it was adjourned to the 3rd March. On the 3rd March the petitioner made several applications one of which was that the trial of his case might be adjourned till the disposal of the case against him. The application was rejected by the Sub-Divisional Officer. The petitioner thereupon moved the District Magistrate of 24-Parganas for transfer of both the cases from the file of the Sub-Divisional Officer and in the alternative for stay of the case in which he was the complainant pending the disposal of the case against him. The learned District Magistrate overruled these

objections and the petitioner obtained this Rule.

The first case that has been placed before us dealing with this point is the case of *Bachu Mollah v. Sia Ram Singh* (1). There are some very emphatic expressions of opinion by Petheram, C. J., and the practice of having counter-cases tried together is strongly condemned. This decision was not considered as good law by a Bench consisting of three Judges in the case of *Queen-Empress v. Chandra Bhuiya* (2) and it was distinguished or its authority attempted to be belittled by the fact that in the case of *Bachu Mollah v. Sia Ram Singh* (1), the learned Judges did not base their decision upon the opinion there expressed and though the Rule was issued upon that ground it was ultimately discharged. In the case of *Queen-Empress v. Chandra Bhuiya* (2) also though the learned Judges did not accept the dictum in *Bachu Molla's case* (1) they did not interfere with the procedure adopted by the Trial Court on the ground that the accused was not prejudiced and that it was a mere irregularity which had occasioned no failure of justice. These cases may be distinguished because the question arose for consideration in them after the decision of the cases. The question arose for consideration in them after the conclusion of the cases and the final orders passed in them did not rest on the conflicting views taken. The point has arisen before us with reference to pending cases. In *Garibulla Akanda v. Sadar Akanda* (3), the learned Judges were of opinion that two cross-cases should not be heard at one and the same time and the evidence in one should not be taken into consideration in the other case. It does not appear from the report that the cases above cited were placed before their Lordships. In *Judhisthir Gope v. Sheikh Samir* (4), it was held that cross-cases should be tried one after the other. The peculiar feature of that case was that one of the cases had already reached the final stage whereas very little was done in the other case. In *Sheikh Bahatur v. Nobadali* (5) decided by the Criminal Bench dealing with

undefended cases it was held that counter-cases should be tried simultaneously and contemporaneously but should be dealt with wholly separately from each other, each on its own merits and upon facts and circumstances appearing therein; the judgment in two cases being pronounced, if possible, after both the trials are over. There is an unreported case (Criminal Revision Case No. 662 of 1919 decided by Sanderson, C. J., and Duval, J., on the 27th August 1919) in which the view expressed in *Bachu Molla's case* (1) was accepted. In this state of the case-law we feel that there is no authority which is absolutely binding upon us. The Code is silent with regard to the procedure to be adopted in such circumstances. It should not, therefore, be laid down as an absolute rule of law that a particular course must be adopted. Each case has to be decided according to its requirements. In the present case the petitioner wants that his case should be taken up after the case against him has been decided. He apprehends that as an accused in the case against him he cannot be cross-examined but as a complainant he will be subjected to cross-examination by his adversary. The law does not allow an accused person to be cross-examined and we do not think that it will be proper that he should be compelled to place himself in the box for examination, though not in the capacity of an accused person. In the cases that have been decided and to which we have referred grievance was made by one of the parties as to simultaneous or separate trial of the cases. In some cases a party wanted that his case should be tried simultaneously with the cross-case against him and he was willing to take the risk of his being cross-examined in his case. The petitioner in this case does not want to run that risk and it is not fair to force a person in the position of an accused to throw himself open to cross-examination by the other side. Furthermore, in the present case we find that 16 witnesses have been examined in the case against him. We think, therefore, that it will serve the ends of justice if we direct that the case against the petitioner should be disposed of first and then the petitioner's case, if he so wishes, be taken up, and we order accordingly.

The Rule is made absolute to this extent. Let the record be sent down at once.

S. D.

Rule made absolute.

(1) 14 C. 358; 7 Ind. Dec. (N. S.) 237.

(2) 20 C. 537; 10 Ind. Dec. (N. S.) 365.

(3) 81 Ind. Cas. 557; 39 C. L. J. 331; 25 Cr. L. J. 941; (1924) A. I. R. (C.) 813.

(4) 75 Ind. Cas. 364; 27 C. W. N. 700; 37 C. L. J. 410; (1923) A. I. R. (C.) 644; 24 Cr. L. J. 940.

(5) 83 Ind. Cas. 625; 28 C. W. N. 487; (1924) A. I. R. (C.) 634; 26 Cr. L. J. 65.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 716 OF 1924.

April 15, 1925.

Present:—Justice Sir Charles Gordon
Spencer, Kt.A. M. A. MURUGAPPA CHETTIAR
BY HIS AGENT THAYAMMASWAMI
PILLAI—DEFENDANT No. 4—PETITIONER
versusL. K. S. S. FIRM AND V. S. S. S. FIRM
THROUGH THEIR MANAGING PARTNER
SHUNMUGAVELU MUDALIAR AND
ANOTHER—PLAINTIFF AND DEFENDANTS
Nos. 1 TO 3—RESPONDENTS.*Civil Procedure Code (Act V of 1908), s. 115, O. I.,
r. 10—Addition of parties—Misjoinder of parties and
causes of action—Revision.*The addition of a party under O. I., r. 10, C. P. C.,
is ordinarily a matter within the discretion of the
Court trying the suit, and an erroneous exercise of
discretion in a matter of procedure should not be
regarded as something done illegally in the exercise
of the Court's jurisdiction under s. 115, C. P. C.*Sitaramaya v. Ramappaya*, 39 Ind. Cas. 160; 5 L. W.
207, not followed.Where, however, the addition of a person as a
party results not only in a misjoinder of parties but
of causes of action as well, a Court of Revision should
interfere.*Arunachalam Chettyar v. Arunachalam Chettyar*, 69
Ind. Cas. 966; 43 M. L. J. 218; 16 L. W. 175; (1922) M.
W. N. 453; (1922) A. I. R. (M.) 436, followed.*Obiter.*—The liability of the transferee of a debtor's
liability is a question on which the Court can
adjudicate without referring the plaintiff to a separate
suit.*Deb Narain Dutt v. Ram Sadhan Mondal*, 20 Ind.
Cas. 630; 41 C. 137; 17 C. W. N. 1143; 18 C. L. J. 603
and *Ajudhia Nath v. Anant Das*, 3 A. 799; A. W. N.
(1881) 73; 2 Ind. Dec. (N. S.) 501, relied upon.Petition, under s. 115 of Act V of 1908,
praying the High Court to revise an order
of the Court of the District Munsif,
Madura, Taluk at Madura, dated the 2nd
July 1924, in Interlocutory Application
No. 322 of 1924, in O. S. No. 483 of 1923.Mr. T. M. Krishnaswamy Iyer, for the
Petitioner.

Mr. K. Rajah Iyer, for the Respondents.

JUDGMENT.—The suit as originally
framed was based on the liability arising
out of a promissory note executed by de-
fendants Nos. 1 to 3. The petitioner has
been added as 4th defendant as being the
transferee of the debtor's liability, and
he seeks to have the order making him a
party set aside in these proceedings under
s. 116, C. P. C.The addition of a party under O. I., r. 10
is ordinarily a matter within the discretion
of the Court trying the suit, and an erro-
neous exercise of discretion in a matter ofprocedure should not be regarded as some-
thing done illegally in the exercise of the
Court's jurisdiction. *Sitaramaya v. Rama-
paya* (1) is an authority of a Single Judge
of this Court for the view that even in
such cases the High Court can interfere
in revision, but I respectfully doubt its
correctness, and I think that the law will
soon make it clear that that view was
wrong, if the recommendations of the Civil
Justice Committee are accepted.But in the present case the liability of
the petitioner under his sale-deed and the
liability of defendants Nos 1 to 3 under
the promissory note are quite distinct and
prima facie there would appear to be here
not only a misjoinder of parties, but a mis-
joinder of causes of action in which case
a Bench of this Court has held in *Aru-
nachalam Chettyar v. Arunachalam Chet-
tyar* (2) that a Court of Revision should
interfere unless and until the law is amend-
ed. I think I am bound by that decision.But I find that besides adding the pe-
titioner as a party to the suit, the lower
Court allowed the plaintiff to amend the
plaint by adding a paragraph in which
this petitioner's liability as a transferee of
the contractual liability of defendants
Nos. 1 to 3 is put in issue. The petitioner
has not asked this Court to interfere with
the order of the lower Court permitting
this alteration of the character of the suit,
and I do not think it necessary to declare
that the trial should not be allowed to
proceed in the manner permitted by the
Trying Court. In *Deb Narain Dutt v. Ram
Sadhan Mandal* (3) and *Ajudhia Nath v.
Anant Das* (4), the liability of a transferee
of a debtor's liability was held to be a
question on which the Court could adjudi-
cate without referring the plaintiff to a sepa-
rate suit. In para. 7 of the defendant's
written statement he has raised a question
of estoppel which will have to be disposed
of in the suit. It cannot be decided in
these proceedings.The civil revision petition is, therefore
dismissed with costs.

V. N. V.

Petition dismissed.

S. D.

(1) 39 Ind. Cas. 150; 5 L. W. 207.

(2) 69 Ind. Cas. 966; 43 M. L. J. 218; 16 L. W. 175;
(1922) M. W. N. 453; (1922) A. I. R. (M.) 436.(3) 20 Ind. Cas. 630; 41 C. 137; 17 C. W. N. 1143; 18
C. L. J. 603.

(4) 3 A. 799; A. W. N. (1881) 73; 2 Ind. Dec. (N. S.) 501.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 328
AND 329 OF 1924.

March 24, 1925.

Present:—Justice Sir Ewart Greaves, Kt.,
and Mr. Justice Cuming.

PURNA CHANDRA SINGHA AND OTHERS
—DEFENDANTS—APPELLANTS IN No. 328 OF
1924—PLAINTIFFS—APPELLANTS IN No. 329
OF 1924

versus

RADHIKA MOHAN DEY AND OTHERS—
PLAINTIFFS—RESPONDENTS IN No. 328 OF 1924.

Sheikh SADAK MRIDHA AND OTHERS—
DEFENDANTS—RESPONDENTS IN No. 329
OF 1924.

*Evidence Act (I of 1872), s. 90—Document more
than 30 years old—Presumption as to genuineness—
Proper custody, production from, proof of.*

A *chitta* relating to a private partition among
certain persons of certain property and purporting to
be more than 30 years old was produced in Court by
an officer of the Collectorate who stated that the
document had been handed over to him by the
record keeper to be produced in Court:

Held, that the genuineness of the document could
not be presumed under s. 90 of the Evidence Act
inasmuch as (a) there was nothing to show that the
document was actually in the custody of the
Collectorate before it was produced in Court, and
(b) there was nothing to show that the custody of the
Collectorate was proper custody within the meaning
of the section. [p. 722, col. 2.]

Appeals against the decrees of the First
Additional District Judge, Dacca, dated the
24th of September 1923, reversing those of
the Subordinate Judge, Fifth Court of that
District, dated the 26th of January 1922.

Mr. Mahendra Nath Roy, Babus Troi-
lakhya Nath Ghose and Santosh Kumar Pal,
for the Appellants.

Mr. Basak, Babus Ramani Mohan Chatter-
jee and Kebati Mohan Chatterjee, for the
Respondents.

JUDGMENT.

Cuming, J.—These two Appeals
Nos. 328 and 329 of 1924 arise out of
two suits. The first suit out of which
Appeal No. 329 arises was a suit for
partition of a certain *howlah* and the
suit out of which the second appeal arises
was a suit for declaration of title and
for recovery of possession on the basis of
a previous partition of the property in
1212 by virtue of a certain *chitta*. With
regard to the first suit, it was dismissed by
the First Court on the ground that the pro-
perty had already been partitioned. The
lower Appellate Court held that no previous
partition had been proved and made a pre-
liminary decree for partition. With regard

to the second suit the First Court decreed
it on the finding that there was a previous
partition and, therefore, the *chitta* of 1212
B. S. on which the plaintiff in that suit
relied was genuine. The Second Court dis-
missed the suit finding that there had
been no previous partition. The defendant
in the first suit who is the plaintiff in the
second suit has appealed to this Court
against both the decrees.

It will be seen that the decision of the
second suit would depend on the view to
be taken of the first suit, for clearly if we
hold that the decision of the first Appel-
late Court is correct, then the order in the
second appeal will also be correct. I would,
therefore, deal, first of all, with Appeal No.
328 of 1924, which is a suit for partition.

The first point that has been argued by
the learned Advocate for the appellant is
that the Judge was wrong because he
refused to apply the presumption of genuine-
ness under s. 90 of the Evidence Act to a
certain *chitta* of 1212 B. S. On the ground
that it had not been proved that this *chitta*
had been produced from proper custody,
I have no hesitation in holding that the
Judge was quite right in the view he has
taken, namely, that it had not been proved
that the *chitta* had been produced from
proper custody. The custody alleged by
the defendant was that of the Collectorate.
Now in the first place there is no evidence
to clearly show that this document had been
in the custody of the Collectorate. An
Officer of the Collectorate was examined and
he stated that the record-keeper had given
him this document to produce in Court. He
himself was neither the record-keeper nor
an officer of the record-room, and the docu-
ment had not been in his custody. All he
proved was that the record-keeper had given
him the document to be produced in Court;
that does not certainly prove that this docu-
ment was actually in the custody of the
Collectorate and the learned Judge was
quite right in the conclusion he came to on
this point. Then there is a further fact that
even if it be admitted for the sake of
argument that this document was produced
from the Collectorate there is nothing to
show that the custody of the Collectorate
was a proper custody. The document in
questions is a *chitta* relating apparently
to a private partition among certain
persons of certain property. Normally
there is no reason for its being in the
Collectorate and, therefore, normally the

Collectorate could not be considered the proper custodian of this document; an endeavour had been made by the defendant-appellant to prove that this document was filed in the Collectorate in 1865 in connection with a petition for registration of their *howlah*. The learned Judge points out and I may incidentally note that this is purely a question of fact that this document is not included in the list of documents which were filed in 1865 at the time when the petition for registration of the *howlah* was made. Mr. Roy has endeavoured to persuade us that the record was not in proper order and he seems to suggest that there has been some change in a certain document, namely, Ex. 2, a list of papers which was filed with the application for registration. Now this ground of appeal finds no place whatever in the twenty-nine grounds of appeal in this case. It is a ground which depends on question of facts and no notice whatever had been given of it to the opposite party. Moreover it is a remarkable fact that this suggestion was never made in the Court of First Appeal. Had there been any substitution or suspicious change in the document obviously the matter would have suggested itself to the learned Vakil who conducted the appeal in the lower Court. Mr. Roy then urged that the parties have been in separate possession of this property ever since 1212 B. S. and he argued that the learned Judge was wrong in saying that nothing could be inferred from that circumstance this way or that way. As a matter of fact the learned Judge in dealing with this point was considering not the separate possession of the whole of the property by different co-sharers, but was referring to the separate possession of certain shares of the homestead by the owners and I am not prepared to say that any inference can be drawn necessarily from the fact that the parties had been in separate possession of their shares of the homestead for many years that there must have been a partition of the whole property.

Then Mr. Roy referred us to a large number of documents in the case in which reference is made to a partition and he seems to argue, if I understand him rightly, that the only inference that the Judge could legally draw from a reference to these documents is that there had been a previous partition. I am not prepared to accept this contention. The learned Judge has so far as I can see dealt with every document in the case, and it is not contended by Mr.

Roy that in this case he has wrongly considered the terms of any of these documents. After a very careful consideration of all the documents produced by both the parties, he has come to the finding of fact, namely, that there was no previous partition. Whether I should come myself to the same finding if it were open to me to go into the facts, I am not prepared to say. Possibly I might not have; but the first Appellate Court was the Judge of facts and we are not sitting in a Court of second appeal able to deal with questions of fact. On consideration of all the evidence he came to a certain finding of fact and he cannot be said to have arrived at this finding without taking into consideration the evidence before him or to have wrongly construed any document that was before him.

For these reasons, the appeals fail and are, therefore, dismissed with costs.

Greaves, J.—I agree.

Z. K.

Appeals dismissed.

PATNA HIGH COURT.

PRIVY COUNCIL APPEAL No. 15 OF 1925.

June 23, 1925.

Present :—Mr. Justice Das and
Mr. Justice Adami.

H. G. PEREIRA—PETITIONER

versus

THE EAST INDIAN RAILWAY—
OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), s. 109—
Limitation Act (IX of 1908), s. 5—"Final order,"
meaning of—Appeal—Order granting extension of
time—Appeal to Privy Council, whether competent.*

A final order within the meaning of s. 109 of the C. P. C. is an order which finally decides any matter which is directly at issue in the case in respect of the rights of the parties.

An order extending the time for presenting an appeal under s. 5 of the Limitation Act is not a "final order" within the meaning of s. 109 of the C. P. C., and is not, therefore, open to appeal to the Privy Council.

Application for leave to appeal to His Majesty in Council arising out of First Appeal No. 23 of 1925.

Mr. S. N. Bose, for the Petitioner.

Messrs. N. C. Sinha, N. C. Ghose and B. B. Mukherji, for the Opposite Party.

JUDGMENT.—This is an application for leave to appeal to His Majesty in Council; and the only question which we

have to decide is whether the order complained of is a final order within the meaning of s. 109 of the C. P. C. The order to which objection is taken in substance extended the time for presenting an appeal to this Court under s. 5 of the Limitation Act. A final order within the meaning of the section is an order which finally decides any matter which is directly at issue in the case in respect to the rights of the parties. We quite agree that if we had refused the application made to us under s. 5 of the Limitation Act, that refusal would have operated as a dismissal of the appeal, and subject to the other provision of the section the order would be appealable not indeed as a final order but as "a decree passed on appeal." But where time is allowed under statutory sanction, and the appeal is admitted, the case obviously stands on a different footing. We have not decided, finally or otherwise, any of the matters in controversy between the parties in the litigation. All that we have done is to remove the bar under the Limitation Act, thereby enabling this Court to take cognizance of the appeal and to decide the rights of the parties. We must accordingly refuse the application with costs. Hearing fee five gold mohurs.

Z. K.

Application dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1442 OF 1924.

March 20, 1925.

Present:—Justice Sir Ewart Greaves, Kt.,
and Mr. Justice Cuming.

Nawab MURTAZA BEGUM—DEFENDANT
—PETITIONER

versus

JOGENDRA NATH ROY AND OTHERS—
OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. IX, r. 13
—Mortgage suit—Ex parte decree—Appeal by plaintiff
—Decree varied—Application by defendant to set aside
ex parte decree, whether maintainable.

A mortgage suit was decreed *ex parte* but the stipulated rate of interest was not allowed from the date of the institution of the suit. After the preliminary decree was signed the defendant applied under r. 13 of O. IX of the C. P. C. to have the matter re-opened. The plaintiff preferred an appeal against the decree with regard to the dismissal of his claim for interest from the date of the institution of the suit. The appeal was allowed and the Appellate Court passed a fresh decree in lieu of the decree

passed by the Trial Court. Thereafter the defendant's application to set aside the *ex parte* decree was rejected by the Trial Court on the ground that the decree sought to be set aside had ceased to exist and had merged in the decree of the Appellate Court.

Held, that the defendant's application under r. 13 of O. IX of the C. P. C. was rightly dismissed inasmuch as there was no decree of the Trial Court in existence which could be set aside.

Rule against an order of the Sub-Judge, Third Court, 24-Perganas (Alipore), in Miscellaneous Case No. 104 of 1923, in (T.S. No. 239 of 1922).

Eabus Sitaram Banerji and Byomkesh Bose, for the Petitioner.

Dr. Basak and Babu Bankim Chandra Banerji, for the Opposite Parties.

JUDGMENT.

Greaves, J.—An *ex parte* decree was passed in a mortgage suit on the 5th December 1923. The suit was decreed in full but the stipulated rate of interest was not allowed from the date of the institution of the suit. After the preliminary decree was signed on the 12th December 1923 and on the same day the petitioner applied under O. IX, r. 13 to have the matter re-opened. Meantime on the 22nd January 1924 the decree-holders preferred an appeal to this Court with regard to the dismissal of their claim for interest from the date of the institution of the suit. On the 16th July 1924 that appeal was allowed and a decree was passed, so far as is material in these terms: "It is ordered and decreed that the decree of the lower Courts be and the same is hereby set aside and in lieu thereof it is hereby declared that there is due and owing the sum of Rs. 2,40,429-12-3 on account of principal and so much on account of costs" and interest was allowed as mentioned in the decree. On the 1st November 1924 the application under O. IX, r. 13 came up for hearing. This was dismissed by the learned Subordinate Judge on the ground that there was no decree against which the application could be directed and no decree which could be set aside. He accordingly dismissed the application on this ground. Against this dismissal this Rule was granted and we were referred to a recent decision reported as *Kalimuddin Ahammad v. Ishakuddin* (1) as authority for the proposition that notwithstanding what happened if there were certain points which had not been dealt with in the judgment of this Court which the petitioner desired to raise in the Court below against the *ex*

(1) 83 Ind. Cas. 220; 28 C. W. N. 795; 39 C. L. J. 369; 51 C. 715; (1924) A. I. R. (C.) 820.

parte decree and notwithstanding the decree of this Court he was entitled to raise them. It seems to us that that case stands as a decision upon the particular facts for in that case the appeal to the High Court had been dismissed as it could not proceed owing to the death of one of the respondents her heirs not having been brought on the record. But the matter is different here. Moreover there are no merits and the petitioner merely delayed with a view to avoid payment of her just dues which she had really admitted by asking adjournments in order that she might raise money elsewhere for the discharge of the mortgage.

Under the circumstances, it would be deplorable if we are to aid her in her delaying tactics by acceding to her prayer.

The Rule is, accordingly, discharged with costs-hearing-fee two gold mohurs.

Let the record be sent down at once.

Cuming, J.—I agree.

Z. K.

Rule discharged.

MADRAS HIGH COURT.

CIVIL APPEAL No. 168 OF 1922

AND

SECOND CIVIL APPEALS NOS. 623 TO 625
OF 1921.

January 21, 1925.

Present:—Sir Victor Murray Coutts-Trotter, Kt., Chief Justice, and
Mr. Justice Krishnan.

Sreemat TIRUMALA TIRUPATI
AND OTHERS—PLAINTIFFS—APPELLANTS
versus

NANDI VADA VENKATASUBBA
RAO AND OTHERS—DEFENDANTS—
RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 65, 175—Lessor, premium payable to—Charge—Sale and lease, distinction between—Transfer of Property Act, whether exhaustive.

When the owner of a land grants a perpetual lease of it in consideration of rent to be paid, as well as a premium, he gets no charge on the leasehold right but thus creates for the premium so payable. [p. 726, col. 1.]

Shepherd v. Beetham, (1877) 6 Ch. D. 597; 43 L. J. Ch. 763; 33 L. T. 909; 25 W. R. 761 and *Kandam Pillai v. Ramasami Munnadi*, 51 Ind. Cas. 597; 42 M. 203, referred to,

There is a fundamental distinction, under the Transfer of Property Act between a transfer of immovable property and a transfer of the right to the enjoyment of immovable property. A lease in perpetuity is merely a transfer of the right to enjoy property. [*ibid.*]

The only charge, valid in the Indian Law, on landed property is to be found in s. 55 of the Transfer of Property Act which is confined to cases which deal with the transfer of the property itself. [*ibid.*]

Per *Coutts Trotter, C. J.*—The Transfer of Property Act is intended to be exhaustive. [*ibid.*]

Appeal against a decree of the Court of the Subordinate Judge, Masulipatam, in O. S. No. 26 of 1918, and second appeals against the decrees of the District Court of Kistna at Masulipatam, in A. S. Nos. 183, 181 and 182 of 1919, preferred against those of the Court of the Additional District Munsif, Gudivada, in O. S. Nos. 324, 152 and 319 of 1919 respectively.

Mr. K. Bhashyam Iyengar, for the Appellants.

Messrs. Ramadoss and V. Krishna Mohan, for the Respondents.

JUDGMENT.

Coutts-Trotter, C. J.—In this case the plaintiffs are the owners of an *agraharam* village in the sense that they own both the *melvaram* and the *kudivaram* rights. In the year 1909, there was a grant of the *kudivaram* right to the 1st and 2nd defendants and in consideration for that, they promised to pay a rent and they also promised to pay what is described as *nazarana* to the landlords and that may be roughly described as a premium for the granting of the *kudivaram* which no doubt was in perpetuity. They gave a promissory note for the amount and the question is whether the debt—because it, undoubtedly, was a debt—was a mere personal debt affecting to the makers of the promissory note or whether it is a charge on the land. In the view that we take of this case the further question, which arose at the trial, *viz.*, whether the 3rd and 4th defendants were *bona fide* purchasers for value without notice, does not arise. It is, no doubt, true that there is a direct decision in England: *Shepherd v. Beetham* (1), a decision of Malins, V. C., which treats a premium as creating a lien upon the leasehold premises. Whether that decision is correct or not, we are not concerned to enquire although it does seem certainly an astounding result. But, in our opinion,

(1) (1877) 6 Ch. D. 597; 46 L. J. Ch. 763; 36 L. T. 909; 25 W. R. 764.

in India the matter is entirely regulated by Statute. There is a fundamental distinction under the Transfer of Property Act between a transfer of immoveable property and a transfer of the right to the enjoyment of immoveable property; and a lease is defined by s. 105 of the Transfer of Property Act as a transfer of a right to enjoy immoveable property made for a certain time, express or implied, or in perpetuity in consideration of the price paid or promised or of money, etc. It is perfectly clear, therefore, that the Transfer of Property Act regards a lease in perpetuity as merely a transfer of the right to enjoy property. Does it or does it not create a charge upon the land? The answer is that the only charge, valid in Indian Law, on landed property, is to be found in the section of the Act which creates such a charge and s. 55 is obviously confined to cases which deal not merely with the transfer of the mere right of enjoyment but with the transfer of the property itself, for, for any other lien or charge, the Act makes no provision at all. In our opinion we are bound to hold that we cannot but regard the Act as intended to be exhaustive and that we are not at liberty to follow English Common Law rules. On this ground we think the appeal fails and must be dismissed with costs. The Second Appeals (Nos. 623 of 1921, 624 of 1921 and 625 of 1921) will follow and are also dismissed with costs.

Krishnan, J.—The question that arises for our decision in this case is, whether when the owner of a land grants a perpetual lease of it in consideration of rent to be paid, as well as of a premium, he has got a charge on the lease-hold right he has so created for the premium so payable.

The promissory note in this case was executed for such a premium and it is now sought in appeal before us to be enforced not against the makers of the note nor against the persons who took the lease but against certain third parties who have now become transferees or assignees of the lease right. Against them the amount of the note could be claimed if at all, only if there is a charge created in favour of the landlords on the property in their hands.

The English Law is apparently that such a lien does not exist; but it is not necessary to consider that position here, for, we are concerned only with the Indian Law on the point. The appellant has to show us how

he gets the charge. The document by which the lease was created gives him no charge whatever for the amount. Therefore the charge must be rested by him upon the general law of this country. Now so far as it appears the only lien that is recognised in the Transfer of Property Act in this country is a lien in favour of the vendor. That being so, a strenuous effort was made by the appellant's Vakil to persuade us that the grant of a lease like this really amounted to a sale or transfer of a fractional right in the property for a price, namely, the premium payable for the grant and he argued that as vendors of that right the plaintiffs have a charge on the lease-hold estate which has been given to defendants Nos. 1 and 2. It is impossible to accept this view, for the Transfer of Property Act makes a very clear distinction between a sale and a lease. This is a transaction that falls clearly within the definition of a lease in the Transfer of Property Act, s. 105; I do not see how then it could be brought under the definition of a sale. The payment of premium is only one of the incidents of the lease just as payment of rent is. It is certainly not a price paid for the transfer of immoveable property as defined in s. 54 of the Transfer of Property Act. It is impossible, it seems to me, to hold that the relationship between the plaintiffs and defendants Nos. 1 and 2 was anything but that of a lessor and a lessee. Apart from the Transfer of Property Act it has not been shown that there is any Common Law in India on which the right of lien claimed could be founded. It is true that in one of the decisions brought to our notice, viz., *Kandasami Pillai v. Ramasami Mannadi* (2), there is an observation by the then learned Chief Justice that a lien like that which exists in England may be claimed here. But that observation cannot be treated as authority as it is only an *obiter dictum* of the learned Judge. When that case came on appeal before three other learned Judges of this Court, these learned Judges held that the principles of equity in England could not be introduced into India for purposes of creating rights like the one in question. The view of the Chief Justice cannot be treated as of weight after the expression of opinion by the Appellate Judges. There is no other decision which has

been brought to our notice where such a lien has been recognised in India.

I am, therefore, entirely in agreement with the learned Chief Justice in holding that whatever the position may be in England, we are not justified in introducing new conceptions of charges in India which are not supported by our Statute Law. When the Estates Land Act was passed the Legislature had to consider what kind of charges should be given to the land-holder on a lease-hold estate. That was the only instance in which the Legislature dealt with a lien of the kind claimed and there we find that the lien was not allowed, see s. 25 of the Estates Land Act. It seems quite clear that such a lien as is now set up cannot be supported. In the result, the appeal and all the second appeals must be dismissed with costs.

V. N. V.

Appeals dismissed.

S. D.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE

No. 1960 OF 1923.

May 1, 1925.

Present:—Mr. Justice Cuming.

PANCHI DAS MINOR BY HER NEXT
FRIEND GOPI NATH SAHA—PLAINTIFF
—APPELLANT

versus

KSHIRODA DAS AND OTHERS—DEFENDANTS
—RESPONDENTS.

Contract Act (IX of 1872), s. 16—Mortgage—Interest, high rate of—Court, power of, to reduce rate of interest—Undue influence, finding of, whether necessary.

A finding in a suit to recover money due on a mortgage-bond that the parties are near relations, that there was good security given for the debt and that the interest charged is excessive is not sufficient to enable the Court to reduce the rate of interest. There must be a further finding that the mortgagee had unduly taken advantage of his position and that he was in a position to dominate the will of the mortgagor and to exercise undue influence over him. Unless it can be shown that undue advantage was taken, the Court cannot interfere with the contract.

Appeal against a decree of the District Judge, Jessore, dated the 4th of April 1923, modifying that of the Munsif, Third Court, Narail, dated the 6th of January 1922.

Babu Bireswar Bagchi, for the Appellant,

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff to recover a certain sum of money borrowed on a mortgage-bond at an interest of $37\frac{1}{2}$ per cent. per annum. The Trial Court decreed the plaintiff's suit in full. The lower Appellate Court modified the decree of the first Court by reducing the rate of interest to $12\frac{1}{2}$ per cent. per annum on the ground that the rate of interest was excessive and the transaction as between the parties was substantially unfair. In dealing with this point the learned District Judge says: "I am of opinion that the argument is valid. The parties were near relations and there was good security given for the debt. In the circumstances the interest charged was clearly excessive and as between the parties the transaction was substantially unfair". This finding, however, by itself is not sufficient to justify the Court in reducing the rate of interest. The learned Judge ought to have gone further and it was necessary for him to find that the money lender had unduly taken advantage of his position and that he was in a position to dominate the Will of the borrower and to exercise an undue influence over him. Unless it can be shown that undue advantage has been taken, the Court cannot interfere with the contract. The only finding that the learned Judge has come to is that there was good security given for the debt. There is no suggestion by any of the parties that the one dominated the other or had exercised undue influence over him.

In these circumstances I allow this appeal, set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance with costs in all the Courts, including this Court.

The defendant will be allowed one month's time from the date of receipt of this order and record in the lower Court for the payment of the decretal amount. In default, the mortgaged property will be sold in satisfaction of the decretal amount. Interest at the bond rate will run up to the date fixed by the Trial Court as the due date of payment and at 6 per cent. per annum from that date until realisation.

Z. K.

Appeal allowed.

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 37 OF 1924.

March 3, 1925.

Present:—Mr. Justice Heald and
Mr. Justice Chari.MAUNG SIT PAUNG AND ANOTHER—
APPELLANTS

versus

MAUNG TUN AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 15—Jurisdiction of Court—Suit lying in Court of lower grade—Higher Court, whether can try—Valuation by plaintiff.

Section 15 of the C. P. C. is imperative, but it is imperative only on the suitor, who is bound to bring his suit in the Court of the lowest grade. The section is not imperative on the Courts, and does not deprive a higher Court of jurisdiction to try a suit that should have been brought in a Court of a lower grade. [p. 728, col 2.]

Nidhi Lal v. Mazhar Husain, 7 A. 230; A. W. N. (1885) 1; 4 Ind. Dec. (N. S.) 452 (F. B.), referred to.

The valuation put by the plaintiff *prima facie* determines the jurisdiction of the Court unless the suit is obviously over-valued and such over-valuation is *mala fide*. [*ibid.*]

Mr. Ankelsaria, for the Appellants.

Mr. Thein Maung, for the Respondents.

JUDGMENT.—In the suit out of which this appeal arises there has been a waste of valuable time probably due to a misapprehension on the part of the Judge of the effect of s. 15 of the C. P. C.

The facts of this case are that the plaintiff filed a suit to recover a piece of land measuring about 40 acres. He valued the land at Rs. 5,000 and adding to that sum Rs. 802 which he claimed as mesne profits, he valued the whole for purposes of jurisdiction at Rs. 5,802. The written statement challenged this valuation and alleged that the land was not worth more than Rs. 3,000 and that even adding the value of the claim for mesne profits the suit was well under Rs. 5,000 which was the limit of the jurisdiction of the Sub-Divisional Court. The learned Judge seems to have imagined that the objection was one against his own jurisdiction, which it most certainly was not, and framed a preliminary issue as to the value of the land in suit. He made an elaborate enquiry, examined eight witnesses besides the plaintiff and the defendant, and arrived at the conclusion that the land was worth Rs. 75 per acre only, then the suit would be beyond the jurisdiction of the Sub-Divisional Judge and triable only by the District Court.

Before analysing the evidence on the question of the value of the land it may be well to draw the attention of the District Judge to

the mistake he made. He seems to have thought that s. 15 of the C. P. C., which enacts that every suit "shall" be instituted in the lowest Court having jurisdiction was imperative and that, therefore, he, the District Judge, had no jurisdiction to try the case. This is apparent from the concluding paragraph of his judgment. In this he is entirely mistaken. Section 15 of the C. P. C., is imperative, undoubtedly, but it is so framed to show that it is imperative on the suitor who is bound to bring his suit in the Court of lowest grade. The word "shall" is certainly not imperative on the Courts and does not deprive the higher Court of its jurisdiction to try the suit: *Nidhi Lal v. Mazhar Husain* (1). That section is intended to prevent the Courts of higher grade from being overcrowded with suits and is intended for the benefit of such Courts. The higher Court is not bound to take advantage of it and can try such suits. It is also well-established that the valuation put by the plaintiff *prima facie* determines the jurisdiction of the Court unless the suit is obviously over-valued and such over-valuation is *mala fide*.

Turning to the evidence, it is quite clear that there is a good deal of diversity of opinion as to the value of the land. In a case where the value is doubtful it is much safer that the Court of higher jurisdiction should entertain the suit and decide it. The plaintiff in this suit examined himself and a number of witnesses. He says that he was offered Rs. 130 by one Ali, who later raised the offer to Rs. 135 per acre. Mg. Kyaw Hla also offered to buy the land at Rs. 135 per acre. U Ogh Doke, a Headman, acting on behalf of others, also offered to buy this land at Rs. 145 per acre. Haji Ali and Ogh Doke support the statement. Maung Ogh Doke was not even cross-examined. This means that his statement that he offered to buy the land was accepted by the defendant. He also states that the plaintiff wanted Rs. 170 per acre. Tun Myaing gives evidence that he sold a piece of land on the other side of the creek measuring 24 acres for Rs. 3,000 that is at the rate of Rs. 125 per acre. He also adds that the lands which he sold are not so good as the plaintiff's land. Maung Kya Byu, who bought the land from Maung Tun Myaing, gives evidence to the same effect that the plaintiff's land is more

(1) 7 A. 230; A. W. N. (1885) 1; 4 Ind. Dec. (N. S.) 452 (F. B.).

valuable than the land bought by him. He also files the sale-deed Ex. A. He was not cross-examined. If the statement of these two witnesses is accepted that the plaintiff's land is better than the land which was the subject of sale between them then it follows it must be worth at least Rs. 125. The learned Judge discredited all this evidence for no conceivable reason and proceeded on the ground that the sale-deed by which the first defendant purchased the land in suit and other lands works out at Rs. 75 per acre, and that the land in suit must, therefore, be worth only that much, since four years ago when the plaintiff bought the land in suit he paid only Rs. 44 per acre. We do not think that either of these is a reliable test and we, therefore, have come to the conclusion that the land in suit has been properly valued by the plaintiff at Rs. 5,000. We set aside the order of the Trial Court and order him to re-admit the plaint in his file and hear the suit on the merits. The respondent will pay the appellant's costs of this appeal. Advocate's fee 5 gold mohurs.

N. H.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 271 OF 1924.

March 19, 1925.

Present:—Justice Sir Ewart Greaves, Kt.,
and Mr. Justice Cuming.

MONORANJAN ADYA—APPELLANT

versus

BIJOY KUMAR ADYA AND OTHERS—
RESPONDENTS.

Probate and Administration Act (V of 1881), s. 86—
Letters of Administration with Will annexed, applica-
tion for—Order holding that certain person has
locus standi to oppose application—Appeal, whether
lies.

A right of appeal under s. 86 of the Probate and
Administration Act is subject to there being a right of
appeal against the interlocutory order under the C. P.
C.

Lakhi Narain Shaw v. Dhanada Kumar Ghose, 15
Ind. Cas. 686; 17 O. L. J. 230 at p. 232; 19 O. W. N.
1099, followed.

An order passed in Probate proceeding holding
that a certain person has a *locus standi* to oppose an
application for the grant of Letters of Administration
with the Will annexed is not open to appeal.

Appeal against an order of the District
Judge, 24-Parganas, dated the 8th July
1924.

Mr. Khitis Chandra Chakravarty and
Babu Panchanan Ghosal, for the Appellant.

Babus Anilendra Nath Roy Chowdhury
and Gour Mohon Datta, for the Respond-
ents.

JUDGMENT.

Greaves, J.—This is an appeal against
an order of the District Judge in Probate
proceeding, holding that a certain person
had a *locus standi* to oppose the application
for the grant of Letters of Administration
with the Will annexed. A preliminary
objection was taken that no appeal lay and
we think that the objection is well-founded.
Apparently, there is some conflict of deci-
sions in this Court and it is urged before
us that by virtue of the provisions of s. 86
of the Probate and Administration Act
there is always an appeal from an in-
terlocutory order in Probate and Administra-
tion proceedings and it is stated that the
reference to the C. P. C. in the section is
merely referable to the procedure to be
adopted in such an appeal. We think that
it is not so and that the appeal by s. 86 is
subject to there being a right of appeal
against an interlocutory order under the
C. P. C. This is the view taken in the case
of *Lakhi Narain Shaw v. Dhanada Kumar
Ghose* (1). As pointed out in this case, the
older cases to which we were referred were
decisions founded on the provisions of s.
588, sub-s. (2) of the old C. P. C., which is
not reproduced in the Code of 1908. We
agree with the view expressed in *Lakhi
Narain Shaw v. Dhanada Kumar Ghose* (1),
that there is no interlocutory appeal from
the order that has been passed by the
District Judge.

The appeal, accordingly, fails and is
dismissed with costs, hearing-fee 2 gold
mohurs.

Cuming, J.—I agree.

Z. K.

Appeal dismissed.

(1) 15 Ind. Cas. 686; 17 O. L. J. 230 at p. 232; 19 C.
W. N. 1099.

MADRAS HIGH COURT.

CIVIL APPEAL No. 71 OF 1922.

March 6, 1925.

Present:—Justice Sir Charles Gordon
Spencer, Kt., and Mr. Justice Ramesam.

NILAMBUR THACHARAKAVIL

MANAVEDAN THIRUMALPAD

AVERGAL—PLAINTIFF—APPELLANT

versus

MESSRS. PARRY & CO., LTD.—DEFENDANTS
—RESPONDENTS.

Landlord and tenant—Two leases, grant of, to same

person—Implication of surrender of first—Indian and English Law, difference between.

The rule of English Law that the acceptance of a new lease operates as a surrender of a prior lease to the same person of the same property is applicable only in cases where there is such incompatibility between the enjoyment under the new lease and the enjoyment under the prior lease that the second will involve a surrender of the first. [p. 730, col. 2; 731, col. 1.]

The plaintiff, a landlord, leased to the defendant a large plot of land for purposes of coffee cultivation for a period of 91 years. Less than 20 years thereafter, the plaintiff again granted 20 acres out of the same area to the same person on lease for gold washing purposes for a period of 36 years. The lessee specifically agreed to pay rent on both the leases without any abatement. On the expiry of the period of the second lease, in a suit by the landlord for damages for use and occupation in respect of the 20 acres of land and for value of buildings and machinery alleged to have been wrongly carried away:

Held, (1) that the grant of the second lease was not inconsistent with the continuation of the first; [p. 731, col. 1.]

(2) that the plaintiff was not, during the existence of the first and the longer lease, entitled to ask for relief on the ground of expiry of the second lease. [*ibid.*]

Per *Ramesam, J.*—Under the Indian Law, where there are two leases to the same person, a surrender of the first lease need not necessarily be implied from the grant of the second. [p. 731, col. 2.]

Even where the leases are of the same kind and they are overlapping and the terms of the second are somewhat inconsistent with the terms of the first, all that is necessary to imply is a cancellation of the first only for a period which is overlapped by the second. [*ibid.*]

Unlike under the English Law, delivery of possession by the lessor to the lessee is not a necessary part of the transaction of a lease in India and the implication on a second lease of the surrender of the first lease is, therefore, not also necessary under the Indian Law. [p. 731, col. 2; p. 732, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge, Nilgiris, Ootacamund, in Original Suit No. 123 of 1920.

Messrs. T. R. Ramachandra Iyer and T. S. Anantraman, for the Appellant.

Messrs. K. P. M. Menon and Krishna Wariar, for the Respondents.

JUDGMENT.

Spencer, J.—This suit was brought by Nilambur Rajah for recovery of possession, together with damages for use and occupation, of 20 acres of land and for value of buildings and machinery removed by the defendant upon a certain area which had been granted on lease by the plaintiff's predecessor on 14th August 1879 to Mr. Minchin for gold washing for a period of 36 years which expired on 14th August 1915.

In 1862 the plaintiff's predecessor granted a lease of 500 cawnies in the same locality

for a rent of Rs. 500 to be paid annually for coffee cultivation to the same Mr. Minchin for a period of 91 years. That lease has not expired and will not expire till 1953. Messrs. Parry and Company, who are the defendants in this suit, obtained an assignment from Mr. Minchin of all his rights in both leases. The contention on the part of the plaintiff, who is the appellant in this Court, is that the grant of a mining lease implied a surrender of the lease for coffee cultivation for the area over which gold washing operations were conducted. This contention is based upon the English rule of law that the acceptance of a new lease operates as a surrender of a prior lease. In *Woodfall on Landlord and Tenant* the learned author explains this rule as being founded upon estoppel. He says that as a lessee is estopped from saying that his lessor has not power to give him the lease and as the lessor cannot grant a new lease during the continuance of the old lease, it follows that the acceptance of the new lease implies a surrender of the first lease. An exception to this rule occurs if what is accepted by the lessee is the grant of a thing collateral to and consistent with the lease of the land. Instances are given in which the grant of a new thing does not imply the surrender of the thing first granted. Mr. Ramachandra Aiyar argues that the two operations, coffee planting and gold mining, cannot be carried on simultaneously, as one operation would interfere with the peaceful enjoyment of the other right over the soil. We must, therefore, see what was the intention of the parties when they gave and received the two lease deeds, Exs. I and II. In the first place it is noteworthy that the lessee in both the leases is the same person, and, therefore, the lessee is in a position to make arrangements for the two operations of coffee planting and gold washing being carried on side by side in such a way as not to interfere with each other. Next it is noticeable that the rent under the two agreements was agreed to be paid simultaneously and that under cl. 4 of Ex. A, which is a counterpart executed by the lessee in favour of the lessor, he agreed that he would not ask for any diminution of the rent due under the lease for cultivation on account of the execution of the gold sifting works in the same area, thus showing that the two operations might go on side by side and that the mining lease was not intended to involve

a surrender of any portion of the land leased for coffee planting. Taking all the circumstances into consideration I feel clear that the grant of the second lease was not inconsistent with the continuation of the first, and that it is only in case where there is some such incompatibility between the enjoyment under the new lease and the enjoyment under the prior lease that the second will involve a surrender of the first.

As regards the removal of machinery, etc., under the cultivation lease the lessee is entitled to keep the machinery upon the land leased to him until that lease expires, and the fact that under cl. 7 of Ex. A his landlord was expressly exempted from liability to pay compensation for machinery and buildings left upon the land itself indicates that the property in them was regarded as remaining with the tenant who erected them. Thus whether the gold mining plant is removed or left standing, the landlord cannot now demand to be paid anything on that account. In this view the plaintiff has no legal claim against the defendant and his suit was rightly dismissed in the lower Court. The appeal must be dismissed with costs.

Ramesam, J.—I agree. The learned Vakil who argued the case for the appellant relied in support of his proposition on Woodfall on Landlord and Tenant, page 363, Redman on Landlord and Tenant, page 561, Foa on Landlord and Tenant, page 697, Bacon's Abridgment of the Law, Vol. IV and Halsbury's Laws of England, Volume XVIII, page 1061. These references no doubt lay down that when there is a second lease by the same lessor to the same lessee there is an implied surrender of the first lease. In England at one time it was necessary for the validity of the lease that the lessor should be in possession of the land leased: see Woodfall, p. 2. (It has now been changed by the Real Property Act of 1845). It seems to follow from this that when a second lease was made, the lessee admitted that the lessor was in possession, or at any rate, was estopped from questioning that the lessor was in possession. The result is that the surrender of the first lease was implied; but it does not seem to me that this implication is necessary in the law as it stands now in India. Section 105 of the Transfer of Property Act defines a lease as a transfer of the right to enjoy certain properties. Section 107 says, that a lease for any term can be made only by a registered

instrument and no delivery of possession is necessary. Section 108 A (b) says that the lessor is bound to put the lessee in possession of the property only *at the lessee's request*; so that delivery of possession is not a necessary part of the transaction of a lease in India. Where the land is in possession of a trespasser, the owner can lease the land to a lessee and the lessee can file a suit to recover it. Section 111 says "A lease of immoveable property determines by implied surrender". But I do not see why where there are two leases to the same person, the surrender of the first lease should be implied. Even where the leases are of the same kind, they are overlapping and the terms of the second are somewhat inconsistent with the terms of the first, all that is necessary to imply is a cancellation of the first, only for a period which is overlapped by the second. In the present case even assuming that the mining lease is not totally inconsistent with coffee plantation, it seems to me that all the necessary implication is a cancellation of the first lease for a period of 36 years and no more. All the passages in the reference relied on by the learned Vakil for the appellant seem to refer to leases of the same kind and it is admitted by him that there is no case available where the second lease is of a different kind from the first. It is a *fortiori* case where the second lease is of a different kind. On this point I need not deal with the case in detail as it has been discussed by my learned brother with whose conclusion I agree, *viz.*, that the two leases are of an entirely different kind. Clauses 5 and 4 of the documents Exs. A and I, which are practically identical, seem to imply that the 20 acres covered by the second lease was not necessarily excluded from the first lease. Clause 7 relied on by Mr. Ramachandra Iyer no doubt seems at first to support his contention; but all that it says is that in the case of eviction by the lessor compensation shall not be payable. Under what circumstances such an eviction is going to happen the clause does not state and there is nothing to compel us to infer that the eviction should necessarily be under the terms of the second lease and irrespective of the conditions of the first lease. I do not think, therefore, that cl. 7 necessarily supports the appellant.

The English Law seems to have been laid down in very wide terms. It is sometime said that even if the intention of the

parties is not to cancel the first lease, the law will imply a surrender. This does not seem to have been adopted in America, and I do not see why such a rule of law should be adopted in India.

For all these reasons I agree to the order proposed by my learned brother.

V. N. V.

Appeal dismissed.

S. D.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 849
OF 1922.

June 23, 1925.

Present:—Mr. Justice Adami and
Mr. Justice Sen.

BAIJNATH RAI AND OTHERS—DEFENDANTS
—APPELLANTS

versus

MANGLA PRASAD NARAYAN SAHI

AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Widow—Alienation to provide for marriage expenses of daughter of co-parcener—Legal necessity.

Where a person takes property either by inheritance or survivorship under the Hindu Law he is bound to provide for the maintenance, education, marriage, *shrads* and other usual religious expenses of the co-parceners and of such members of their family as they are, or were when alive, legally or morally bound to maintain, and a female heir is under exactly the same obligation to maintain the members of the family as a male would have been by virtue of succeeding to the same estate. Therefore, a Hindu widow who has succeeded to the property of a childless son is bound to provide for the marriage expenses of the daughter of a deceased co-parcener and is for that purpose entitled to alienate the property. [p. 733, col. 2; p. 734, col. 1.]

Appeal from a decision of the Subordinate Judge, Muzaffarpur, dated the 10th June 1922, reversing that of the Munsif, Hajipur, dated the 10th June 1921.

Messrs. S. M. Mullick and S. Dayal, for the Appellants.

Messrs. L. N. Singh and L. K. Jha, for the Respondents.

JUDGMENT.

Sen, J.—The appellant instituted a suit out of which this appeal arises for redemption and possession of certain specified shares in the properties set out in the plaint which he alleged were in the wrongful possession of the defendants first party. The following facts appear to be undisputed the questions raised being only as to the character and legal effect of some of the transactions.

Upon the death of one Ram Ratan Singh the family property, except certain parcels

which went to some widows in lieu of their maintenance, came into the hands of one Dhuna Singh his grandson, by his son Maniar Singh. Subsequently on the death of Dhuna Singh the estate went by inheritance to his mother *Musammam Ramdularee Kuer*, the widow of Maniar Singh. On the 11th April 1896 *Ramdularee* executed a mortgage-bond (Ex. 8) for Rs. 1,000 in favour of one Jagarnath Sahi cousin of Durga Prasad Narain Sahi (the father of the plaintiff). By this mortgage-bond the *Musammam* purported to hypothecate 12-annas of *Touzi* Nos. 2345 and 2346 by way of security for the loan which she purported to raise for defraying the expenses of marriage of *Musammam Ramsumaree Kuer* with the plaintiff. *Musammam Ramsumaree* was the son's daughter of Jhonti Singh, the elder brother of Maniar Singh. On the 19th August 1897 an *ex parte* decree was obtained on foot of the mortgage above mentioned and the properties mortgaged brought to sale and purchased in the name of Jagarnath Sahi. On the 16th November 1898 Dhanpat Singh, the next reversioner, instituted a suit being Suit No. 110 of 1898 challenging the mortgage in favour of Jagarnath Singh and all proceedings based thereon. This suit was compromised and the result was that on the 22nd August 1899 an *ekrarnama* (Ex. 11) was executed whereby Jagarnath Sahi relinquished his claim to 12-annas of *Touzi* Nos. 2345 and 2346 and accepted a third share of the estate subject to all debts and liabilities of Dhuna Singh. *Ramdularee* also took one-third and Dhanpat Singh, the next reversioner, took the remaining one-third share. On the 24th September 1899 Jagarnath sold his entire interest by *kobala* (Ex. 1) to plaintiff for a consideration, it is alleged, of Rs. 3,500. Hence the plaintiff claims to have become entitled to the shares in the *mouzas* claimed in the suit.

Then came another set of transactions which brings us to the immediate cause of the plaintiff's suit. The plaintiff alleges that on the 18th September 1909 he and the then presumptive heir Dhanpat Singh borrowed a sum of Rs. 1,995 from Bechan Sahi, father of defendant No. 9, and Basist Sahi defendant No. 10, and executed a *zer-peshgi* bond in respect of the *Touzi* numbers comprised within the estate of Dhuna Singh in favour of Bechan and Basist Narain. It is said that out of the sum of Rs. 1,995 the

plaintiff got Rs. 595 only and Basist Narain the balance of Rs. 1,400. Thereafter Dhanpat Singh the presumptive reversioner died and his son Ramparichan Singh came into possession of all his estate. He applied for mutation of his name before the Collector, the application was opposed by the actual reversioners of Dhuna Singh who are the defendants first party in the suit (for by that time *Musammāt* Ramdularee had died and succession had opened to the reversioners). On the 28th November, 1918, it is alleged by the plaintiff, a collusive and fraudulent *ekrarnama* was entered into between Ramparichan Singh and the defendants first party, whereby the defendants first party got a portion of the *zerpeshgi* property and on the strength thereof on the 14th March 1919 collusively got the entire amount of *zerpeshgi*, that is, Rs. 1,995 deposited in Court in the name of the creditors, that is, the defendants third party without the knowledge of the plaintiff, and the defendants third party collusively withdrew the said bond money from the Court and gave up possession of the *zerpeshgi* property to them. Hence the plaintiff was denied the opportunity of depositing his proportionate share of the debt. As a result the defendants first party got possession of the entire *zerpeshgi* property and are still in possession thereof. On the facts above mentioned the plaintiff prayed for a declaration that he was entitled to get possession of his share of the properties given in *zerpeshgi* on payment of his share of the debt and for a decree for redemption and possession in his favour. The defendants first party, the present reversioners, were the contesting defendants. They assailed the mortgage (Ex. 8) as unsupported by any legal necessity and the transaction entered into under Ex. 8, Ex. 11 and Ex. 1 as being void and of no effect as they were alleged to be parts of a device to deprive the reversioners of their just right and to divide up the estate between the limited owner Ramdularee and the presumptive owner Dhanpat Singh. They alleged that Jagarnath was a mere *farzidar* of Ramdularee and no interest passed under the *krarnama* (Ex. 11) to Jagarnath and consequently none passed to the plaintiff under the sale-deed (Ex. 1). As regards the *zerpeshgi* deed dated the 18th September 1909, their case was that that was really a transaction entered into by Ramdularee in the name of the plaintiff and Dhanpat Singh for the pur-

pose of paying up the debts of Dhuna Singh due to Gopal Sahi and others that they were just debts of the last male-holder, and, therefore, binding on the reversioners and on the estate, that the allegation of the plaintiff that a portion of the *zerpeshgi* money was due from him was utterly false, that upon the death of Dhanpat his son Ramparichan realized that the estate had passed to the defendants first party, the present reversioners, and he thereupon saw the necessity of executing the *ekrarnama*, dated the 28th November 1918, to discharge the aforesaid debt, that the defendants first party have as such reversioners paid off the *zerpeshgi* debts and secured possession of the property to which they were justly entitled and that the plaintiff's claim to redemption and possession should be dismissed.

Two main points of law have been put forward before us. First, whether the expenses of marriage of Ramsumaree Kaur could come within the description of legal necessity, and consequently whether the mortgage (Ex. 8) or any rights thereunder could be deemed to be valid beyond the lifetime of the limited owner. Secondly, did the *ekrarnama* (Ex. 11) pass a valid title to Jagarnath Singh or was it invalid and of no effect? Was it a mere device by the limited owner to defeat the right of the reversioners?

As a question of fact it is now beyond all dispute that the amount of Rs. 1,000 which was raised upon the mortgage (Ex. 8) was actually employed on the marriage expenses of *Musammāt* Ramsumaree Kaur. What is disputed is that there was any duty cast upon the limited owner *Musammāt* Ramdularee to defray the marriage expenses of Ramsumaree Kaur out of the estate in her hands. It is urged that the duty of marrying *Musammāt* Ramsumaree lay on Jhonti Singh, or in the last instance, upon Dhuna Singh the last male-holder. It is also urged that directly the estate passed by inheritance to *Musammāt* Ramdularee Kaur it ceased to be bound to pay the marriage expenses of Jhonti's son's daughter. This view appears to me clearly untenable. The true principle as laid down in the *Shastras* is that where a person takes a property either by inheritance or survivorship he is legally bound to maintain those whose maintenance was a charge upon it in the hands of the last holder (see Mayne's *Hindu Law*, Art. 453): "A female heir is

under exactly the same obligation to maintain the members of a family as a male heir would have been by virtue of succeeding to the same estate. "The obligation extends even to the King when he takes the estate by escheat or by forfeiture." (see Mayne's Hindu Law, Art. 458). In fact the duty of the person who inherits is to provide for the maintenance, education, marriages, *sraddhs* and other usual religious expenses of the co-parceners and of such members of their family as they are, or were, when alive, legally or morally bound to maintain. Now, Ramsumaree Kaur would easily come within the description of such members as were dependent on the male co-parceners when they were alive. In this view it appears that the mortgage (Ex. 8) was for legal necessity and the mortgagee decree-holder got a valid right and title to the properties purchased by him at the execution sale.

The next question relating to the validity or otherwise of the *ekrarnama* (Ex. 11) calls for a somewhat detailed investigation. The Munsif held that the *ekrarnama* was not supportable on the ground of alienation by Ramdularee for legal necessity, nor was it supportable on the doctrine of surrender or renunciation. He further held that Dhanpat Singh, the presumptive reversioner had no right or interest *in presenti* in the property which Ramdularee held for life until it vested in him on her death should he survive her. He had no substantial claim on which to litigate with her at the time and that, therefore, the *ekrarnama* which purported to compromise the matters in dispute and difference between the parties to that suit could not be held to be legally valid. On this ground he held that the plaintiff who derived his title from Jagarnath on foot of the said *ekrarnama* could not recover possession by redemption of any portion of the estate as against the reversioners. He accordingly dismissed the suit. On appeal the learned Subordinate Judge held that the plaintiff's vendor Jagarnath had derived a good title under the mortgage; that he could not be blamed for suing on it when the mortgage-money was not paid; that the *ekrarnama* whereby Jagarnath relinquished what he had purchased under the decree, and took what was given to him as one-third of the estate plus the encumbrance thereon was good and valid so far as Jagarnath was concerned and it conferred a title on him. With

regard to the other parties to the *ekrarnama* he observes: "Whether it operated as surrender or alienation on behalf of the lady in favour of Dhanpat is a different question with which we are not concerned in the present suit." Upon these findings he proceeded to hold that the plaintiff had a right to redeem the *zerpeshgi* which Dhanpat executed in favour of the defendant third party and he allowed the appeal.

It has been urged before us that a disposition by compromise such as that effected by the *ekrarnama* (Ex. 11) is perfectly valid as the entire estate was then in the hands of Musammam Ramdularee and that although a limited owner, she was still the manager and as such manager was quite competent to dispose of the estate to the best of her discretion. The subject of the power of a limited owner to deal with the estate of the last male holder as against the rights of the reversioner was dealt with very fully in the case of *Rangasami Gounden v. Nachiappa Gounden* (1). The Judicial Committee in that case observed:—

"This raises the consideration of the whole subject of the power of a Hindu widow over an estate which belonged to her husband to which she has succeeded, either immediately on the death of her husband, or as heir on the death of her own childless son, her husband being already dead. This subject has been dealt with in many cases which are too numerous to cite individually; it has given rise to different currents of judicial opinion, and, as in this case and some others, to actual difference in judicial determination..... It has often been noticed before, but it is worth while to repeat, that the rights of a Hindu widow in her late husband's estate are not aptly represented by any of the terms of English Law applicable to what might seem analogous circumstances. Phrased in English Law terms, her estate is neither a fee nor an estate for life, nor an estate tail. Accordingly one must not, in judging of the question, become entangled in Western notions of what a holder of one or other of these estates might do. On the other hand, what a Hindu widow may do has often been authoritatively settled. Here arises

(1) 50 Ind. Cas. 498; 42 M. 523; 36 M. L. J. 493; 17 A. L. J. 536; 39 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 26 M. L. T. 5; 10 L. W. 105; 46 I. A. 72; 1 U. P. L. R. (P. O.) 66 (P. C.).

that distinction which, as Seshagiri Ayyar, J., most justly observed in the present case, will, if not kept clearly in view, inevitably lead to confusion—the distinction between the power of surrender or renunciation, which is the first head of the subject, and the power of alienation for certain specific purposes, which is the second.

To consider first the power of surrender. The foundation of the doctrine has been sought in certain texts of the Smritis. It is unnecessary to quote them. They will be found in the opinions of the learned Judges in some of the cases to be cited. But in any case it is settled by long practice and confirmed by decision that a Hindu widow can renounce in favour of the nearest reversioner if there be only one or of all the reversioners nearest in degree* if more than one at the moment. That is to say, she can, so to speak, by voluntary act operate her own death." (Pages 531 and 532*).

At page 536* their Lordships observed:—

"The result of the consideration of the decided cases may be summarised thus: (1) An alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a *bona fide* surrender, not a device to divide the estate with the reversioner. (2) When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then, if such necessity is not proved *aliunde* and the alienee does not prove inquiry on his part and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one. These propositions are substantially the same as those laid down by Jenkins, C. J. and Mookerjee J., in the case of *Debi Prasad Chowdhry v. Golap Bhagat* (2)."

The question to be considered, therefore, is whether the *ekrarnama* in question can

(2) 19 Ind. Cas. 273; 40 C. 721; 17 C. W. N. 701; 17 O. L. J. 499.

*Pages of 42 M.—[Ed.]

be supported on either of the principles above laid down. There can be no valid contention in this case that the *ekrarnama* is supportable on the doctrine of legal necessity. On the finding that the mortgage-deed was for legal necessity the sale of 12-annas in favour of Jagarnath of Touzi Nos. 2345 and 2346 may be considered to be valid and binding. But thereafter we find that Dhanpat, the presumptive reversioner, institutes a suit against Musammatt Ramdularee and Jagarnath for a declaration that the mortgage was not for legal necessity and that, therefore, the sale was not binding. It was this suit which was purported to be compromised by the *ekrarnama* (Ex. 11) and by virtue of that *ekrarnama* each of the three parties to the suit got a third share in the whole estate. The transaction has to be looked into from different points of view. Firstly, had Dhanpat at that time any right or interest in the property in regard to which he instituted the suit? True he was entitled as presumptive reversioner, to institute a suit for a declaration, but was he under any circumstances entitled to a share in the property? The interest of a Hindu reversioner has been defined as *spes successionis*, that is, a mere possibility of succession. Such a possibility gives no interest to the reversionary heir in the estate of the deceased present, or future, vested or contingent. This principle is supported by various rulings among which may be mentioned the cases of *Amrit Narayan Singh v. Gaya Singh* (3) and *Bhagwati Kuer v. Jagdam Sahay* (4). On this principle it has also been laid down that an alienation by way of compromise entered into between a limited owner and persons who had no *bona fide* claim to the property at the time of the compromise is not binding on the reversioners. [*Anup Narain Singh v. Mahabir Prasad Singh* (5)]. Therefore, it is clear that the *ekrarnama* in question offends the principle laid down in these rulings on account of the fact that it purports to give Dhanpat Singh who had no interest *in presenti* at the moment a third share in the whole estate which he was clearly not entitled to.

(3) 44 Ind. Cas. 408; 27 C. L. J. 296; 23 M. L. T. 142; 22 C. W. N. 409; 34 M. L. J. 298; 4 P. L. W. 221; 16 A. L. J. 265; (1918) M. W. N. 308; 7 L. W. 581; 20 Bom. L. R. 546; 45 C. 590; 45 I. A. 35 (P. C.).

(4) 62 Ind. Cas. 933; 6 P. L. J. 604 at p. 613; 2 P. L. T. 471.

(5) 42 Ind. Cas. 95; 3 P. L. J. 83; 3 P. L. W. 295

Secondly, looking at it from the point of view of the limited owner Musammam Ramdularee Kuer, the question that has to be considered is whether she purported to efface herself completely and to operate her own death as it were by relinquishing the entire estate and consequently accelerating the interest of the consenting heir. This she clearly did not do, for she purported to take under the *ekrarnama* one-third of the estate. It is urged before us that this share in the estate was given to her in lieu of her maintenance. It is doubtful if she could do so, but the matter does not arise at all inasmuch as there is no evidence on the record, nor does it appear to have been contended in any stage of the proceedings that the share that she took was by way of her maintenance. On this ground it appears to me to be quite clear that the *ekrarnama* is illegal and invalid as against the right of the actual reversioners. The learned Subordinate Judge seems to think that it is not necessary to consider whether the *ekrarnama* operated as surrender or alienation on behalf of the lady in favour of Dhunpat, but that it is sufficient to consider as to whether Jagarnath got a valid title under it. Such a piecemeal consideration of the *ekrarnama* is wholly unwarranted. It is either valid or invalid, and if it be invalid, it must be held to be invalid in respect of all the parties. That being so, the conclusion is irresistible that Jagarnath never got a valid title under the *ekrarnama* and that, therefore, the plaintiff is not entitled to any relief.

This decision will not in any way prejudice such rights as the plaintiff or his vendor Jagarnath might have in respect of *Touzi* Nos. 2345 and 2346 which Jagarnath purchased at auction in execution of his mortgage-decree.

The appeal must, therefore, be allowed with costs. The judgment and decree of the learned Subordinate Judge must be reversed and the judgment and decree of the learned Munsif restored.

Adami, J.—I agree.

Z. K.

Appeal allowed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 390 OF 1924.

September 11, 1925.

Present:—Mr. Dalal, J. C.

Sheikh IBAD ALI AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

DWARKA AND OTHERS—DEFENDANTS

—RESPONDENTS.

Adverse possession—Agreement to relinquish equity of redemption—Agreement not properly evidenced by document and not binding, whether sufficient to start adverse possession.

An agreement to relinquish the equity of redemption would not be binding if not properly evidenced by a document but it will start adverse possession against the mortgagor from the date of such agreement. [p. 737, col. 1.]

Mahendra Bahadur Singh v. Chandrapal Singh, 63 Ind. Cas. 284; 24 O. O. 155; 8 O. L. J. 622, *Bijai Partab Singh v. Raghuraj Singh*, 67 Ind. Cas. 572; 25 O. C. 115 at p. 123; 9 O. L. J. 173; 4 U. P. L. R. (O.) 33; (1922) A. I. R. (O.) 7 and *Karnam Kandasami Pillay v. Chinnappa*, 62 Ind. Cas. 603; 44 M. 253; 40 M. L. J. 105; (1921) M. W. N. 1; 29 M. L. T. 167; 13 L. W. 423, referred to.

Second appeal against the judgment and decree of the First Subordinate Judge, Bahraich, dated the 26th May 1924, confirming that of the Munsif, Qaisarganj, District Bahraich, dated the 30th November 1923.

Mr. K. P. Misra, for the Appellants.

Mr. M. Wasim, for the Respondents.

JUDGMENT.—The plaintiffs sued for redemption of a mortgage of June 1863 of a certain portion of plot No. 1040. The area of plot No. 1040 which corresponds to present plot No. 1360 is 4 *bighas* 14 *biswas* and out of this redemption was sought of an area of 3 *bighas* 11 *biswas*.

Plaintiffs' case was that old plot No. 1041 of 3 *bighas* 11 *biswas* was mortgaged by his predecessor-in-interest Moazzam Ali to Kerhi Sah predecessor-in-interest of the defendant and the mortgagee on non-payment of interest took possession of the property. Subsequently there was a partition between the mortgagor and his co-sharers and plot No. 1041 was allotted to another co-sharer so the mortgagee was given 3 *bighas* 11 *biswas* out of plot No. 1040. The balance of this plot 1 *bigha* 3 *biswas* was sold by the successor-in-interest of the original mortgagor to the successor-in-interest of the original mortgagee on the 2nd January 1883.

The learned Judge of the lower Appellate Court dismissed the suit on the ground that the mortgagees were in adverse possession from the 2nd January 1883. By

that sale-deed the descendants of the mortgagor declared in favour of the descendants of the mortgagees that they had no right left in plot No. 1010. This was construed by the lower Appellate Court as an agreement to relinquish the equity of redemption and though such an agreement would not be binding if not properly evidenced by document it will start adverse possession against the mortgagors. This principle of law is well settled both by rulings of this Court and of other High Courts. In *Mahendra Bahadur Singh v. Chandrapal Singh* (1), the learned Judicial Commissioner (now Mr. Justice Lindsay) had before him a case where adverse possession was claimed on the following facts. Certain property was mortgaged with possession in 1866 and subsequently it was sold in 1889 by an unregistered deed which did not pass title for want of registration. When the redemption suit was brought it was held by this Court that though under s. 54 of the Transfer of Property Act the unregistered deed of 1889 could not operate to pass to the mortgagee the right of redemption it changed the character of possession of the mortgagee which became adverse to the mortgagor. This decision was followed by a Bench of this Court in *Bijai Partab Singh v. Raghuraj Singh* (2). In this case there was a sale-deed which could not be enforced at law. In the Madras case of *Karnam Kandasami Pillay v. Chinnappa* (3), there was an oral arrangement between the mortgagor and the usufructuary mortgagee under which the latter retained possession of a portion of the mortgaged property in full ownership in satisfaction of the mortgage-debt and enjoyed it as full owner for more than 12 years after the arrangement. When a suit for redemption was brought it was held by a Bench that the mortgagee had acquired by adverse possession an absolute title to the property and that the mortgagor's right to redeem the property was barred by limitation.

It is obvious that under the deed of 1883 the rights of ownership were conceded to the mortgagees by the mortgagors. There was an oral arrangement to relinquish the equity of redemption or to make the mort-

gagees the owners of the rest of the plot because they had purchased the other portion.

It was argued by the appellants' learned Counsel that in 1885 the defendants' ancestors were still recorded as mortgagees and, therefore, no adverse possession started in 1883. The entries in the village records are, however, very confused. In 1885 on the basis of an order of the 1st of July 1883 an entry of a mortgage is made while in Ex. A-2 of 1893 on the basis of the same order of 1st July 1883 a mention of mortgage has disappeared. The original order of 1st July 1883 is not produced and we are not in a position to say what it was and how it was obtained, whether in reality it had originated subsequent to 2nd January 1883 or prior to it.

I see no cause for interference with the reasoning of the lower Appellate Court and dismiss this appeal with costs.

S. D.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No.
1888 OF 1922.

May 8, 1925.

Present :—Mr. Justice Cuming and
Mr. Justice Chakravarti.

HARI BARMAN—PLAINTIFF—
APPELLANT
versus

KHATIJAN AND OTHERS—DEFENDANTS—
RESPONDENTS.

Landlord and tenant—Occupancy holding—Usufructuary mortgage of holding—Sale of holding for arrears of rent—Mortgagee, whether can maintain suit for declaration that sale was brought about by fraud.

A usufructuary mortgagee of an occupancy holding is entitled to recover possession of the holding from the landlord, unless the landlord can establish that after the execution of the usufructuary mortgage, the raiyat had abandoned the land. A usufructuary mortgagee of an occupancy holding, therefore, has *locus standi* to maintain a suit for a declaration that a sale of the holding at the instance of the landlord in execution of a decree for arrears of rent was brought about by fraud. [p. 738, col. 2.]

Appeal against a decree of the District Judge, Rangpur, dated the 10th April 1922, reversing that of the Munsif, Second Court, at Kurigram, dated the 23rd December 1920.

Mr. Atul Chandra Gupta (with him Babu Radhika Ranjan Guha), for the Appellants.

(1) 63 Ind. Cas. 284; 24 O. C. 155; 8 O. L. J. 622.

(2) 67 Ind. Cas. 572; 25 O. C. 115 at p. 123; 9 O. L. J. 173; 4 U. P. L. R. (O.) 33; (1922) A. I. R. (O.) 7.

(3) 62 Ind. Cas. 603; 44 M. 253; 40 M. L. J. 105; (1921) M. W. N. 1; 20 M. L. T. 167; 13 L. W. 423.

Mr. Gunada Charan Sen (with him Babu Prosanta Bhusan Gupta), for the Respondents.

JUDGMENT.

Chakravarti, J.—We think this appeal ought to succeed. The plaintiff brought a suit for a declaration that the sale of the tenure at the instance of the landlord in execution of a decree for arrears of rent was brought about by fraud. The defendant No. 6 purchased the holding at that sale. The plaintiff alleged that such a sale had affected prejudicially his right as a usufructuary mortgagee under a mortgage executed by the tenants in his favour in the year 1324, by virtue of which he had been in possession of the land in suit. The plaintiff, therefore, prayed for an order directing the sale to be set aside and also for a declaration to the effect that the sale was vitiated by fraud and, therefore, was of no effect so far as he was concerned.

The defence of the defendants, amongst others, raised the question that the plaintiff was not entitled to any relief on the ground that he had no interest in the holding as against the landlord.

The Court of first instance found that the sale was brought about by fraud and that the plaintiff although he was not entitled to have the sale set aside, was entitled to a declaration that the sale was, so far as the plaintiff was concerned, in effectual.

Against that decree the defendant No. 6 who contested the suit, preferred an appeal to the District Judge. The learned District Judge without going into all the questions which arose in the appeal, allowed the appeal and dismissed the plaintiff's suit on the ground that the plaintiff had not established that he was "entitled to any legal character or to any right as to any property". This view was based upon the authority of two cases, viz., *Krishna Chandra Dutta v. Khiran Bajania* (1) and *Rasik Lal Dutt v. Bidhu Mukhi Dasi* (2). The learned Judge was of opinion that those cases were authorities for the proposition that a usufructuary mortgagee has no right to possession of the property as a mortgagee by a *raiyat* against his landlord. In this view the learned Judge held that the plaintiff could not ask for a declaratory decree.

In this appeal it has been contended by the learned Advocate who has appeared for the plaintiff-appellant, that the view of the District Judge is wrong, because, the decisions in the two cases relied upon by the learned Judge were questioned and disapproved of in the case of *Ambika Debi v. Swarnamoyi Dasi* (3). It appears to us that this contention is correct. It was pointed out in the case to which I have just referred that the decisions in the cases reported in 10 Calcutta Weekly Notes were inconsistent with the ruling laid down in the Full Bench case of *Dayamoyi v. Ananda Mohan Roy* (4). It was held that an usufructuary mortgagee was entitled to recover possession from the landlord unless the landlord could establish that after the execution of the usufructuary mortgage, the *raiyat* had abandoned the land. In the case before us the possession of the usufructuary mortgagee, the plaintiff, was undisturbed at the time when he brought the suit. It was the apprehension of a disturbance by the auction-purchaser which gave rise to the present suit by the plaintiff. The question, therefore, reduces itself to this: Had the plaintiff, the usufructuary mortgagee, from the *raiyat*, a right to possession of the property even as against the landlord whether the sale took place or not. If he had, as the case reported as *Ambika Debi v. Swarnamoyi Dasi* (3) shows that he had, then it cannot be said that the plaintiff had no legal character or any right to any property. It is, no doubt, open to the defendant the auction-purchaser, or the landlord to show that the *raiyat* not only had executed the usufructuary mortgage but had abandoned the land and, therefore, the landlord had a right of re-entry and that the usufructuary mortgagee had no right to remain in possession of the land. But that is a matter which we cannot discuss at this stage. We are only concerned with the question—a bare proposition of law—as to whether an usufructuary mortgagee in the absence of anything else is entitled to possession of the mortgaged property as against the landlord. We, therefore, think on the authority of the case of *Ambika Debi v. Swarnamoyi Dasi* (3), he has such a right and, unless the defence succeeds, the plaintiff

(1) 10 C. W. N. 499; 3 C. L. J. 222.

(2) 10 C. W. N. 719; 4 C. L. J. 306; 33 C. 1094.

(3) 68 Ind. Cas. 425; 49 C. 989; (1922) A. I. R. (C.) 135.

(4) 27 Ind. Cas. 61; 42 C. 172; 18 C. W. N. 971; 20 C. L. J. 52

iff would be entitled to the relief claimed.

The judgment and decree of the lower Appellate Court are, therefore set aside and the case sent back to the learned District Judge for a decision of the other questions which arise in the case. The defendants who were the appellants in the lower Appellate Court will be entitled to raise all the questions which they did raise in their defence; and also the question of abandonment by the tenants. The learned District Judge will determine all the questions raised according to law.

Let the record be sent down to the lower Appellate Court.

Costs of this appeal and the costs of the Courts below will abide the result.

Cuming, J.—I agree.

Z. K.

Appeal allowed.

PATNA HIGH COURT.

LETTERS PATENT APPEALS NOS. 4 AND 5
OF 1924.

July 23, 1925.

Present:—Sir B. K. Mullick, Kt., Acting
Chief Justice, and Mr. Justice Kulwant
Sahay.

HEMCHANDRA MAHTO AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

PREM MAHTO—DEFENDANT—RESPONDENT.

*Civil Procedure Code (Act V of 1908), s. 47—
Partition suit—Decree allotting separate properties to
each party—Subsequent suit to obtain possession of
properties allotted, whether barred—Defendants, posi-
tion of—Court-fee, whether payable by defendant in
partition suit.*

Where a partition decree merely directs the separation of the shares of the plaintiffs in the suit and leaves the shares of the defendants joint amongst themselves, the defendants cannot execute the decree and there is nothing to prevent them from bringing a fresh suit for partition of the lands jointly allotted to them. Where, however, in such a suit a partition takes place between all the parties thereto and shares are allotted to each, the defendants are also in the position of plaintiffs and in regard to the properties allotted to them they are in the position of decree-holders and can obtain possession of such properties by execution of the decree. A separate suit by any of them to obtain possession of the property allotted to him would be barred by the provisions of s. 47 of the O. P. C. [p. 740, col. 2.]

In a partition suit a defendant has merely to ask for his share of the properties in suit to be separately allotted to him and it is then open to the Court to order the shares of the defendants to be separated as

amongst themselves. The decree that is finally drawn up in a partition suit has to be stamped as an instrument of partition under the Stamp Act and, except the stamp duty levied on the decree, no other duty as Court-fee is payable by the defendants in such a suit. [p. 741, cols. 1 & 2.]

Letters Patent Appeals against the judgment of Mr. Justice Das, reversing that of the Subordinate Judge, Purulia, dated the 18th November 1921, confirming that of the Munsif, Raghunathpur, dated the 9th April 1921.

Mr. Subal Chandra Mazumdar, for the Appellants.

Mr. A. B. Mukharji, for the Respondents.

JUDGMENT.

Kulwant Sahay, J.—*Mouza Kaluhar in Manbhum was owned by a large number of co-sharers. In 1913 a partition suit was brought by some of the co-sharers in the Court of the Subordinate Judge of Purulia which was registered as Suit No. 219 of 1913. In that suit the present plaintiffs and defendants were all arrayed as defendants. A preliminary decree was passed on compromise on the 12th September 1914, wherein the shares of all the co-sharers were determined. A Commissioner was appointed to effect partition by metes and bounds. The Commissioner effected the partition and made allotments to all the co-sharers who were parties in the suit; and in accordance with the report and allotments of the Commissioner the Court made a final decree on the 19th June 1916. The case of the plaintiffs in the two suits giving rise to the present appeals was that by the said partition, lands were separately allotted to them. In Suit No. 1172 the plaintiffs claimed that 1 bigha, 19 kathas out of plot No. 83 of the Commissioner's map was separately allotted to them in Suit No. 1173, 1 bigha 2 kathas in plots Nos. 83 and 83-A was also separately allotted to them. Their case is that when they wanted to take possession of these lands they were obstructed by the present defendants who were also defendants in the partition suit and hence they brought the present suits for declaration of their title and recovery of possession. The defendants pleaded that they were not aware of the partition alleged by the plaintiffs; that there was no compromise in the said partition suit; that the Commissioner had no authority to partition the shares of the other co-sharers except those of the plaintiffs in the said partition suit; and there was an objection taken to the effect that the present*

suits were barred under s. 47 of the C. P. C.

The learned Munsif overruled the objections of the defendants and made decrees in favour of the plaintiffs in the two suits. On appeal by the defendants the learned Subordinate Judge confirmed the decrees of the Munsif. The defendant No. 3 thereupon came up in second appeal to this Court.

It may be noted that the plaintiffs in the two suits were different but the defendants were the same in both the suits; and the second appeals to this Court were by the defendant No. 3 alone.

Two points were raised in the second appeal which were heard by Mr. Justice Das sitting singly. The first point was that the preliminary decree in the partition suit, which was a consent decree was not binding upon the defendant No. 3 inasmuch as he was a minor at the time the said consent decree was passed but that the petition of compromise was not signed by his guardian *ad litem*, and that, therefore, the said decree was wholly void as against him. The second point taken was that s. 47 of the C. P. C. was a bar to the suit. The learned Judge of this Court held that the findings of the Subordinate Judge were not sufficient or satisfactory and that the points raised by the appellant could not satisfactorily be determined by him, and he accordingly set aside the decrees of the Subordinate Judge and remanded the case for re-hearing.

Against this decision of Mr. Justice Das the present appeals have been filed by the plaintiffs under the Letters Patent.

As regards the first objection, namely, that the defendant No. 3 being a minor, and the petition of compromise not being signed by any one on his behalf and, therefore, the preliminary decree being void, it appears that this objection was not taken in either of the Courts below. From the judgment of the learned Subordinate Judge it appears that the objection taken before him was that the guardian of the defendant No. 3 did not obtain the permission of the Court to enter into the compromise and that the decree, therefore, was *ultra vires*. The learned Subordinate Judge disallowed this objection on the ground that there was nothing on the record to show that the Court had not granted permission to the guardian of the defendant No. 3 to compromise the suit. The objection taken in

this Court was different from the objection taken before the Subordinate Judge, and, in my opinion, he ought not to be allowed to take this objection for the first time in second appeal. The decision of this question depends on findings of fact which the Courts below were not asked to decide. Moreover, it is admitted that in the final decree which was passed in the partition suit on the 19th June 1916, there was no defect whatsoever. The defendant No. 3 is evidently bound by this final decree and, in my opinion, there is no substance in this objection and there was no necessity of a remand to enquire into this point.

As regards the second objection, namely, the bar of s. 47 of the C. P. C. I am of opinion, that the decision of Mr. Justice Das is correct. The First Court overruled this objection on the ground that the plaintiffs in the present suit were defendants in the previous partition suit and they were not the decree-holders and so they could not have got possession in execution of the decree. The learned Subordinate Judge on appeal observes that the effect of the partition decree declaring what specific lands were allotted to the plaintiffs in the present suits was to make that decree a declaratory decree so far as they were concerned, and as a declaratory decree is incapable of execution the present plaintiffs could not enforce the same by execution, and that, therefore, the present suits were not barred by the provisions of s. 47 of the C. P. C. Mr. Justice Das rightly points out that the view taken by the Courts below was incorrect. He observes that if a decree is passed in a partition suit, the parties thereto whether arrayed as defendants or as plaintiffs, are in the position of plaintiffs, and in regard to properties that may be allotted they are exactly in the position of decree-holders. No doubt, as was observed by Mr. Justice Das, if the partition decree merely directed the separation of the shares of the plaintiffs in the partition suit and left the shares of the defendants joint amongst themselves, the defendants could not execute that decree and there was nothing to prevent those defendants from bringing a fresh suit for partition of the lands jointly allotted to them. The view, therefore, taken by the lower Courts was incorrect.

Mr. Justice Das, however, remanded the case for a determination as to what was

the position of the parties in the present suits under the final partition decree. In my view the materials on the record are sufficient to dispose of this question in this Court, and the remand seems to be unnecessary. The final partition decree is on the record, and it directs that a decree be passed in accordance with the report, map and allotment papers of Babu Radha Ballabh Sarkar the Commissioner appointed in the suit, and that the report, map and allotment papers do form a part of the decree and it awards costs to the plaintiffs in the suit. It is admitted by the present plaintiffs, and it also appears on reference to the allotments made by the Commissioner that the lands now claimed by the plaintiffs in the present suits were allotted to them in the previous partition case and the final decree in the partition suit directs that the allotments made by the Commissioner be confirmed. The present plaintiffs were, therefore, in a position to take delivery of possession of the lands allotted to them by executing the final partition decree. It is argued that there is no direction in the final decree for possession being delivered to the present plaintiffs over the lands allotted to them; but there is no such direction even in favour of the plaintiffs in the partition suit. It is clear that the decree intended that each of the parties should take possession in accordance with the allotments made by the Commissioner. As regards the payment of Court-fees by the present plaintiffs, who were defendants in the partition suit, in order to enable them to obtain possession of their shares, I see nothing in the law which requires a defendant in a partition suit to pay Court-fees in order to have his share separately allotted to him; he was merely to ask for it in his written statement, and it is open to the Court to order the shares of the defendants in a partition suit to be separated as amongst themselves. The decree that is finally drawn up in the partition suit has to be stamped as an instrument of partition under the Stamp Act and except the stamp duty levied on the decree, no other duty as Court-fee is payable by the defendants: see *Nawab Mir Sadrudin v. Nawab Nuruddin* (1). A contrary view appears to have been taken in *Abdul Kadar v. Bapubhai* (2) and *Murarrao v. Sitaram* (3). But these two cases do not appear to be

pure suits for partition. At any rate no provision of the law has been referred to in these cases. In the present case we find that a final partition decree was prepared by the Court and although there is nothing on the record to show it, it must be presumed that the decree was properly passed after payment of the stamp duty. In my opinion, therefore, there is no necessity of a remand in the present case and it is clear on reference to the final partition decree that it was open to the present plaintiffs to obtain possession of the lands allotted to them on taking out execution of the decree. That being so the present suits for recovery of possession of the lands which were admittedly allotted to them in the previous partition are evidently barred by s. 47 of the C. P. C.

I would, therefore, modify the order passed by Mr. Justice Das and allow the second appeals filed in this Court by the defendant No. 3 and dismiss the plaintiffs' suits altogether. The respondent will get his costs throughout.

Mullick, Actg. C. J.—I agree.

Z. K.

Order modified.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 348 OF 1924.

August 31, 1925.

Present:—Mr. Simpson, A. J. C.

SITLA BUX SINGH AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

RAM NIWAZ AND OTHERS—DEFENDANTS
—RESPONDENTS.

Limitation Act (IX of 1908), s. 6—Minor's assignee, whether protected.

An assignee cannot take advantage of s. 6 of the Limitation Act. [p. 742, col. 1.]

Imam-ud-din v. Mumtaz-un-nissa, 27 Ind. Cas. 118; 18 O. C. 34; 1 O. L. J. 747 and *Muhammad Nur Khan v. Lachmi Narayan*, 66 Ind. Cas. 101; 9 O. L. J. 88; (1922) A. I. R. (O.) 31, relied on.

Bans Bahadur Singh v. Sukhraj Kuar, 81 Ind. Cas. 484; 11 O. L. J. 297; 10 O. & A. L. R. 250; (1924) A. I. R. (O.) 385, construed and explained.

Second appeal against a decree of the District Judge, Fyzabad, dated the 29th March 1924, modifying that of the Additional Subordinate Judge, Sultanpur, dated the 21st November 1923.

Mr. H. Husain, for the Appellants.

(1) 29 B. 79; 6 Bom. L. R. 834.

(2) 23 B. 189; 12 Ind. Dec. (N. S.) 124.

(3) 23 B. 184; 12 Ind. Dec. (N. S.) 121.

Messrs. M. H. Qidwi, H. K. Ghosh and Zahur Ahmad, for the Respondents

JUDGMENT.—This judgment relates to Second Civil Appeals Nos. 348 and 274 of 1924. They both arise out of a single suit brought by Sitla Bakhsh Singh and Hirde Narain Lal to set aside a number of transfers effected by the father of Sitla Bakhsh Singh, and to obtain possession of the property transferred. Hirde Narain Lal is the man who is financing Sitla Bakhsh Singh. Sitla Bakhsh Singh has sold half the property in dispute to him, and now they both sue as plaintiffs to recover the property. This is the only important fact with regard to plaintiffs' appeal, which is No. 348 of 1924. There are other grounds in the memorandum of appeal but when the hearing came on plaintiffs' Counsel abandoned them all except the first three, which relate to the question of limitation. Grounds Nos. 4, 5 and 6 were abandoned.

The question of limitation is a curious one. Sitla Bakhsh Singh claimed to be within time because these transfers were effected during his minority, and he was suing within three years of attaining his majority. In the Court of Trial the age of the plaintiff was put in issue and it was decided that he was within time. In the lower Appellate Court the point was taken that though plaintiff might be in time by making use of s. 6 of the Limitation Act, his co-plaintiff, being only an assignee, was not entitled to the same privilege, and was beyond time. Accordingly, with regard to such of the transfers as were effected, the decree was modified to the extent of giving plaintiff a decree for half the property, while the half which he had transferred to the assignee was to remain in possession of the defendants.

It is this decision which is impugned by the plaintiffs' appeal. Now it is well-settled law that an assignee cannot take advantage of s. 6 of the Limitation Act. The case of this Court, which is referred to in the judgment, *Imam-ud-din v. Mumtaz-un-nissa* (1), no longer possesses authority. It was overruled in *Muhammad Nur Khan v. Lachhmi Narayan* (2). But that was on a special point. On the question whether the assignee can take advantage of s. 6 of the Limitation Act, both

decisions agree that he cannot. *Muhammad Nur Khan v. Lachhmi Narayan* (2) is a Bench decision and I am bound to follow it. There is no authority to the contrary. All the High Courts have agreed on the point. But I am pressed with certain remarks contained in *Bans Bahadur Singh v. Sukhraj Kuar* (3). I say with certain remarks, for I do not think that the decision itself, if it is rightly construed, will in any way help the appellant. The case was similar to the present one. The plaintiff was a daughter's son or claimed to be so. It was dismissed by the Court of Trial on the point of limitation. There were two issues:

"Was plaintiff born on 4th January 1898?" and

"Is this suit within time?"

The Court of Trial decided that the suit was barred by limitation, and dismissed it without going into the merits. On appeal a Bench of this Court decided that the plaintiff was within time, and sent the case back for decision according to law. It was argued for the defendant-respondent that there were two plaintiffs because the daughter's son had sold a one-third share of the property in suit to one Babu Hazari Lal, and they had sued together as co-plaintiffs. The Court of Trial had held that in any event the transferee's claim in respect of his one-third was barred by limitation. Hazari Lal was not appellant in the case. He was arrayed as a respondent. It was argued, therefore, that because he had not appealed his suit ought to stand dismissed with respect to one-third of the property. It was said:

"We are not satisfied that the argument is a sound one. Plaintiff No. 2 derives his title from plaintiff No. 1. If the claim of plaintiff No. 1 is barred by limitation; his title to the whole of the property must be deemed to have been extinguished and the converse proposition that if his claim is not barred by limitation, it is not barred with respect to any portion of the property, is equally true in the circumstances of this case. What may be the equities between the two plaintiffs or what may be the rights of one plaintiff against the other, we are not called upon to decide at this stage. It is clear that the question of title of plaintiff No. 1 affects the claim not only of that plaintiff but also of the plaintiff No. 2.

(1) 27 Ind. Cas. 118; 18 O. C. 34; 1 O. L. J. 747.

(2) 63 Ind. Cas. 101; 9 O. L. J. 88; (1922) A. I. R. (O.) 31.

(3) 81 Ind. Cas. 484; 11 O. L. J. 297; 10 O. & A. L. J. 250; (1924) A. I. R. (O.) 385.

Thus it is a matter of common interest to them and one of them could appeal against the whole decree as the plaintiff No. 1 has done. It will be open to the Court below to decide hereafter as to whether the plaintiff No. 2, if he continues to appear as such in these proceedings, is entitled to any relief separately or not."

This language certainly creates some difficulty, but, if it is borne in mind that the Court was not deciding the case but merely deciding that the transferee was entitled to state his case, the difficulty disappears. The Court below had held that the daughter's son was barred by limitation, and that that bar applied equally to the transferee. I have obtained the record from the record room and I see that the Court of Trial had further held that even if the daughter's son was held to be within time, still his assignee, not being entitled to the benefit of s. 6 of the Limitation Act, would be barred by time. There was thus a double bar against the assignee. The decision of the Appellate Court removed one of these bars and left the path clear for the decision of the suit on the merits as regards the daughter's son. The question was whether the Appellate Court was to pronounce a decision on a point which had already been decided against the assignee. The Appellate Court refused to do so, as they say at that stage, the merits not having been gone into at all. As they said, the title of the daughter's son, if it was not barred by limitation with respect to two-thirds of the property, was equally not barred by limitation with respect to the other third of the property. They preferred to leave the Court of Trial to decide what the rights of the assignee might be. They said that these rights ought not to be decided "at this stage." These words are important. I am asked to construe them as if they had said that the rights had not to be decided "in this litigation", but that is not the meaning. The use of the words, "at this stage" imply on the contrary that they ought to be decided "in this litigation". I cannot believe that the Bench intended in this remand order to lay down the proposition that where there has been an assignment and the assignee is barred by limitation, while the assignor is not because he can claim the privilege of s. 6 of the Limitation Act, that this is to operate in some unexplained fashion in favour of the assignee and bring him within limita-

tion too. It is pointed out that the Court of Trial gave the plaintiffs a joint decree, but it ought not to have given the plaintiffs a joint decree. Their interests are not joint. The plaintiff has no interest left in the property which he has transferred to his assignee, and the assignee has no interest in the property which the plaintiff has retained. It is conceded that if the plaintiff had transferred the whole of the property to a transferee, then neither the plaintiff himself nor his transferee could obtain possession of the property. I cannot see any distinction between a transfer of part of the property and a transfer of the whole.

For these reasons plaintiffs' appeal fails and is dismissed with costs.

[The judgment disposing of the cross-objections is omitted as unreportable.—Ed.]

S. D.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1699 AND 1700
OF 1923.

February 12, 1925.

Present:—Mr. Justice Odgers.

VARADARAJULU CHETTI AND OTHERS—
DEFENDANTS NOS. 2 TO 4—APPELLANTS

versus

VELAYUDHA UDAYAN, MINOR BY THE
GUARDIAN SENGAMALAI UDAYAN AND
ANOTHER—PLAINTIFF AND DEFENDANT

No. 1—RESPONDENTS.

*Succession Certificate Act (VII of 1889), s. 4—Pro-
note in favour of individual—Debt due to joint family
—Succession certificate, whether necessary—Practice—
One plaintiff in two suits—Common question—Evi-
dence in one suit treated as evidence in other suit—
Consent of parties—Irregularity.*

Where a promissory note is executed in favour of an individual member of a joint Hindu family but the debt is due to the joint family, no succession certificate is necessary, even if there is nothing on the face of the document to show that the debt is due to the joint family. [p. 744, col. 2.]

Subramanian Chetti v. Racku Sarrai, 20 M. 232; 7 M. L. J. 100; 7 Ind. Dec. (N. S.) 165, and *Pichaikuttia Pillai v. Renganadan*, 28 Ind. Cas. 490; 28 M. L. J. 323; 17 M. L. T. 264, followed.

Venkataramanna v. Venkayya, 14 M. 377; 5 Ind. Dec. (N. S.) 264, not followed.

Where there is the same plaintiff but different defendants in two suits and by consent of parties the evidence in one case is treated as evidence in the other, the irregularity is cured by the consent. [p. 744, col. 1.]

Jainab Bibi Saheba v. Hyderally Saheb, 56 Ind. Cas. 957; 43 M. 609; 38 M. L. J. 532; 28 M. L. T. 23; (1920) M. W. N. 360; 12 L. W. 64 (F. B.), relied upon.

Second appeal against the decrees of the District Court, Salem, in A. S. No. 35 of 1922 and A. S. No. 256 of 1921, preferred against those of the Court of the Additional District Munsif, Salem, in O. S. Nos. 143 of 1920 and 615 of 1919 respectively (O. S. Nos. 511 of 1919 and 1533 of 1917, on the file of the Court of the Principal District Munsif, Salem).

Mr. V. C. Seshachariar, for the Appellants.

Mr. C. Krishnamachariar, for the Respondents.

JUDGMENT.—In the first of these cases, the plaintiff brought a suit on a promissory note dated the 15th June 1916 executed by one Balakrishna Chetty, deceased, to Appudayan, the deceased adoptive father of the plaintiff. The District Munsif dismissed the suit holding that the discharge alleged to be evidenced by Ex. I was proved.

The question was raised in this case as also in the connected S. A. No. 1700 of 1923 whether the plaintiff was in fact the adopted son of Appudayan, and by consent the evidence on this point taken in the other case was treated as evidence in this case before the District Munsif. It was contended by Mr. V. C. Seshachariar for the appellant that such a proceeding is wrong in law and the Vakils have no power to bind their clients by such a consent. The matter is, however, concluded by the Full Bench ruling in *Jainab Bibi Saheba v. Hyderally Saheb* (1) that the evidence recorded in a previous judicial proceeding between the same parties is made admissible in a subsequent proceeding by the consent of both parties. The suits were heard on the same day, and although the defendants were not the same in the other case, the question of adoption was common to the two cases and all the parties concerned presumably let in their evidence at one and the same time. As Coutts-Trotter, J., (as he then was) held in the case referred to, "Consent can cure what would otherwise be a defective method of letting in evidence in its substance and context relevant and germane to the issues." Both the Courts on the evidence of adoption given in the other case came to the conclusion that the adoption was true.

(1) 56 Ind. Cas. 957; 43 M. 609; 38 M. L. J. 532; 28 M. L. T. 23; (1920) M. W. N. 360; 12 L. W. 64 (F. B.).

The next point is that the acting District Judge having disbelieved, as against the District Munsif Ex. I and having found that it is not genuine ought to have given the defendants an opportunity of letting in further evidence with regard to this Ex. I, as it was not challenged before the District Munsif. I am unable to see how the plaintiff could have challenged it there, as it was a matter of defence and all he could do naturally was to cross-examine the defendant's witnesses on it. Further Ex. I was supported by three witnesses, D. Ws. Nos. 1 to 3. The acting District Judge disbelieved these witnesses when they said that money was paid to the plaintiff. I think this point also fails.

The most substantial point raised in this appeal is that there is nothing to show, on the face of the suit on promissory note Ex. A that it was executed in favour of a managing member and it is contended that there must be something on the face of the document, to show that it is a family debt before the plaintiff can be absolved from the obligation of obtaining a certificate under s. 4 of the Succession Certificate Act. There are cases on both sides of the line. The appellant-defendant here has referred to a case in *Venkataramanna v. Venkayya* (2), where it was held that a certificate in such a case was necessary unless there was something on the face of the bond to show that the debt was due to the joint family. It was held there that though Act VII of 1899 applied only to cases of succession, the preamble states that it is intended to afford protection to parties paying debts to the representatives of deceased persons. No authorities are referred to in the judgment. On the other hand, in a later case in *Pallamraju v. Bapanna* (3), Shephard and Boddam, J.J., held that, as the family was admittedly undivided and the plaintiff claimed by survivorship, the Succession Certificate Act did not apply, following a similar case in *Subramanian Chetti v. Rekku Sarvai* (4). In *Pichaikuttia Pillai v. Ranganandan* (5), Seshagiri Iyer, J., sitting as a Single Judge held that where the document stands in the name of an individual member and does not show on the face of it that the debt is due to the family, no certificate is necessary, in the case of a debt

(2) 14 M. 377; 5 Ind. Dec. (N. S.) 264.

(3) 22 M. 380; 8 Ind. Dec. (N. S.) 274.

(4) 20 M. 232; 7 M. L. J. 100; 7 Ind. Dec. (N. S.) 165.

(5) 28 Ind. Cas. 490; 28 M. L. J. 323; 17 M. L. T. 264.

due to a Hindu joint family. The cases were all reviewed and in the absence of an authoritative ruling by the Full Bench I am bound by the later decisions of the Benches of this Court which Mr. Justice Seshagiri Iyer preferred. A further point is as to Ex. G. The District Munsif held that it constituted an assignment of the promissory note to the plaintiff; the District Judge held against this that it was only a record of proceedings. In this view he is, in my opinion, right.

The second appeal must be dismissed with costs.

V. N. V.

S. D.

Appeal dismissed.

ODUH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL MISCELLANEOUS APPEAL No. 37
OF 1925.

August 27, 1925.

Present:—Mr. Simpson, A. J. C.

SANT BAKHS—DEFENDANT—

APPELLANT

versus

ODUH RAM AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Ex parte decree, application to set aside—Order conditional on payment of costs—Facts alleged in petition not found to be true or false—Legality of order.

In determining whether an *ex parte* decree should be set aside or not, it is the duty of the Court to come to a finding whether the facts set forth in the petition are true or false.

It is not proper that the Court should pass a conditional order on payment of costs and to refuse to set aside the decree if costs are not paid.

Manni Lal v. Sheo Baran, 78 Ind. Cas. 157; 27 O. C. 103; 10 O. & A. L. R. 136; 11 O. L. J. 412; (1924) A. I. R. (O.) 389, referred to.

Appeal against an order of the Sub-Judge, Fyzabad, dated the 14th March 1925.

Mr. Mohammad Hafiz, for the Appellants.

JUDGMENT.—This is an appeal from an order refusing to set aside an *ex parte* decree. The appellant was defendant in the suit, and service was effected on him by affixation to his house on 17th January. The report of the process-server was that the defendant had gone to Fyzabad four days earlier, and it was not known when he would return. There were two objections to this service. The first is that service by affixation on a party who is temporarily absent from home is not good

service unless further efforts are made to effect personal service [*Sakina v. Gauri Sahai* (1).] Secondly, that even supposing the defendant had returned home, he would necessarily have had a very short time, because the date fixed was the 21st of January. If he had been present he would only have had four days, and this time must have been shortened by whatever time elapsed before his return. When the case was called on the 21st of January the defendant was absent. The service was pronounced good, and an *ex parte* decree was passed for a large sum of money, nearly Rs. 9,000. On the 3rd of February the defendant put an application to have the *ex parte* decree set aside. He said that he had learned about the suit on the 31st of January, and he supported his application with an affidavit. It was taken up on the 7th of March. The record of that day is brief.

"Applicant in person with B. Anukul Hazra, Pleader. O. P. No. 1 in person. Pt. Parasnath Pleader for all the opposite parties. Opposite Parties' Pleader presses for his costs only.

ORDER—I shall restore the suit conditionally on payment of Rs. 50 Pleader's costs to the opposite parties. Case adjourned till 14th March 1925."

This was not a proper order. It was the duty of the learned Subordinate Judge to come to a finding whether the facts set forth in the petition, supported by the affidavit, were true or false. There seems every reason to suppose that they were true. There was an affidavit. As a matter of fact the original service was not good, although it had been pronounced to be good. There was no evidence to the contrary. There were no materials on which the learned Subordinate Judge could come to a conclusion that the statements were false. If the statements were true there was no reason why the defendant should pay the plaintiff's costs. The reason why he was not present was because he had not been served. But insufficient service was the fault either of the plaintiff or of the Court. It could not be the fault of the defendant. On the 14th of March the defendant had not paid the fifty rupees. He made an application that he should not be asked to pay it at present, but it should be added to the opposite parties' costs when

the original suit was decided. The Court then refused to set aside the *ex parte* order on the ground that the terms imposed had not been carried out. The case resembles *Manni Lal v. Shoe Baran* (2).

I allow the appeal, set aside the order refusing to restore the suit. I think the best course is to set aside the *ex parte* decree, and all proceedings subsequent to it, and direct that the suit be restored to the register of pending suits and decided according to law. I make no order as to costs.

S. D. *Appeal allowed.*
(2) 78 Ind. Cas. 157; 27 O. C. 103; 10 O. & A. L. R. 136; 11 O. L. J. 412; (1924) A. I. R. (O.) 389.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 182
OF 1923.

March 26, 1925.

Present:—Justice Sir Ewart Greaves, Kt.,
and Mr. Justice Cuming.

INDRA NARAYAN GHOSE AND
ANOTHER—DEFENDANTS—APPELLANTS
versus

TARINI PROSAD GUIN—
PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 167—Mortgage of holding—Mortgage decree—Sale of holding—Rent-decree, sale in execution of—Mortgage, whether encumbrance—Title of auction-purchaser at rent sale.

Defendants obtained a mortgage-decree against a holding and in execution of the decree themselves purchased the holding. At a sale held in execution of a rent-decree, the holding was subsequently purchased by the plaintiff. Plaintiff thereafter brought a suit to recover possession of the holding from the defendants:

Held, (1) that the mortgage in favour of the defendants was extinguished when the defendants obtained a mortgage-decree and that by purchasing the holding in execution of their decree the defendants had become the owners of the holding and could not set up their mortgage as an encumbrance within the meaning of s. 167 of the Bengal Tenancy Act;

(2) that the plaintiff was, therefore, entitled to obtain possession of the holding as against the defendants.

Appeal against a decree of the District Judge, Murshidabad, dated the 28th of August 1922, reversing that of the Munsif, Second Court at Kandi, dated the 20th of August 1921.

Babus Baranasibashi Mukerjee and Gopendra Krishna Banerjee, for the Appellants.

Mr. Sarbadhicari and Babu Nripendra Chandra Dass, for the Respondent.

JUDGMENT.

Greaves, J.—This is an appeal by the defendants Nos. 1 and 2 against a decision of the District Judge of Murshidabad reversing a decision of the Munsif of Kandi. The suit out of which the appeal arises was brought by the plaintiff to recover possession of certain property on declaration of his title thereto. The plaintiff's title was based on a purchase at a rent sale on the 21st May 1918. The defence of the defendants was that they had purchased the property on the 17th September 1913 in execution of a mortgage-decree in respect of which they were decree-holders and they alleged that as their mortgage had not been annulled under s. 167 of the Bengal Tenancy Act, the plaintiff could not recover his possession of the premises. The first Court dismissed the prayer for *khas* possession but declared that the plaintiff was entitled to get rent from the defendants in respect of the property. The second Court decreed the plaintiff's claim for *khas* possession holding that there was no encumbrance on the property.

Now it is urged before us that under the circumstances the mortgage is an encumbrance on the property and that consequently the decree of the lower Appellate Court giving *khas* possession is incorrect; and reliance is placed by the appellants on the decision in the case of *Sukhi v. Ghulam Safdar Khan* (1) and on a decision of this Court in the case of *Sital Chandra Majhi v. Parbati Charan Chakrabarti* (2). The respondent, on the other hand, relied on the decision in the case of *Bhawani Kumar v. Mathura Prasad Singh* (3) (a decision of the Judicial Committee) and also on a decision of this Court in the case of *Sabjan Mandal v. Haripada Saha* (4). The appellants distinguished the case in *Bhawani Kumar v. Mathura Prasad Singh* (3) on the ground that that was decided whilst the provisions of s. 89 of the Transfer of Pro-

(1) 65 Ind. Cas. 151; 43 A. 469; (1921) M. W. N. 445; 14 L. W. 162; 26 C. W. N. 279; 42 M. L. J. 15; 30 M. L. T. 175; 24 Bom. L. R. 590; (1922) A. I. R. (P. C.) 11; 48 I. A. 465 (P. C.).

(2) 69 Ind. Cas. 841; 35 C. L. J. 1; (1922) A. I. R. (C.) 32.

(3) 16 Ind. Cas. 210; 40 C. 89; 16 C. W. N. 985; 23 M. L. J. 311; 12 M. L. T. 352; (1912) M. W. N. 244; 14 Bom. L. R. 1046; 16 C. L. J. 606; 39 I. A. 228 (P. C.).

(4) 66 Ind. Cas. 103; 25 C. W. N. 424.

erty Act were still in force. The concluding words of that section are that upon the happening of the events therein set out the defendants' right to redeem and the security shall both be extinguished and the appellants say that by reason of the repeal of that section and the omission of the concluding words of s. 89 in the provisions of O. XXXIV, r. 5 of the C. P. C. which had re-placed s. 89 of the Transfer of Property Act, the decision in *Bhawani Kumar v. Mathura Prasad Singh* (3) cannot be relied on. It is necessary, therefore, to examine these cases in order to see if the contention of the appellants is correct. In *Bhawani Kumar v. Mathura Prasad Singh* (3); the mortgagee had obtained a decree on a mortgage-bond on the 31st May 1899, which decree was made absolute on the 19th December 1899. The decree was executed by the mortgagee on the 19th March 1900 and he himself purchased the property, the sale having been confirmed on the 23rd April 1900. Meantime on the 29th March 1900, there was default in payment of Government revenue and on the 6th of June 1900, the whole share was sold and purchased in the name of the second defendant in the suit by the third defendant. A sale certificate was obtained on the 3rd July 1901 and possession was delivered on the 5th July 1901. The Judicial Committee in that case held that the sale in execution of the mortgage-decree took effect from the actual date of the sale and not from its confirmation and that the mortgagee who had purchased on the 19th March 1900 became by virtue of his purchase the proprietor of the estate sold and not merely a purchaser of such right, title and interest in it as a purchaser might have had and their Lordships, therefore, decided that at the time of the revenue sale there was no encumbrance on the property because by virtue of the purchase by the mortgagee at the sale in execution of the mortgage-decree the mortgagee became the owner of the property and his mortgage was merged in his higher right as a purchaser. That decision was based on the general law and not on any special provisions occurring either in the Transfer of Property Act or in any other Act. As I have already stated that case was followed by this Court in *Sabjan Mandal v. Haripada Saha* (4). Mr. Justice Chatterjee in delivering the judgment of the Court refers to this case in *Bhawani Kumar v. Mathura Prasad Singh* (3) and says that by virtue

of the purchase the mortgagee became the owner of the property and could not maintain as against himself or as against third parties not connected with the mortgage transactions, the position that his mortgage still remained an encumbrance thereon. The law that was applied in that case was the law as laid down in O. XXXIV, r. 5 of the C. P. C., which, as I have already stated, does not contain the words that appear at the end of s. 89, of the Transfer of Property Act. Now the case in *Sukhi v. Ghulam Sajdar Khan* (1) was a case between mortgagees. There the puisne encumbrancer had not been made a party to the mortgage suit and he accordingly claimed to redeem the property having regard to his rights as a puisne encumbrancer and it was decided in that case that having regard to the fact that the words which appear at the end of s. 89 are not contained in O. XXXIV, r. 5, it was open to the prior mortgagee to set up as against the puisne encumbrancer his mortgage despite the fact of his purchase in execution of the mortgage-decree. Mr. Justice Mukerjee in the case reported as *Sital Chandra Majhi v. Parbati Charan Chakrabarti* (2) refers to this decision and states that the conclusion at which he had arrived to which I shall refer presently did not militate against the decision in *Bhawani Kumar v. Mathura Prasad Singh* (3) which was applied in the case reported as *Sabjan Mandal v. Haripada Saha* (4). We do not think, therefore, that it can be suggested that he thinks that those two cases are no longer the law having regard to the change which had occurred by reason of the concluding words of s. 89 of the Transfer of Property Act not having been imported into the provisions of O. XXXIV, r. 5. The point which arose for decision in the case before Mr. Justice Mukerjee was whether the purchase by a landlord at a rent sale does or does not *ipso facto* cancel the mortgage on the property. In that case the purchase by the landlord at a rent sale was prior to the decree obtained by the mortgage, and Mr. Justice Mukerjee there decides that the mere fact that the landlord had purchased in execution of a rent-decree while the mortgage was still subsisting could not be held by itself to annul the encumbrance. It will be notified that in that case at the time the landlord purchased, the mortgage was a mortgage merely and that there had been no decree in respect thereof. Con-

sequently in that case, when the landlord purchased, the mortgage was a subsisting encumbrance and if the landlord desired to annul it, he could only do so by proper proceedings under s. 167 of the Bengal Tenancy Act. It is true that Mr. Justice Mukerjee does refer to the change in law by reason of the omission of the concluding words of s. 89 from the provisions of O. XXXIV, r. 5. But as I have already stated he expressly says that the decision in *Bhawani Kumar v. Mathura Prasad Singh* (3) still stands and he does not dissent from Mr. Justice Chatterjee's judgment in *Sabjan Mandal v. Haripada Saha* (4) and he decided the case on the facts that had happened in the particular case that was before him. Now there is no doubt that the point is not an easy one for it may well be said, as has been urged before us, that if the mortgage even after the purchase by the mortgagee in execution of a mortgage-decree, can be set up as a shield as has been decided in *Sukhi v. Ghulam Safdar Khan* (1) it is equally open to the mortgagee to set it up as a defence against the landlord who has purchased at a sale in execution of a rent decree and we think that there is good deal to be said for this point of view. But nevertheless I think, that the decision in *Sukhi v. Ghulam Safdar Khan* (1) must not be taken as conflicting in any way with the decision in *Bhawani Kumar v. Mathura Prasad Singh* (3) which was decided on general principles but merely as laying down that as between mortgagees it is open to the prior mortgagee even after he has purchased the property in execution of his mortgage-decree to set up his mortgage as a shield against any claim by a puisne encumbrancer whose rights have not been affected by reason of his not being included as a party in the mortgage suit and, therefore, thinking that the decision in *Bhawani Kumar v. Mathura Prasad Singh* (3) has been unaffected by the decision in *Sukhi v. Ghulam Safdar Khan* (1), we think that the decision of the lower Appellate Court was right and this appeal must fail.

The appeal is, accordingly, dismissed and with costs.

Cuming, J.—I agree.

Z. K.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 1136
OF 1923.

April 23, 1925.

Present:—Mr. Justice Odgers.

RAJA VELUGOTI Sri GOVINDA
KRISHNA YACHENDRA BAHADUR
VARU—PLAINTIFF—PETITIONER

versus

MUDUMI SRINIVASA RAMACHARLU
MINOR BY GUARDIAN M. VENKATA-
RAGHAVACHARLU AND OTHERS—
DEFENDANTS NOS. 1, 2 AND 4 TO 8

—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. I, r. 3—
Multifariousness.*

A suit by a plaintiff under s. 13 of the Survey and Boundaries Act of 1897 to set aside an order of the Survey Officer that certain plots of land in the possession of the various defendants are not within the boundaries of the plaintiff's village is not bad for multifariousness.

Petition, under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise an order of the Court of the Subordinate Judge, Chittoor, dated the 21st November 1923, in O. S. No. 32 of 1922.

Mr. A. Krishnaswami Iyer, for the Petitioner.

JUDGMENT.—The suit is filed against decisions of the Head Surveyor and Assistant Director of Survey under s. 13 of the Survey and Boundaries Act, 1897. The Survey Authorities decided that certain plots of lands were not as alleged by the plaintiff within the boundaries of the village of Inagaloor of which he is the proprietor. The Subordinate Judge has found the suit bad for multifariousness and put plaintiff to his election on the ground that the disputes are not connected with each other. He also speaks of encroachments but I am unable to see any reference to such in the plaint. Now under the old Code it was held in *Dorasamy Pillai v. Muthusamy Mooppan* (1) that a suit might be brought against a number of purchasers of different items of land distrained and sold under the Rent Recovery Act as the cause of action, viz., the wrongful sale, was the same against all the defendants. So here, in my opinion, it is the decision of the Survey Authorities and it should be remarked that all the objections seem to have been dealt with in a single order both by the Head Surveyor and by the Assistant Director, that are common cause of

action. The sole question in the case is whether plots in the possession of each defendant are or are not included in the village of Inagaloor and I think a right of relief in respect of the same act or series of acts (*viz.*, the decisions referred to above) exists against them severally under O. I, r. 3, C. P. C. If separate suits were brought the common question of fact would be whether the plots should be included in the village of Inagaloor. The respondents do not appear. The Subordinate Judge was wrong. His order must be set aside and the trial of the suit proceeded with.

V. N. V.

Order reversed.

S. D.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 88 OF 1924.

June 8, 1925.

Present:—Mr. Justice Lindsay and
Mr. Justice Kanhaiya Lal.

BRIJ RAJ AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

RAM SARUP AND OTHERS—DEFENDANTS
—RESPONDENTS.

Minor—Guardian ad litem—Gross negligence, test of—Negligence, meaning of—Due care, standard of.

A minor has a remedy either by application for review of judgment or by separate suit when either "gross" laches or fraud or collusion is found in the next friend or the guardian *ad litem*, but the negligence or laches of the guardian which entitles the minor to avoid the decree must be of a gross character. The test is whether or not there has been a culpable negligence of the interests of the minor. Has there been in the conduct of the suit any act or omission on the part of the next friend or the guardian *ad litem*, which in the result has wrought prejudice to the minor's interests? That is what is meant by the expression "gross" negligence or laches when used in this context. [p. 752, col. 2; p. 753, col. 2; p. 754, col. 1.]

Case-law discussed.

Negligence is the breach of a legal duty to take care and unless it is known what that duty is in a particular case it is not possible to predicate whether there has been negligence or not. [p. 753, col. 1.]

The standard of due care in all cases in which a duty to take care exists is the care which would be taken in the same circumstances by an ordinary careful man. The test is the conduct of the average man in like circumstances, with like knowledge and means of knowledge and the amount of care will be different in different cases. [*ibid.*]

First appeal from a decree of the Subordinate Judge, Budaun, dated the 22nd November 1923.

Sir Dr. Tej Bahadur Sapru, Dr. N. C. Vaish and Mr. Harnandan Prasad, for the Appellants.

Mr. S. A. Haidar, for the Respondents.

JUDGMENT.—This litigation has its origin in a deed of sale executed on the 30th of September 1914 by one Sita Ram and his mother Musammatt Parbati in favour of Haji Muhammad Ghafoor Bakhsh, by which the executants purported to convey certain shares in Kasba Ujhani and Mauza Mahona for a sum of Rs. 13,110 in order to satisfy certain debts and to meet personal expenses. It was represented in the document that the houses in which the vendors were living had been advertised for sale and had to be saved. It was stated moreover in the deed that Sita Ram was the only heir of Musammatt Parbati and that he and she were competent to sell the property. Sita Ram further stated that he had an only son, Deo Dat, who had given his consent to the sale. This was a false statement for it appears that he had no less than eight sons.

In the deed of sale the details of consideration are set out. It appears that there were a number of debts owing which the vendee undertook to pay, and amongst these was a decretal debt for Rs. 1,750 owing to one Kanhaiya Lal.

Ghafoor Bakhsh had some trouble in obtaining mutation on the basis of this document. It appears that the other sons of Sita Ram intervened and made trouble and all this resulted in criminal proceedings taken both by Ghafoor Bakhsh and by the sons of Sita Ram. Eventually in the early part of March 1915 (about 15th March) Ghafoor Bakhsh got possession and mutation.

On the 30th September 1915 one Shankar Prasad filed a suit to pre-empt this sale. One of the defendants to this suit was Ghafoor Bakhsh and another was his wife Musammatt Rashida Khatun. The reason why this lady was impleaded was that after the sale of the 30th of September 1914 and before the suit for pre-emption was brought she had purchased in execution of a decree a share of the Mahona property which had already been sold to her husband. We have already mentioned that there was a decree in favour of one Kanhaiya Lal for Rs. 1,750. It seems that after the execution of the sale-deed in his favour Ghafoor Bakhsh failed to pay off this debt and Kanhaiya Lal took out execution and brought the

property which had been mortgaged to him to sale. It was purchased on the 21st January 1915 by Rashida Khatun for Rs. 792 and the sale was confirmed on the 13th of March 1915.

The pre-emption suit brought by Shankar Prasad was decreed on a compromise on the 3rd of January 1916. Under this decree Shankar Prasad was directed to pay Rs. 3,074-7-0 to Ghafoor Bakhsh and his wife; this sum representing all the consideration which had actually passed from these purchasers and including the Rs. 792 which Rashida Khatun had paid for the property in the execution sale.

We now come to the 31st October 1917 on which date there was filed a suit brought by five sons of Sita Ram for the purpose of recovering the property. This suit was Suit No. 185 of 1917. Shankar Prasad the pre-emptor died just after this suit was filed and his sons and grand sons were made defendants in his place. One of these sons was Bansidhar and two of Bansidhar's sons were Brij Lal and Lallu who were both minors and for purposes of the suit Bansidhar was appointed their guardian *ad litem*.

The sons of Sita Ram who were the plaintiffs alleged that the property sold on the 30th September 1914 was joint ancestral family property; that Sita Ram had no right to sell and that there was no legal necessity for the sale. The sons and grandsons of Shankar Prasad contested the claim on a variety of grounds. The case was fought out to a finish in the Court of the Subordinate Judge of Badaun who held that legal necessity had been proved to some extent. The result was that he gave a decree by which the defendants were to be entitled to retain possession of the property if they paid Rs. 2,094 into Court for payment to the plaintiffs. If they failed to do so then the plaintiffs were to be entitled to recover possession from the defendants on payment into Court of a sum Rs. 7,845-8-0.

The plaintiffs appealed against this decree to this Court (F. A. No. 161 of 1919) and the defendants filed cross-objections. The hearing of the appeal occupied a considerable time and it was found necessary to call for a finding on an issue which had not been tried out by the Subordinate Judge, namely, whether the property in dispute or any part of it was joint ancestral family property.

After receipt of the finding this Court decided that out of the item of Ujhani property sold on the 30th September 1914 a 4-biswansi odd share was the separate property of Sita Ram having come to him by collateral inheritance and which he was, therefore, competent to sell without any interference on the part of his sons and grandsons.

The result was that this Court varied the decree of the Trial Court. It dismissed the claim of the plaintiffs with respect to the 4-biswansi share just mentioned and for the rest declared that the plaintiffs could get possession on payment into Court within four months of Rs. 3,189-8-0, that being the sum in respect of which legal necessity was held to have been established.

It appears from the High Court judgment that another plea was raised on behalf of the defendants-respondents at the stage of appeal with reference to the share in *Mauza Mahona* which, as we have said above, was purchased in execution of Kanhaiya Lal's decree by Rashida Khatun on the 21st January 1915. It was pointed out that Kanhaiya Lal's decree for Rs. 1,750 had been obtained against Sita Ram and his sons and grandsons. The decree was a decree for sale on a mortgage and a copy of it was on the record bearing date 1st of September 1913. It was urged therefore that as this decree bound Sita Ram and his family and as the property had been sold in execution and had passed out of the family Sita Ram's sons could not recover it. This Court held that this claim might have been a good one had it been raised at the proper time, namely, by a plea in the written statement and had the plaintiffs been given notice of the plea. As this, however, had not been done this Court refused to go into the matter at the stage of the appeal.

Taking the hint from the observation of the Court in its judgment in F. A. No. 161 of 1919 the present suit (Suit No. 40 of 1923) was launched by Brij Lal and Lallu sons of Bansidhar who were parties to the earlier litigation and by another minor son of Bansidhar who was not in existence when the earlier suit was brought.

The object of this suit is to obtain a declaration that the decree in the previous Suit No. 185 of 1917 is not binding on the plaintiffs, and in the plaint as filed that

relief was sought on the following grounds:—

It was alleged in para. 5 of the plaint that in the earlier suit the defendants second party (which includes Bansidhar the father of the present plaintiffs) "did not take necessary and legal objection with regard to the property sold by auction nor did they produce any evidence in respect thereof". This plea relates to the share in Mahona which was purchased by Rashida Khatun in execution of Kanhaiya Lal's decree.

In para 6 of the plaint it was alleged that the defendants second party (including Bansidhar) acting in collusion with the defendants first party (the sons and grandsons of Sita Ram) "did not produce evidence in support of legal and family necessity although they were called upon to do so nor did they prove the necessity for the antecedent debts nor did they take any proceeding to safeguard the interests of the plaintiffs".

In para. 7 it was pleaded that owing to the negligence and dishonesty of the defendants second party Suit No. 185 of 1917 was ultimately decided against the plaintiffs who were deprived of all the property except the 4 *biswansi* odd share in Ujhani.

In the 8th paragraph of the plaint it was set out that by reason of the negligence of the defendants second party and their dishonesty and collusion with the defendants first party in the earlier suit the decree was not binding. The suit was contested by the defendants first party, that is to say, the representatives of Sita Ram who denied all the allegations of negligence and collusion and pleaded that the present suit was collusive. No written defence was filed on behalf of the defendants second party, that is to say, the sons and grandsons of Shankar Prasad including Bansidhar.

The written statement filed by the first set of defendants was put in on the 9th of May 1923. On the 24th July 1923 the Subordinate Judge of his own motion examined a person named Ajudhia Prasad or Ajudhia Saran who was the *pairokar* of the plaintiffs, and later on, that is to say on the 18th September 1923, he examined one of the defendants second party, Pandit Ajudhia Prasad, who is an uncle of the plaintiffs. Why he examined Pandit Ajudhia Prasad is not apparent for this man did not represent the plaintiffs in the earlier suit. As we have said they were represented by

their own father Bansidhar who is alive and is a party to the present proceedings.

After these two persons had been examined the plaintiffs on the 2nd of October 1923 applied for amendment of the plaint. They asked that the allegations of collusion and dishonesty made against the defendants second party might be struck out of the plaint and asked for the addition of a fresh paragraph, para. 8a, in which it was alleged that there had been dishonesty on the part of a certain *karinda*, Narain Das, who had been employed by the defendants second party.

On the 4th October the Subordinate Judge disposed of this application. He allowed the allegations of dishonesty and collusion to be struck out from the plaint but he refused to allow the addition of a new paragraph to the plaint, *viz.*, para. 8a, though strangely enough in spite of this order the addition to the plaint was made and initialled by the Subordinate Judge.

Without calling for any other evidence on the issue of negligence which he had already framed the Subordinate Judge dismissed the suit on the 2nd of November 1923 on the finding that there had been no such negligence in the conduct of the earlier suit on behalf of the plaintiffs as would justify a declaration that a decree was not binding on them.

We have now this appeal before us in which the judgment of the Subordinate Judge is attacked on various grounds. We do not, in view of the order we are about to pass, propose to discuss at any length at the present moment all the pleas which are set out in the memorandum of appeal. We do not approve of the method by which the Subordinate Judge has disposed of the case. Having framed an issue regarding the question of negligence he proceeded to dispose of it on the evidence of two witnesses of his own choosing and that, in our opinion, was not a proper thing to do. It was open to him, of course, to decide upon the allegations in the plaint that the negligence which was assigned could not constitute a cause of action for the suit but that is not the course which has been followed. We find it necessary, therefore, to remit issues which will be decided after giving both sides opportunity to produce evidence, but before we proceed to do so we think it expedient to make certain observations concerning the questions which arise for disposal.

We would say in the first place, that the complaint laid in the 5th ground of the memorandum of appeal to the effect that the Subordinate Judge should have allowed amendment of the plaint as asked for by the plaintiffs is not well-founded. On the contrary we hold that the Subordinate Judge's order at pages 11 and 12 of the record passed upon the application for amendment was a perfectly proper order. The only fault we have to find with the Subordinate Judge's procedure is that in spite of this order he allowed the whole of para. 8a to be added to the plaint. This was probably the result of inadvertance. At any rate, this para. 8a has no business to be in the plaint and must be expunged from the pleadings to the extent the amendment was disallowed.

In the next place, we have to observe that the allegations of the negligence which constitutes the cause of action are directed against the defendants second party consisting of three persons, Pandit Ajudhia Prasad, Pandit Bansidhar and Kishan Swarup. We have no concern in this case with any negligence or alleged negligence on the part of Ajudhia Prasad or Kishan Swarup. They owed no duty whatever to the present plaintiffs in connection with the previous suit. The only person whose negligence can be pleaded in this suit is Bansidhar who was the guardian *ad litem* of two of the plaintiffs who were impleaded in Suit No. 185 of 1917 as minor defendants (we have explained that the third plaintiff in the present suit was not born at the time when the earlier suit was brought). And so it follows that what has to be investigated in this suit is the negligence, if any, of Bansidhar.

Coming now to the law which has to be applied we have no doubt that it is well-settled that in certain circumstances a minor can claim to avoid a decree passed against him in a suit in which he was represented by a guardian *ad litem*. The general rule on this subject derived from the authorities is thus stated in Halsbury's Laws of England, Vol. 17, page 138, para. 136:—

"An infant plaintiff is as much bound as an adult by a judgment or order in the cause even though there may have been irregularities in the conduct of it unless there has been fraud or gross negligence on the part of his next friend".

For a statement of the law as applied in

India we may refer to the case reported as *Lalla Sheo Churn Lal v. Ramnandan* (1). In that judgment various authorities are cited. A reference is made to Macpherson on Infants, page 386, which reads as follows:—

"An infant plaintiff though thus favoured in the course of the suit is as much bound by a decree and by all the proceedings in a cause as a person of full age and cannot, nor can his representatives, open the proceedings unless upon new matter or on the ground of gross laches or of fraud and collusion which will annul the proceedings of the Courts of Justice as much as any other transactions".

Reference is also made to Simpson on the Law of Infants, 1st Edition, p. 475 (1). In this the law is stated as follows:—

"A decree may also be impeached where there has been gross negligence by the next friend in the conduct of the infant's case or new matter discovered since the date of the decree".

The judgment also refers to the case of *In re Houghton, Houghton v. Fiddey* (2). That was a case in which the Court found that the next friend of the minor had "grossly and inexcusably" neglected his duty, and so it was held that the infant had a remedy and might on the ground of the neglect of duty by the next friend re-open the proceedings.

After referring to these English authorities the Court observed that the same rule of law would be applied in India, namely, that the gross negligence of his next friend would entitle a minor to the avoidance of proceedings undertaken on his behalf, and by parity of reasoning the same rule would apply in the case of a minor defendant who had been represented in litigation by a guardian *ad litem*.

The law was laid down in the same sense in *Ram Sarup Lal v. Shah Latafat Hossein* (3), where *Gregory v. Molesworth* (4) was cited to show that an infant has a remedy either by application for review of judgment or by separate suit when either gross laches or fraud or collusion is found in the next friend. The result appears to be that the negligence or laches of the guardian which entitles the minor to avoid the decree must be of a gross character. The word "gross" is used in all the cases to which

(1) 22 C. 8; 11 Ind. Dec. (N. S.) 7.

(2) (1874) 18 Eq. 573 at p. 576; 43 L. J. Ch. 758; 22 W. R. 854.

(3) 29 C. 735.

(4) (1747) 3 Atk. 626; 26 E. R. 1160.

we have referred. It has been argued before us and on very good authority that the expression "gross negligence" has no definite meaning and reference has been made to the dictum of Rolfe B. in *Wilson v. Brett* (5) that he could see no difference between "negligence" and "gross negligence" but that it was the same thing with the addition of a vituperative epithet.

Then there is authority of Lord Denman in *Hinton v. Dibbin* (6) who says:—

"It may well be doubted whether between 'gross negligence' and negligence merely any intelligible distinction exists."

The truth is that no real definition of negligence can be laid down without a conception of the measure of the duty prescribed in the circumstances of the particular case under consideration.

Negligence is the breach of a legal duty to take care and until we know what the duty is in the particular instance we are unable to predicate whether there has been negligence or not. The standard of due care in all cases in which a duty to take care exists is the care which would be taken in the same circumstances by an ordinary careful man. The test is the conduct of the average man in like circumstances and with like knowledge and means of knowledge and obviously the amount of care will be different in different cases for as observed by a learned author (Salmond in his *Law of Torts*):

"A reasonable man will not show the same anxious care when handling an umbrella as when handling a loaded gun."

The case we are dealing with here is that of a person appointed as guardian *ad litem* to look after the interests of an infant defendant and the standard of duty is in this case that which would be followed by the man of ordinary prudence if he were called upon to act in like circumstances on behalf of himself and his own property. He must do as much to protect the interests of the minor as he would do to protect his own.

No more precise definition of the duty of a guardian *ad litem* can be safely laid down. It is to be observed that it is not every act or omission of a guardian *ad litem* which may seem at first sight to constitute a falling away from this standard of duty

which can be seized upon for the purpose of founding a case of negligence. As was pointed out in the case of *Baboo Lckraj Roy v. Baboo Mahtab Chand* (7) while it is undoubtedly the duty of guardians scrupulously to regard the interests of minors in dealing with their estates the interests of infants would seriously suffer if a notion were to prevail that guardians were bound for their own security to contest all claims against an infant's estate whether well or ill-founded.

The application of this is that there is no universal duty cast upon a guardian *ad litem* to defend a suit brought against a minor even if the suit be ill-founded. It may, in the particular circumstances of the case, be expedient in the interests of the minor to refrain from making any defence.

And following this authority it was held in the case of *Parneswari Pershad Narayan Singh v. Sheo Dutt Rai* (8) that it is not every kind of negligence nor any amount of negligence which would render proceedings otherwise regular and proper liable to be opened. It must be such negligence as leads to the loss of a right which, if the suit had been conducted or resisted with due care, must have been successfully asserted. It is not sufficient to show that the guardian *ad litem* absented himself; it must also be proved that there was an available good ground of defence which was not put forward owing to the default of the guardian *ad litem* to appear at the trial. Or, to put the matter differently the nature of the duty demanded from the guardian *ad litem* may vary according to the nature of the case in which he is called upon to act. An omission to defend or to raise a particular plea or to call certain evidence might, in the circumstances of a particular case, amount to negligence or to a breach of the duty which was owing by the guardian *ad litem* to the infant in that case. In different circumstances such an omission might not amount to negligence. The thing to be regarded in each circumstance is the interest of the minor.

In short the test which the cases seem to lay down is whether or not there has been a culpable neglect of the interests of the minor. Has there been in the conduct of the suit any act or omission on the part of

(5) (1813) 11 M. & W. 113 at p. 115; 12 L. J. Ex. 264; 152 E. R. 737; 63 R. R. 528.

(6) (1812) 2 Q. B. 646 at p. 661; 2 G. & D. 36; 11 L. J. B. 113; 6 Jur. 601; 114 E. R. 253; 57 R. R. 754.

(7) 14 M. I. A. 393 at p. 399; 17 W. R. 117; 10 B. L. R. 35; 2 Suth. P. C. J. 536; 3 Sar. P. O. J. 43; 20 E. R. 833.

(8) 6 C. L. J. 448.

the guardian *ad litem* which in the result has wrought prejudice to the minor's interests? That appears to be what is meant by the expression gross negligence or laches when used in this context.

In the case with which we are dealing we are concerned with what was done or not done by Bansidhar alone. He was the person responsible for the protection of the interests of his two minor sons who, like himself, were impleaded as defendants. Incidentally it may be observed that Bansidhar was not engaged merely in looking after the interests of the minors alone; his own interests in the same property were at stake and were capable of protection in the same way.

The matter then to be decided is whether with reference to the allegations contained in paras. 4 and 5 of the plaint as they stand, and to those contained in paras. 6, 7 and 8 as now amended, Bansidhar was guilty of negligence in the sense laid down above. We think this question must be enquired into and an opportunity given to the plaintiffs, which has not hitherto been given them, of showing if they can, the negligence asserted. We, therefore, remit the following issues to the Court below for findings:—

(1) With reference to the allegations contained in paras. 4 and 5 and the amended paras. 6, 7 and 8 of the plaint was Bansidhar as guardian *ad litem* in Suit No. 185 of 1917 guilty of negligence in the conduct of the suit on behalf of his minor sons?

(2) If so, has that negligence resulted in prejudice to the rights of the minors?

Both sides will be allowed to produce evidence on these issues and the findings will be returned to this Court within three months from this date. On receipt of the findings the usual period of ten days will be allowed for objections.

S. D.

Issues remitted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 392 of 1922.

February 4, 1925.

Present:—Mr. Justice Odgers.

APPA PAI AND OTHERS—DEFENDANTS

APPELLANTS

versus

SOMU AND ANOTHER—PLAINTIFFS—

RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 83, 84.—

Mortgagor, deposit of money by—Son of mortgagee minor—Guardian ad litem, appointment of, whether necessary.

Under ss. 83 and 84 of the Transfer of Property Act, where the mortgagee is a minor and unable to draw the mortgage-money out of Court, without security, it is necessary that a guardian *ad litem* should be appointed and unless such a guardian is appointed it cannot be said that the mortgagor has done all that is necessary for him to do to enable the mortgagee to draw the money. [p 755, col. 2.]

Khunnu Mal v. Indarpal Singh, 71 Ind. Cas. 278; 45 A. 273; 21 A. L. J. 39; (1923) A. I. R. (A.) 183 and *Krishna Aiyar v. Chakrapani*, 29 Ind. Cas. 475, relied upon.

Walian v. Banke Behari Pershad Singh, 30 C. 1021; 7 C. W. N. 774; 5 Bom. L. R. 822; 30 I. A. 182; 8 Sar. P. C. J. 512 (P. C.), distinguished.

Second appeal against the decree of the District Court, South Kanara, in A. S. No. 55 of 1921, preferred against that of the Court of the District Munsif, Puttur, in O. S. No. 342 of 1920.

Mr. K. Y. Adiga, for the Appellants.

Mr. K. Sundara Rao, for the Respondents.

JUDGMENT.—In this case, the plaintiffs brought a suit to oblige the defendants to accept a mortgage amount which plaintiffs deposited in Court under s. 83 of the Transfer of Property Act. There is no dispute as to the amount. The defendants are the sons of the original mortgagee and consist of two brothers, a major and a minor respectively. The petition under s. 83 was presented on the 17th March 1920 and prayed "that the under-mentioned amount may be ordered to be paid to the counter-petitioners after obtaining security for the minor if necessary etc." The first counter-petitioner filed a statement in answer to this petition on the 21st of April 1920 in which he stated that he was the *ejaman* of the family, that the petitioner had refused to pay the amount to him and had deposited it in Court and that the petitioner is not entitled to ask for security. He adds, "If the petitioner is willing to pay the said amount to me, I consent to receive the amount." On this, the District Munsif ordered the petition to be recorded observing that the Vakil who appeared on behalf of the 1st counter-petitioner had no authority to appear for the minor that the 1st counter-petitioner refused to receive the amount by giving security, that he was the guardian (I presume he means natural guardian) of the 2nd counter-petitioner and that the former was absent. The District Munsif held that it was not possible to order the payment. Hence the suit.

The District Munsif in the suit held that the 1st defendant by his conduct in not having entered the appearance of the 2nd defendant disabled the Court from ordering the payment apart from the question of security. So he held that the tender in Ex. A was valid. The District Judge upheld the decision of the District Munsif. The plaintiffs' explanation as detailed by the District Judge as to why they made the offer of payment conditional is that they believed the mortgage-money to have been the self-acquisition of the father so that the two defendants would take equally as heirs and not as survivors. I cannot say that the explanation is very lucid and no attempt has been made to explain it by the learned Vakils who are appearing before me. The question is entirely technical and Mr. Yegnanarayana Adiga for the appellants contends that the tender is invalid because in fact the mortgagor has omitted certain formalities which are necessary under the provisions of the Transfer of Property Act and the C. P. C. before this can be held to be a valid tender. The chief section we are concerned with here is s. 84 which provides that interest shall cease from the date of the tender or as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take the amount out of Court. The objection here is that it is for the mortgagor to carry out all the requirements of the law and not the mortgagee, so that in this case the mortgagor having joined in his petition, the minor defendant with the major ought to have seen that the minor was properly represented by the appointment of a guardian in order that the Court might be able to order the money to be paid. It must be remembered, it is not a case of a deposit to the credit of persons entitled to a definite share in the mortgage-money but that these two persons were members of an undivided Hindu family. There seems to be a dearth of authorities for the proposition that has been advanced in Madras. But in *Pandurang v. Mahadaji* (1), a Bench of the Bombay High Court held in a similar case that it was the duty of the mortgagor not only to apply for the appointment of a guardian *ad litem* but to see that one was appointed, and that for the purpose of a tender under

the Transfer of Property Act, it is incumbent on the mortgagor to procure the appointment of a guardian *ad litem* and that, until such appointment has been made, there is no one to whom under the Act the tender on behalf of the minor could be made. The same view seems to prevail in Allahabad. *Sheo Saran Chaudhri v. Ram Lagan Das* (2) has been referred to on both sides. On behalf of the respondent here it is relied on as showing that, where a mortgage is in reality a mortgage taken by the head of a Hindu family, the mortgage-money being supplied from the joint family funds, it may well be held that an offer to pay the money due on such a mortgage to the managing member is a good and valid tender. It is said in this case that there was such an offer, but the wording of the petition shows that it was not so. The amount was prayed to be paid to the counter-petitioners after obtaining security for the minor if necessary. A point might have been taken that this is a conditional tender. But as I have come to my conclusion on other grounds it is unnecessary to definitely decide that this was a conditional tender. Now in *Khunnu Mal v. Indarpal Singh* (3) it was held on a construction of ss. 83 and 84 that, where the mortgagee is a person who is unable to draw the money out of Court, it is necessary that a guardian *ad litem* should be appointed and, therefore, unless such a guardian was appointed it cannot be said that the mortgagor had done all that was necessary for him to enable the mortgagee to draw the money (cf. s. 103 of the Transfer of Property Act and O. XXXIII, r. 6, of the C. P. C.). It has been held by a single Judge of this Court (Oldfield, J.), in a case reported in *Krishna Aiyar v. Chakrapani* (4) that the next friend of a minor plaintiff, even if he is the managing member of a joint Hindu family of which both are members, is not entitled to draw money from Court on behalf of the minor plaintiff without furnishing security.

On the other side I am referred to a case of the Privy Council reported as *Walian v. Banke Behari Pershad Singh* (5) in which

(2) 64 Ind. Cas. 413; 44 A. 61; 19 A. L. J. 832; (1922) A. I. R. (A.) 355.

(3) 71 Ind. Cas. 278; 45 A. 273; 21 A. L. J. 39; (1923) A. I. R. (A.) 183.

(4) 29 Ind. Cas. 475.

(5) 30 C. 1021; 7 C. W. N. 774; 5 Bom. L. R. 822; 30 I. A. 182; 8 Sar. P. C. J. 512 (P. C.).

(1) 27 B. 23; 4 Bom. L. R. 744.

their Lordships held that in the case before them the absence of a formal order appointing the mother as guardian *ad litem* was only an irregularity and the irregularity could be cured. There it was uncertain whether there had been a formal order of appointment as the appointment, if made, would have been made 14 years before the question arose, and the mother had appeared throughout the proceedings as guardian. It does not appear to me that the facts of that case in any way resemble those of this case, or can constitute an authority to bind me.

I must, therefore, hold that the mortgagor has not performed what the law requires to be performed when a deposit is made under s. 83 of the Transfer of Property Act and that the lower Court was wrong in holding that he had. There was, therefore, in my opinion no valid tender under s. 83, and, therefore, there is in my view no question of interest on this mortgage.

A question is raised as regards costs. The appellants here failed in both the lower Courts and had to pay the respondents their costs. My order as to costs in the lower Courts is that each party should bear their own. With regard to costs here, the appellants must have them. The appeal is, therefore, allowed with costs in this Court.

V. N. V.

Z. K.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1912
OF 1922.

March 20, 1925.

Present:—Justice Sir William Ewart Greaves, Kt., and Mr. Justice Cuming.

NABIN CHANDRA KAPALI—

DEPENDANT NO. 1—APPELLANT

versus

GOUR MOHAN MISTIRI—PLAINTIFF AND
OTHERS—*Pro forma* DEFENDANTS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, O. XLI,
r. 27—*Res judicata*—Rent suit—Finding as to title
—Appeal—Admission of additional evidence without
objection—Reasons, failure to record, effect of.

One of the issues decided in a rent suit was whether a certain portion of the land in dispute did or did not belong to a certain person. The same question arose between the same parties with regard to the same lands in a subsequent suit;

Held, that the decision in the previous suit operated as *res judicata*. [p. 757, col. 1.]

Where a document is admitted in evidence by an Appellate Court without any objection by the opposite party and no prejudice is caused to the latter by the admission of the document, the document would not be rendered inadmissible by the mere fact that the Appellate Court neglected to state its reasons for admitting it in evidence. [p. 757, col. 2.]

Appeal against the decree of the Additional District Judge, Mymensingh, dated the 1st December 1921, modifying that of the Munsif Third Court at Iswargunj, dated the 31st May 1920.

Babu Kalikinkar Chakravarti, for the Appellant.

Babu Birendra Kumar De, for the Respondents.

JUDGMENT.

Cuming, J.—In the suit out of which this appeal arises the plaintiff sued for the recovery of produce rent of a certain parcel of land. The plea of the defendants was that the land no doubt originally belonged to the plaintiff but that by a partition between the plaintiff and his co-sharers a portion of this land had fallen to a third party and that, therefore, he was not obliged to pay the whole rent claimed. The Trial Court held that this question as to portion of the land being held by a third party was *res judicata* between the plaintiff and the defendants and decreed the plaintiff's suit in full. The defendants appealed to the District Court and that Court held that there was not sufficient material on the record to identify the land in the present suit with the land in former suit and he remanded the case for a re-trial. The Trial Court accepted the defence and decreed the suit in part. The plaintiff once more appealed to the District Court. The District Court held that the question as to whether the portion of land for which rent was claimed belonged to a third party was *res judicata* between the parties to the suit and he, therefore, allowed the appeal holding that the defendants were tenants of the plaintiff in regard to the whole land in suit. The effect of the finding is to decree the whole of the plaintiff's suit. The defendants have appealed to this Court.

A preliminary point has been raised that s. 153 of the Bengal Tenancy Act is a bar to an appeal to this Court. As the appeal fails on the merits it is unnecessary to decide this point. The appellants have raised three points in appeal. First of all, it is urged that the lower Appellate Court

was in error in holding that the defence was barred by the rule of *res judicata*. Secondly, it was urged that the first Court of Appeal having held that the plea of *res judicata* was not available to the plaintiff it was not open to the Court of Appeal when the case was taken up again on appeal to have entertained this plea of *res judicata*; and, lastly, it was urged that the lower Appellate Court erred in admitting in evidence certain additional evidence, namely, the plaint which has been marked Ex. (6) without giving its reasons for admitting it in evidence.

With regard to the first contention the appellants rely on the case of *Nilmadhub Sarkar v. Brojo Nath Singha* (1). The facts of that case, however, are different. It is impossible to lay down any hard and fast rule as to whether a previous decision in a rent suit does or does not operate as *res judicata*. In the case, we have just referred to, the learned Judges remarked that the case might have been different if the Court had in the previous suit definitely determined the area of the land in the defendants' possession and the annual rent payable for the same. It might then be said that the determination was general and not limited to the particular years for which the rent was claimed. Now in the present case the point on which it is sought to establish *res judicata* between the parties was whether a certain portion of the land did or did not belong to a third party. This point was decided in the former suit and it cannot be said that this is a question which is limited to the particular year for which rent is claimed and, therefore, this case is distinguishable from the case relied upon by the learned Vakil for the appellants. We think that the judgment in the former rent suit does operate as *res judicata* between the parties. The parties are the same, the areas of the lands are the same and the defence is the same, namely, a third party holding certain portion of the whole land.

The next point raised is that when the case came up for the first time in appeal the Appellate Court held that the previous judgment could not operate as *res judicata*. As a matter of fact the Appellate Court in that appeal did not decide that point at all. What it did decide was that there was not sufficient material on the record to show

(1) 21 C. 236; 10 Ind. Dec. (N. S.) 789.

whether or no the question was or was not *res judicata* and that being so, it cannot be said that it decided that it was *res judicata* and it was, therefore, open to the Judge when the case came up to him for the second time to decide that this question was *res judicata* between the parties.

The last point raised by the learned Vakil for the appellants is that the lower Appellate Court admitted certain additional evidence without giving any reason for it and without giving the parties an opportunity to argue it. It will appear from the order-sheet that this additional evidence which is the plaint in the former rent suit was put in by the plaintiff on the 23rd November. No doubt the case had already been argued in part but the order-sheet shows that after this document was put in further argument was heard. The document was exhibited on the 1st December. But it had been put in evidence on the 28th November during the course of the argument. The list shows that it was admitted without objection. No doubt the learned Judge who admitted this document in evidence neglected to state his reasons for admitting it. That, however, would not render the evidence inadmissible. It does not appear that the parties were in any way prejudiced. They did not object at the time of the admission of the evidence that they had no opportunity to argue on it. All the points are, therefore, decided against the appellants.

The result is that this appeal fails and is dismissed with costs.

Greaves, J.—I agree.

Z. K.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1385
OF 1922.

June 24, 1925.

Present:—Mr. Justice Adami and
Mr. Justice Sen.

Musammam SHEO DANI KUER—PLAINTIFF
—APPELLANT

versus

RAMJI UPADHYA AND OTHERS—
DEFENDANTS—RESPONDENTS.

Hindu Law—Will, construction of—Bequest in
favour of female—"Malik", use of, effect of.

The word "*malik*" is not a term of art and does not, when used in a Will, necessarily define the quality of the estate taken by a devisee. [p. 758, col. 2.]

A Hindu testator devised certain property in favour of a female stating that she would be "*malik mokamil*" thereof and then proceeded to state that at times of real necessity she would be at liberty to mortgage the property or otherwise deal with the same and out of the income and produce of the property to find means for her livelihood:

Held, that the testator intended to confer on the devisee not an absolute estate but the estate of a Hindu woman subject to a power of alienation only in the event of legal necessity. [p. 759, col. 1.]

Appeal from a decision of the Subordinate Judge, Saran, dated the 26th August 1922, reversing that of the Munsif, Chapra, dated the 9th August 1921.

Mr. *Hareshwar Prasad Singh* for Mr. *Bhagwan Prasad*, for the Appellant.

Mr. *Harnarain Prasad*, for the Respondents.

JUDGMENT.

Sen, J.—There is only one point in this appeal and that is whether upon a proper construction of the last Will of one Sheogopal Upadhyaya the property in dispute passed to the plaintiff's mother Kishun Kuer absolutely or only for life.

It appears that Sheogopal had two sons both of whom predeceased him. Sheogopal died leaving one Bacha Kuer the widow of his son Anmaul Upadhaya and Kishun Kuer the widow of his son Ratan Upadhaya. In his Will, Sheogopal provided that the property in question should be enjoyed by Bacha Kuer so long as she might live; and that Bacha Kuer should be able to maintain herself out of the property, but that she would have no power or right to make any sort of transfer of the same; and on her death the property would come to the possession of Musammatt Kishun Kuer.

As regards the character of the enjoyment of Musammatt Kishun Kuer provided for in the Will, there is a great deal of dispute between the parties. The appellant before us contends that there are words of disposition which would clearly amount to conferring an absolute estate upon Kishun Kuer, whereas the respondent contends that there are certain terms in the Will which would clearly show that the intention of the testator was not to confer an absolute estate but only the interest of a limited owner. A great deal of stress is laid upon the use of the words "*malik mokamil*". The learned Vakil for the appellant contends that the very use

of the word *malik* shows that the estate that was purported to be granted to Kishun Kuer was an absolute estate and that once that absolute estate was conferred upon Kishun Kuer then the restrictions laid down in the later portions of the Will would be of no avail. Various rulings are cited in support of this proposition, but the matter is now beyond all doubt that the use of the word *malik* does not necessarily imply that the estate conferred is an absolute estate. As observed by their Lordships of the Judicial Committee in the case of *Bhaidas Shivdas v. Bai Gulab* (1) the word *malik* is not a term of art, it does not necessarily define the quality of estate taken; but in the context of the Will before their Lordships in that case their Lordships thought that the estate conferred was an absolute estate. Therefore, the real question before us is as to whether, reading the context, the word *malik mokamil* in the present case indicates that an absolute estate was intended to be given to Kishun Kuer. I think it is clear that the testator did not intend to give an absolute estate to Kishun Kuer for he observes that "it shall also be within the power of the said Kishun Kuer that at times of real necessity she will meet the same by mortgaging and giving in *zurpeshgi* portions of the lands; further she will do what she likes and from the income and produce of the above she will afford her livelihood, perform pilgrimages hear *Khata Puran* etc. etc."

Now, if the testator really intended to grant an absolute estate it would be entirely unnecessary for him to state that at times of real necessity the donee would be at liberty to mortgage the properties or otherwise deal with the same and out of the income and produce of the properties to find means for her livelihood. There is not a word in the Will to show that the testator ever contemplated that the corpus of the property would be alienated by Kishun Kuer in any way.

The learned Vakil for the appellant points out that the words "she may do what she likes" indicate that the testator intended to give her absolute powers of disposal over the property. That does not appear to me to be a correct construction of the

(1) 65 Ind. Cas 974; 26 O. W. N. 129; 15 L. W. 412; 20 A. L. J. 289; 42 M. L. J. 385; 49 I. A. 1; 35 C. L. J. 314; 24 Bom. R. 551; 46 B. 153; (1922) A. I. R. (P. C.) 193 (P. C.).

words, for they must again be taken together with the context and judging from the manner in which those expressions have been used, it seems to me that what the testator intended to say was that she would be at liberty to do what she chose with the income and produce of the property. At any rate, it does not appear that those words would confer upon the devisee the power to deal with the corpus. In view of the fact that no absolute estate was conferred upon Kishun Kuer, the question does not rise as to whether there were in the later portions of the Will expressions repugnant to an absolute estate which would, therefore, have to be declared to be invalid and of no effect. Taking the instrument in its entirety, I am of opinion that what was really intended to be conferred upon Kishun Kuer was the estate of a Hindu woman subject to alienations only in the event of legal necessity.

In the circumstances the appeal must be dismissed with costs.

Adami, J.—I agree.

Z. K.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 115 AND 368 OF 1924.

February 11, 1925.

Present:—Sir Victor Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice Phillips and Mr. Justice Kumaraswami Sastri.

IN C. R. P. No. 115 OF 1924.

S. GOPALA IYENGAR AND ANOTHER—
PETITIONERS

versus

M. K. MAHOMED IBRAHIM ROWTHER
AND OTHERS—RESPONDENTS.

IN C. R. P. No. 368 OF 1924.

V. N. SETHA IYENGAR—PETITIONER

versus

MAHALINGA PILLAI AND OTHERS—
RESPONDENTS.

Madras District Municipalities Act (V of 1920)—Rules for decision of election disputes, r. 12—Disqualified candidate elected—Objection petition—Next candidate, whether can be declared elected.

Under r. 12 of the Rules for the decision of disputes as to the validity of an election under the Madras District Municipalities Act, if the candidate obtaining the largest number of votes at an election is unseated on the ground that he is interested in a Municipal contract and is, therefore, disqualified from sitting, the candidate obtaining the next largest number of votes cannot be declared elected in the absence of an allegation and proof that the disquali-

cation under which the successful candidate is ultimately found to labour was known to the voters who cast their votes for him. [p. 759, col. 2.]

Hobbs v. Morry, (1901) 1 K. B. 71; 73 L. J. K. B. 47; 68 J. P. 132; 52 W. R. 348; 89 L. T. 531; 20 T. L. R. 50; 2 L. G. R. 7, followed.

If a voter throws away a vote by ignoring something which he could have known and which would have told him that he was throwing away his vote because he was giving it for a person who could never succeed in the election, then his vote is to be taken as wiped out of the election and the man who has the next highest number of votes can be declared duly elected; but, if the votes were given in ignorance of the disqualification under which the candidate of his choice was in fact labouring, then it would be inequitable to allow the votes to be thrown away for that reason and the only proper course is to order re-election. [p. 760, col. 1.]

Petitions under s. 115 of Act V of 1908 (by the petitioners and the 2nd respondent in the lower Court) praying the High Court to revise the orders, dated 28th November 1923, of the District Court, Trichinopoly, in O. P. No. 138 of 1923.

Mr. D. Ramasami Iyengar, for the Petitioners.

Mr. T. V. Ramanatha Iyer, for the Respondents.

JUDGMENT.—In this case the candidate who obtained the greatest number of votes at the election was unseated on the ground that he was interested in a Municipal contract and that, therefore, he was disqualified from sitting. The petitioner claimed the seat but he did not allege that the disqualification under which the successful candidate was ultimately found to labour was known to all or any of the voters who cast their votes for him. The first argument on behalf of the 2nd respondent was that r. 12 of the Rules for the decision of disputes as to the validity of an election means that if the seat were claimed by the petitioner, the Judge must declare him duly elected and that the option of ordering a second election only applies to cases where the petitioner did not claim the seat. That seems to us a quite untenable view and we do not think that the draftsman of these Rules—and it is a matter of common knowledge that both the District Municipalities Act (V of 1920) and the rules drawn under it were very largely based on English procedure and English decisions—could have meant to overlook the fundamental principles which have governed English Electoral Courts for many years. The principles appear to be these and we cannot put them better than they were put in the argument of Mr. Corrie in *Hobbs v.*

Morey (1). He says, "the principle of Election Law is that when there has been an election the candidate who is declared to be elected must be shown to have the majority of votes". This *prima facie* requirement of the law is subject to a modification. He goes on, "If, however, a candidate is disqualified by status, as in the case of a woman or a felon, the votes given for that candidate will be held to have been thrown away, and the opposing candidate, although in fact he has received a less number of votes, will be declared to be elected". That was the argument which was accepted by the learned Judges and on which Mr. Justice Kennedy's judgment is based. There are several authorities which we need not trouble to go into. The effect of those authorities is that, if a voter throws away a vote by ignoring some thing which he could have known and which would have told him that he was throwing away his vote because he was giving it for a person who could never succeed in the election, then his vote was to be taken as wiped out of the election and the man who has the next highest number of votes can be declared duly elected; but, if the votes were given in ignorance of the disqualification under which the candidate of his choice was in fact labouring, then it would be inequitable to allow the votes to be thrown away for that reason and the only proper course is to order re-election. There is a passage in the judgment of Kennedy, J. which is relied upon to show that in this case it would be a suitable course to have a further inquiry to see whether the 2nd respondent can bring himself within the words of the learned Judge. Those words are these. He sets out the principle that the disqualification should be apparent and says "As here the disqualification was not apparent and the petition does not allege that the voters knew of the respondent's disqualification (the only notices being notices to the Mayor and to the opposing candidate) and the petitioner had only a minority of votes, I do not think that he can successfully claim the seat".

We respectfully accept the view put forward by Kennedy, J., as accurate, though we see the very inconvenient consequences that might arise if such an inquiry as is outlined were ever ordered. But, as there is

here no allegation of knowledge of the disqualification on the part of the persons who voted for the unseated candidate, we agree that the proper course is the one suggested by the learned Judge and there is no cause to interfere. Both the petitions are dismissed.

V. N. V.

Petitions dismissed.

ODUH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 60 OF 1924.

September 2, 1925.

Present: - Mr. Simpson, A. J. C.

GANESH PRASAD—PLAINTIFF—
APPELLANT

versus

SANT DIN AND OTHERS—DEFENDANTS
—RESPONDENTS.

Oudh Courts Act (XIII of 1879), s. 18—Pre-emption claimed on payment of less than Rs. 5,000—Decree on payment of more than Rs. 5,000—Appeal.

In a pre-emption suit the plaintiff claimed decree on payment of Rs. 3,552-12-0 as market value of the property in suit, but the Court granted decree on payment of Rs. 7,410-3-0:

Held, that appeal against the decree lay to the District Judge and not to the High Court. [p. 761, col. 1.]

Appeal against the decree of the Sub-Judge, Bahraich dated the 30th July 1924.

Mr. Zahur Ahmad, for the Appellant.

Mr. M. Wasim, for the Respondents.

ORDER.—This is a first civil appeal. A preliminary objection is raised that the appeal lies to the District Judge and not to this Court. This objection must prevail. Under s. 18 of the Oudh Civil Courts Act (XIII of 1879), the appeal lies to the District Judge where the value of the suit does not exceed Rs. 5,000. The suit was one for pre-emption, and it arose out of a sale of two villages Raghunathpur and Asni. These two villages had been sold by means of a single sale-deed, and the price as set forth in the sale-deed was Rs. 14,343, without specification of how much was paid for each village. The plaintiff had a right to pre-empt the share sold in Raghunathpur. He stated in his plaint that the true price paid was Rs. 10,000 only, and that the higher price was fraudulently entered in the sale-deed. He further made a calculation that out of Rs. 10,000, the price of the share sold, according to area, would be Rs. 3,552-12-0 and he asked for a decree for pre-emption at that figure. But he also made the calculation for the

(1) (1904) 1 K. B. 74; 73 L. J. K. B. 47; 68 J. P. 132; 52 W. R. 348; 89 L. T. 531; 20 T. L. R. 50; 2 L. G. R. 7.

price in the sale-deed. He brought it out at Rs. 4,997-5-9, and he announced himself prepared to pay any sum which the Court might find to be right. He valued the suit for Court-fees at five times the land revenue which came to Rs. 171-14-0 and for jurisdiction he valued the suit at Rs. 3,552-12. The defendant admitted plaintiff's claim to pre-empt, but he said that the proportionate value of the property was Rs. 7,650. The Court of trial gave plaintiff a decree for pre-emption on payment of Rs. 7,410-3. Plaintiff comes here in appeal asking to have this amount reduced by Rs. 1,700. He is prepared to pay Rs. 5,700-3. The question is what is the value of the suit. The ordinary rule is that the value of the suit is whatever the plaintiff has asked for in his plaint. The rule is not absolute. The main exception is where the plaintiff has intentionally mis-stated the value of the suit in order to have his matter heard by the wrong Court. There are other possible exceptions none of which will apply to the present case. The plaintiff quite clearly valued his suit at Rs. 3,552 and 12 annas. There was no intentional error in this. He was not certain what the market-value of the property was, but he thought that that was what it might be, and he was prepared to pay that figure. That being so, that is the value of his suit, and will remain so through out all its stages. The case is strictly on all fours with *Thakur Sheodat Singh v. Thakur Bishunath Singh* (1) and the order to be passed will be the same.

I direct that the memorandum of appeal be returned for presentation to the proper Court. The appellant must pay respondent's costs in this Court.

S. D. *Memorandum returned.*
(1) 6 O. C. 255.

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 17
OF 1925.

July 1, 1925.

Present:—Mr. Justice Adami and
Mr. Justice Kulwant Sahay.

BHUPENDRA NARAIN MANDER—
APPELLANT

versus

JANESWAR MANDER AND ANOTHER—
RESPONDENTS.

*Execution of decree—Application filed on last day
of limitation—Particulars, want of, effect of.*

An application for execution of a decree was filed on the last day of limitation and the necessary particulars were either omitted or were entered incorrectly. The omissions were pointed out to the applicant and the Court returned the application so that the omissions may be supplied. A week later the application was re-filed without the order of the Court having been fully complied with. The Court gave another opportunity to the applicant to remove the defects but he failed to do so. When most of the particulars had been supplied it was discovered that the application had originally been filed on the last day of limitation.

Held, that the original application filed was a mere scrap of paper and did not amount to an application for execution and that, consequently, no application for execution had been made within limitation. [p. 762, col. 1.]

Appeal from an order of the District Judge, Bhagalpur, dated the 23rd December 1924, reversing that of the Munsif, Madhipura, dated the 6th August 1924.

Mr. A. P. Upadhyaya, for the Appellant.

Messrs. S. C. Mazumdar and Nawadip Ch Ghose, for the Respondents.

JUDGMENT.

Adami, J.—This is an appeal from an order of the District Judge of Bhagalpur, setting aside the order of the Munsif of Madhipura, rejecting an application for execution of a decree. It appears that the decree of which execution was sought was passed on the 28th October 1911, and time, therefore, would expire on the 28th October 1923. On the 13th November 1923, the application was filed. It would be in time on that date because that date was the first date after the Civil Court vacation. The application, however, was defective in very many ways; the heading was blank and so was column 8, column 6 was not correctly entered and no list of the properties sought to be sold was given; sheet No. 2 was blank and there was no copy of the decree attached to the application, column 10 did not show a clear statement of the petition, the names of the decree-holders were not given. The Munsif passed an order on the 13th November 1923: "Petition returned for compliance of the omissions pointed out." No date was given for compliance. On the 19th November, the application was put in again, but it was found that all the defects noted had not been removed, and the Munsif passed an order on that date that the decree-holder must remove all the errors by the 4th of December. On the 7th December, the order-sheet shows that, the number and date of the previous execution proceedings had not been correctly given; it was noted that the decree appeared to be time-barred, that

is to say, I suppose, that the application was time-barred. The Munsif ordered that the decree-holder should shew cause by petition why the application should not be rejected, and, if he failed, the petition would stand time-barred. The application was returned for compliance by the 17th December. The next order on the order sheet is not dated, but it is to the effect that the order of the 7th December must be complied with by the 17th of January, and it seems that some objection was taken that notice of the order of the 7th January had not been given to the Pleader. No petition was put in on the 17th January 1924, but on the 18th January, the decree-holder filed a petition showing cause why the application should not be found to be time-barred and excused his failure to file the application on the 17th on the ground that he could not get any stamp on that date. The next order on the order-sheet is dated the 28th January 1924 and is "register the petition." This entry was made by a clerk without orders from the Munsif, and the Munsif paid no attention to it. He found that the application was beyond time and time-barred.

An appeal was made to the District Judge and he held that, as the Munsif had given no date on the 13th November 1923, for compliance with his order, but on the 19th November gave time till the 4th December for compliance, it must be held that he had allowed time till the 4th of December, and thus had saved the application from being time-barred. The learned District Judge admits that, even on the 4th December, the application was still defective, but he decided, on the basis of various rulings which he cited that the defects on the 4th December were not material defects and, therefore, it must be held that time had been extended and the order had been complied with by the 4th December. He, therefore, admitted the application.

In my opinion, the application should be held to be time-barred. It is clear that at the last moment the decree-holder put in a piece of paper with certain facts written on it and certain prayers, but that application was not an application for execution such as is required by law. It was very flagrantly defective; it was treated as being of no avail and it was returned to the decree-holder to be completed in proper form. At that time the question whether the application was time-barred could not

be considered, because the facts stated in the application did not afford the necessary information; it was in fact treated as no application at all. On the 19th November time was given until the 4th December, and it was then first noticed that the application appeared to be time-barred, and the decree-holder was called upon to point out any reasons why it should not be condemned as time-barred.

In the case of *Salimulla Bahadur v. Sainaddi Sarkar* (1), a decree-holder applied for execution of his decree and, before the period of limitation had arrived, he applied to the Court under O. XXI, r. 17 to be allowed to file a list of immoveable properties. The Court simply made the order "permitted" and did not fix any time within which the list was to be filed. The list was subsequently filed after the period of limitation had already run. It was there held that the proceedings in execution were barred by limitation inasmuch as the provisions of O. XXI, r. 17, sub-r. (2) were not complied with, and the necessary formalities were not carried out within the time prescribed by law. In that case, as in this case, it was not brought to the notice of the Court at the time the application was made that there was any question of limitation. The failure to file a list of properties was a material defect and, by the time that the order was passed on the 19th November, the application was already time-barred.

The learned District Judge has cited various cases where various defects were held to be individually not material. But in the present case, the application was defective in nearly every way and many of the defects were material. The decree-holder in the later stages seems to have continued to delay and his excuse that he could not file the petition on the 17th January, because he could not get the stamp was not a good one. I can see no good reason for considering that it can be held that an application for execution was made within time, and in my opinion the application should be held to be time-barred.

The appeal should be allowed with costs, the order of the learned District Judge set aside and that of the Munsif restored.

Kulwant Sahay, J.—I agree.

Z. K.

Appeal allowed.

(1) 22 Ind. Cas. 337; 18 C. L. J. 538.

CALCUTTA HIGH COURT.
APPEAL FROM APPELLATE DECREE No. 1572
OF 1922.

May 4, 1925.

Present:—Mr. Justice Cuming and
 Mr. Justice Chakravarti.

MAHAMMED ISMAIL AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

SHARFATULLAH AND OTHERS—
DEPENDANTS—RESPONDENTS.

*Construction of document - Usufructuary mortgage—
 Redemption provided after possession by mortgagee—
 Limitation, operation of - Limitation Act (IX of
 1908), Sch. I, Art. 148.*

Where a usufructuary mortgage provides that the right of redemption would accrue only after possession is delivered to the mortgagee, limitation does not run against the mortgagor until possession is delivered to the mortgagee. [p. 764, col. 1.]

A usufructuary mortgage executed in 1854 provided that the mortgagee would retain possession of the mortgaged land and that he would realise rents, and that afterwards if the mortgagor re-paid the money, then the land would be released. The mortgagee did not get possession before December 1860. In September 1919 a suit was brought to redeem the property:

Held, that under the terms of the mortgage-deed, the right of redemption did not arise until after possession had been delivered to and enjoyed by the mortgagee, and that the suit brought well within sixty years from December 1860 was within time. [p. 765, col. 1.]

Appeal against a decree of the Subordinate Judge, Second Court, Chittagong, dated the 31st of March 1922, reversing that of the Officiating Munsif, Additional Court at that place, dated the 27th of September 1920.

Babu Ram Charan Mazumdar (with him Babu Chandra Sekar Sen), for the Appellants.

Babus Paresh Chandra Sen, Asita Ranjan Ghose, Narendra Kumar Das, Moulvi Mohammed Nurul Huque Chaudhury, Babus Bhagirath Chandra Das, Dharmadas Set and Biraj Mohan Mazumdar, for the Respondents.

JUDGMENT.

Chakravarti, J.—This appeal is by the plaintiffs and arises out of a suit brought by them for redemption and after redemption for recovery of possession of the mortgaged property. The facts shortly stated are these:—

It appears that the predecessors of the plaintiffs gave a mortgage of the properties in suit in favour of the predecessors of defendants Nos. 1 to 12. The plaintiffs alleged that the mortgage was an usufructuary mortgage and that under the conditions of that mortgage the mortgagees were to

enjoy possession of the properties in lieu of interest and that the mortgage would be redeemable on payment of the principal money which was a sum of Rs. 188. It is not stated that there was any date fixed for the re-payment of the money and as it would appear later on no such date was fixed at the time of the original mortgage transaction. The plaintiffs now want to redeem the mortgage of 1854 on payment of the principal amount which was paid under the mortgage. It was further alleged by the plaintiffs that in the year 1855 a suit was brought by the mortgagee and that suit was non-suited. Nothing came out of those proceedings. Then the mortgagees brought a suit for possession of the mortgaged properties in the year 1859 and that suit terminated in a decree for possession in favour of the mortgagees as mortgagees. That decree was passed in 1860.

The present suit was brought on the 12th September 1919. This suit was brought not only against the representatives of the original mortgagees defendants Nos. 1 to 12 but against a number of other defendants, who, according to the plaintiffs, were in possession of a part of the mortgaged property as purchasers from the mortgagees.

The main defence and the common defence of all the defendants was that the suit was barred by limitation. There were special defences set up by the other defendants, I mean the defendants other than the defendants Nos. 1 to 12 upon the special circumstances of the case for each set of defendants. I ought to have stated that the plaintiffs' allegation in their plaint that the mortgage was an usufructuary mortgage was not traversed or in any way controverted by the defendants in their written statement. The Trial Court came to the conclusion that the mortgage was a usufructuary mortgage. The original mortgage-deed is not forthcoming; but it appears that the deed was produced in the suit of 1850 and the terms of the mortgage have been gathered from the proceedings of that suit, and, as I have already stated the Court of first instance in trying the question as to limitation says as follows:—"In case of usufructuary mortgage embodying stipulation for redeeming the mortgage whenever money is paid, right to redeem undoubtedly arises from the date of the mortgage." Therefore, there was no question raised in the Court of first instance

that the mortgage in question was anything less than an usufructuary mortgage. As no date for re-payment of the money was stated in the original mortgage the Court of first instance held that the period of limitation would run from the date of the mortgage. It appears that, that Court came to the conclusion that the suit was not barred by limitation although it was brought evidently after more than 60 years from the date of the original mortgage, namely February 1854 because there was admission of liability within 60 years of this. It was sought by the plaintiffs in the Court of first instance to establish this acknowledgment of the rights of the mortgagees in the previous suit of 1859. The Court, came to the conclusion that the bar of limitation was saved by the acknowledgment within s. 19 of the Limitation Act. The Court of first instance decreed the suit.

On appeal by the defendants the lower Appellate Court has disposed of the case on the question of limitation holding that the acknowledgment relied upon by the plaintiffs was really not established by the proceedings of the earlier suit; and in that view the suit was dismissed without any trial of the rights of the various defendants Nos. 1 to 12 the original mortgagees. As I have already stated the present appeal is by the plaintiffs and the learned Advocate who has appeared for them did not question the finding of the lower Appellate Court that there was no acknowledgment within the meaning of s. 19 to save the suit from the bar of limitation. He, however, contended that the period of limitation would run not from the date of the mortgage but from the date when the mortgagees obtained possession of the properties and on the ground that the mortgage was not a completed transaction until the mortgagees obtained possession as usufructuary mortgagees.

It was, secondly, argued that apart from the general question as to whether an usufructuary mortgage is a completed mortgage until possession is delivered, in the present case the right of redemption did not arise under the terms of the mortgage until the mortgagees had obtained possession and enjoyed such possession and then the right of the mortgagors to redeem would arise.

The learned Vakils for the defendants raised the question as to whether the mortgage in suit was really an usufructuary

mortgage or not. They contended that the mortgage was really a mortgage by conditional sale. It appears to us, however, that it was not disputed by the defendants that the mortgage was an usufructuary mortgage as was alleged in the plaint by the plaintiffs. The Court of first instance clearly proceeded upon the view that the mortgage was an usufructuary mortgage. In the lower Appellate Court, it appears, that no question was raised by the defendants who were appellants before that Court that the finding of the First Court that the mortgage was an usufructuary mortgage was not correct. The points for determination as stated by the learned Subordinate Judge do not show that such a question was raised before him. We have the terms of the mortgage as set out in the judgment and decree of the year 1860 and we agree with the learned Munsif that the mortgage was an usufructuary mortgage. Then the question arises when did the time run against the plaintiffs for redemption of the mortgage. Article 148 of the Limitation Act runs as follows:— "Against a mortgagee to redeem or to recover possession of immoveable property mortgaged. When the right to redeem or to recover possession accrues." Apparently, therefore, when there is a date for re-payment fixed in the original mortgage-deed, the time would run from such date. The question then arises when does the right to redeem or to recover possession accrue when there is no specific date mentioned in the terms of the mortgage. Ordinarily in such a case the time would run from the date of the mortgage and as an authority for this proposition it is sufficient to refer to the case of *Soni Ram v. Kanhaiya Lal* (1) where the Judicial Committee of the Privy Council pointed out that in the absence of a date fixed in the mortgage-deed the time would run from the date of the mortgage. It was argued by the learned Advocate for the appellants that an usufructuary mortgage is not completed until the mortgagee obtains possession of the property and limitation will not run until the transaction is completed and in support of this view the learned Advocate relies upon the language of s. 58 of the Transfer of Property Act. Although the

(1) 19 Ind. Cas. 291; 40 I. A. 74; 13 M. L. T. 437; 17 C. W. N. 605; 11 A. L. J. 389; (1913) M. W. N. 470; 17 C. L. J. 488; 15 Bom. L. R. 489; 35 A. 227; 25 M. L. J. 131 (P. C.).

mortgage in question was executed long before the Transfer of Property Act came into operation the provisions of the Act may be relied upon in support of the contention now raised as a general principle of law. In the view that we take of the second question we think it is unnecessary for us to decide this questions for the purposes of this appeal. It appears to us from the terms of the mortgages as set out in the earlier litigations that it was stipulated in the mortgage in question that the right of redemption would accrue after the mortgagees were put in possession and after they had enjoyed the usufructs of the property. As no date for redemption was fixed it appears to us that this condition in the deed itself is very material for the purpose of showing what was in the contemplation of the parties as to when the right of redemption would be exerciseable by the mortgagors. It appears from the judgment in the suit of 1859 that the terms of the mortgage were stated as follows: "It clearly appears therefrom that Feda Gazi and Hira Bibi and Khaidja Bibi mortgaged the disputed *taluka* lands to the plaintiffs' father on receipt of Rs. 188 from him on condition that the plaintiffs' father would retain possession of the said land and that he would realise rents and that afterwards if the mortgagor re-paid the money, then the land would be released." It, therefore, appears from the terms of this mortgage that it was contemplated that the right of redemption of the mortgagors would accrue only after the mortgagees were put in possession of the mortgaged properties and had realised rents of those properties and, as I have already stated, in the present case, the possession of the mortgaged properties was not delivered to the mortgagees at the time of the mortgage but the mortgagees obtained possession of the properties as usufructuary mortgagees after they had obtained a decree for possession in the year 1860. We, therefore, think that the contention of the learned Advocate that the right to redeem the mortgage as provided for in Art. 148 of the Limitation Act did not arise under the terms of the mortgage until after possession had been delivered and enjoyed by the mortgagees is sound. That being so, the suit which was brought well within sixty years from 1860 would be within time. We have not got the exact date when possession was recovered under the decree of 1860, but possession

could not have been obtained earlier than the 4th December 1860 which would be within 60 years from the date of the present suit which was instituted on the 12th September 1919. In this view, therefore, we think that the suit of the plaintiffs so far as the original mortgagees are concerned, is not barred by limitation. But as I have already stated there are several other defendants who are in possession of parts of the mortgaged properties under various rights which have accrued during this long lapse of time from the time of the mortgage.

In these circumstances we think the best course would be to remit this case to the lower Appellate Court for raising clear issues as to the defence of each of the numerous defendants in so far as they are concerned and to try the questions which will arise between the plaintiffs and those defendants, and we order accordingly. If there is any question of special limitation as regards any of those defendants that question will also be decided by the lower Appellate Court.

The questions which are to be tried by the lower Appellate Court, are subject to this limitation, namely, that the questions would be decided only between the plaintiffs and those defendants who have appealed against the decree passed by the Court of first instance or were impleaded as respondents in the appeal.

The appellants are entitled to their costs in this appeal against the original defendants Nos. 1 to 12. As regards the costs of the other defendants in this appeal, they shall abide the result of the trial by the lower Appellate Court.

I ought to mention here that some of the defendants who had died were not represented in this appeal. It was contended on behalf of the respondents that the whole appeal was incompetent and should be dismissed. In our opinion this contention is not sound. All the original mortgagors are properly before us and so far as some of the purchasers-defendants who are not properly represented, the result of this appeal will not affect their right. This dismissal of the suit as against them will stand good. The plaintiffs must redeem the whole mortgage.

Cuming, J.—I agree.

N. H.

*Appeal allowed;
Case remanded.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 501 of 1924.

August 31, 1923.

Present:—Mr. Dalal, J. C.

RAMCHARAN—PLAINTIFF—APPELLANT
versus

Musammât SIRTAJI AND ANOTHER—
DEFENDANTS—RESPONDENTS.

Family settlement—Oral agreement to maintain existing possession with title—Bona fide dispute—Settlement—Consideration.

Where a person is already in possession of property and has a title to it, an oral agreement to maintain him in that right is quite sufficient and no conveyance is necessary. [p. 767, col. 1.]

Baldeo Singh v. Udâl Singh, 58 Ind. Cas. 732; 43 A. 1 at p. 13; 2 U. P. L. R. (A.) 202; 18 A. L. J. 877, referred to.

The existence of a *bona fide* dispute is a good and sufficient consideration to support a contract even though the claim which caused the dispute turns out afterwards to have no foundation. [*ibid.*]

Gandharp Singh v. Nirmal Singh, 51 Ind. Cas. 325; 22 O. C. 300; 6 O. L. J. 529, referred to.

Second appeal against a decree of the District Judge, Fyzabad, dated the 4th September 1924, upholding that of the Additional Subordinate Judge, Sultanpur, dated the 19th March 1923.

Mr. Niamat Ullah, for the Appellant.

Mr. Bisheshar Nath Srivastava, for the Respondents.

JUDGMENT.—The plaintiff Ram Charan sued for possession of 1/4th of a certain property under the following circumstances. He and one Deoki were sons of two brothers. Deoki's father Arjun had two sons Girdhari and Deoki of whom Girdhari predeceased him. The defendant Musammât Sartaji is widow of Girdhari. On the death of Arjun Deoki was left in possession of half the property of Arjun and Musammât Sartaji received maintenance from him. It was further agreed between them that on Deoki's death she should succeed to his property in default of male descendants.

On Deoki's death Musammât Sartaji obtained mutation of names whereupon Ram Charan applied for a review. During this litigation the parties arrived at an agreement under which Musammât Sartaji was maintained in possession and ownership of 1/4th of the property and Ram Charan in possession and ownership of the other 1/4th, in addition to his own 1/2.

Subsequently Ram Charan sued for this 1/4th of the property (in which he maintained Musammât Sartaji during mutation proceedings) on the ground of title.

The suit has been dismissed by both the Subordinate Courts.

The main point argued in the lower Courts was that the family settlement Ex. A-5 between the woman and Deoki and A-7 between the parties to the suit required registration and were not admissible in evidence, as they were unregistered documents. The Subordinate Courts held that Ex. A-7 did not require registration.

I do not think it necessary to enter into the question of registration of the document Ex. A-7. The learned Counsel for the respondent female has drawn my attention to a decision of Mr. Justice Piggott in *Baldeo Singh v. Udâl Singh* (1). As pointed out by the learned Judge any document, whether a family settlement or not, which purported to create title to property and was put forward in Court as the basis of title required registration. This case is, however, similar to the case in which the learned Judge delivered his judgment and it can be decided on the basis of the oral agreement between the parties. The terms of Ex. A-7 clearly indicate that there was a previous oral agreement and the application to the Mutation Court merely noted that oral agreement in order that the Mutation Court may act upon it. The words in Ex. A-7 are that for certain reasons the parties had already come to an agreement that one party will be owner of 1/2 and the other party owner of the other half. The document itself was not a document of title but merely evidence of oral agreement between the parties. At page 15* the learned Judge says:—

"Now the agreement come to by the parties in this case was undoubtedly of the nature of a family settlement of doubtful claims....When such an agreement decides a *bona fide* disputed claim to immoveable property, particularly when the dispute is between members of the same family. I do not think that it is correct to treat the transaction as if there had been a conveyance of immoveable property by any one party to any other....The whole question in issue in a case like the present is whether the plaintiff is to be permitted to prove his title, as he claims that it existed independently of, and antecedently to, the family arrangement. The question is whether the arrangement itself does not bind

(1) 58 Ind. Cas. 732; 43 A. 1 at p. 13; 2 U. P. L. R. (A.) 202; 18 A. L. J. 877.

*Page of 43 A.—[Ed.]

the parties to it. In this view of the matter there does not seem to be room for the contention that the arrangement arrived at on the family compromise amounted to a conveyance by one party to the other....I quite fail to see how a distribution of property amongst the parties like that which I am considering could be called either a sale, or an exchange or a gift. If so, it follows that the parties to such an arrangement are not bound to execute an instrument in writing at all."

In the present case *Musammatt Sartaji* was already in possession and had a title to property which both parties considered to be sound at the time and in maintaining her in a portion of that property no conveyance of immovable property was necessary. An oral agreement to maintain her in the right which she claimed was sufficient and such oral agreement has been clearly proved in this case.

It was argued that the claim of the woman rested on a document which is inadmissible in evidence. This argument has been properly met by the Trial Court by reference to *Gandharp Singh v. Nirmal Singh* (2), that the existence of a *bona fide* dispute is a good and sufficient consideration to support a contract even though the claim which caused the dispute turns out afterwards to have had no foundation. I am of opinion that the woman is in possession of the property in virtue of a contract which cannot be rescinded by the plaintiff.

It was argued that under that contract the woman had only a life-interest. The plaintiff never put forward any such plea in his plaint and this point was raised late in the lower Appellate Court. He deserves no sympathy because his plaint was based on suppression of facts. In the plaint no mention whatsoever was made of an agreement entered into by him with the woman. A man who comes seeking justice on suppression of truth does not deserve any consideration in a Court of Justice.

I dismiss this appeal with costs.

S. D.

Appeal dismissed.

(2) 51 Ind. Cas. 325; 22 O. C. 300; 6 O. L. J. 529.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1493 of 1922.

April 9, 1925.

Present:—Mr. Justice Phillips.

TIRUVENGADAM PILLAI—DEFENDANT
No. 4—APPELLANT

versus

SABHAPATHI PILLAI, MINOR BY
GUARDIAN VENUGOPALA SASTRI
AND OTHERS—DEFENDANTS NOS. 1 TO 3—
RESPONDENTS

Transfer of Property Act (IV of 1882), s. 101—Discharge of prior mortgage—Intention to keep alive mortgage—Presumption of fact or law.

The presumption is that a person paying off a mortgage intends to keep alive the mortgage if it is for his benefit to do so. [p. 768, col. 1.]

Gokaldas Gopaldas v. Puranmal Premsookh Das, 10 C. 1035; 11 I. A. 126; 8 Ind. Jur. 393; 4 Sar. P. C. J. 543; 5 Ind. Dec. (N. S.) 692 (P. C.), referred to.

But the presumption is not irrebuttable. It is not one of law but of fact and the inference of intention has to be drawn from the circumstances in each case. [*ibid.*]

Mohesh Lal v. Mohant Bawan Das, 9 C. 961; 10 I. A. 62; 13 C. L. R. 221; 7 Ind. Jur. 382; 4 Sar. P. C. J. 421; 4 Ind. Dec. (N. S.) 1291 (P. C.), *Sunduramayya v. Mummareddi Yanadamma*, 9 Ind. Cas. 139; 21 M. L. J. 180; 9 M. L. T. 258, *Govindaswami Thevan v. Doraiswami Pillai*, 6 Ind. Cas. 781; 31 M. 119; 20 M. L. J. 380; 8 M. L. T. 132; (1910) M. W. N. 390, relied on.

Second appeal against a decree of the District Court, Trichinopoly, in A. S. No. 131 of 1921, preferred against that of the Court of the Additional Subordinate Judge, Trichinopoly, in O. S. No. 30 of 1920 (O. S. No. 3 of 1919 on the file of the Court of the Subordinate Judge, Trichinopoly).

Mr. A. Narasimhachariar, for the Appellant.

Mr. K. Kuttikrishna Menon, for the Respondents.

JUDGMENT.—The appellant is the owner of one item of mortgage property and in purchasing that property he discharged a prior mortgage on that one item and also two other items of property, one of which is the subject-matter of the suit mortgage along with the property, purchased. The question is whether the appellant is entitled to subrogation in respect of that prior mortgage. Both the lower Courts have found that he is not so entitled.

Objection is taken to the finding of the lower Appellate Court on the ground that the reasons given by the learned District Judge are not relevant in coming to the conclusion as to the intention of the appellant when

he discharged the prior mortgage. The District Judge has rightly kept in mind the fact that in such cases the presumption is that the person paying off a mortgage intends to keep alive the mortgage if it is for his benefit to do so, a principle which is laid down in *Gokaldas v. Puranmal Premsukh Das* (1). Starting with that presumption the Judge has considered the evidence and has come to the conclusion that in the circumstances of the case that presumption is rebutted.

In appeal it is contended that he has rather addressed himself to the intention of the original mortgagor than to the intention of the appellant. I do not think that this is clearly established. There are circumstances in the case which undoubtedly weaken the presumption that he intended to keep it alive. The original mortgage was in respect of three items of property and the appellant has only purchased one of these items. The mortgage bore very heavy interest and there can be no doubt that the mortgagors intended that it should be put an end to and there is the circumstance that this one property was sold to discharge a mortgage on three items. There is also an endorsement on the original mortgage-deed that the money was actually paid to the mortgagee and the document was cancelled. The contention in appeal really seems to be that according to the authorities the presumption of law as to intention is really irrebuttable. That that is not so is clear from the decision of the Privy Council in *Mohesh Lal v. Mohant Bawan Das* (2) and also two cases of this Court *Sundaramayya v. Mummareddi Yanadamma* (3) and *Gorindaswami Thera v. Dorai Swami Pillai* (4). Therefore the question of intention is a question of fact. It has been laid down in several cases that certain acts, or certain facts, are not sufficient to rebut the presumption but when we consider the intention of a person doing an act, that act under one set of circumstances may show a certain intention, whereas the same act under a different set of circumstances may show a different intention, so that the in-

ference in all cases has to be drawn from the circumstances of the cases themselves. The District Judge has chosen to consider that the several circumstances in this case are sufficient to establish what was the intention of the appellant and that is all that he is required to do, and he has evidence to go on. Consequently, this being a second appeal, I do not think that I can interfere with this finding of fact. The appeal is dismissed with costs. Time for payment is extended to three months from this date.

V. N. V.

S. D.

*Appeal dismissed.***CALCUTTA HIGH COURT.**

CIVIL RULE No. 208 OF 1925.

May 11, 1925.

Present :—Justice Sir Babington Newbould, Kt., and Mr. Justice Pearson.

MANMATHA NATH CHOUDHURY—

PETITIONER

versus

Choudhury JAMINI NATH MALLIK

REPRESENTED BY HIS MANAGER NIRAPADA

CHATTERJI—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. IX, r. 8—Adjournment of suit refused—Pleader having no further instruction—Default of appearance—Dismissal of suit.

Where, after an application for the adjournment of the hearing of a suit is rejected, the party's Pleader states that he has no further instruction, that is equivalent to the absence of the party from the proceeding, and the dismissal of the suit for default by the Court in such a case is a dismissal under r. 8 of O. IX of the C. P. C. [p. 769, col. 1.]

Satish Chandra Mukherjee v. Ahara Prasad Mukerjee, 34 C. 403; 5 C. L. J. 247; 2 M. L. T. 123; 11 C. W. N. 329, followed.

Rule against an order of the Court of the District Judge, Midnapore, in Miscellaneous Appeal No. 151 of 1921.

Babu Bejoy Kumar Bhattacharjee, for the Petitioner

Babu Surendra Nath Guha and Mr. M. Nuruddin Ahmed, for the Opposite Party.

JUDGMENT.—The petitioner in this Rule was the plaintiff in a suit in which a Commissioner was appointed to make a local enquiry. After the Commissioner had submitted a report he was directed to make a further enquiry and submit a fresh report, and the petitioner was directed on the 3rd July 1924 to deposit Rs. 60 within three

(1) 10 C. 1035; 11 I. A. 126; 8 Ind. Jur. 396; 4 Sar. P. C. J. 543; 5 Ind. Dec. (N. S.) 692 (P. C.).

(2) 9 C. 961; 10 I. A. 62; 13 C. L. R. 221; 7 Ind. Jur. 382; 4 Sar. P. C. J. 424; 4 Ind. Dec. (N. S.) 1291 (P. C.).

(3) 9 Ind. Cas. 139; 21 M. L. J. 180; 9 M. L. T. 258.

(4) 6 Ind. Cas. 781; 34 M. 119; 20 M. L. J. 380; 8 M. L. T. 132; (1910) M. W. N. 390.

[90 I. C. 1925]

ASHLOKE SINGH v. BODHA GANDERI.

days of that date as Commissioner's fee, etc., and the hearing of the suit was adjourned to the 21st July. On the 21st July it appears that this sum had not been paid and the plaintiff's explanation was not accepted by the Court and his application for time was rejected. Thereon the plaintiff's Pleader stated that he had no further instruction, and the suit was dismissed for plaintiff's default. The plaintiff then applied to the Trying Court under r. 9 of O. IX, C. P. C. for revival of the suit. That application was rejected. On appeal to the District Judge the appeal was dismissed on the ground that the order passed by the Subordinate Judge was not in a proceeding contemplated by O. IX of the Code and consequently no appeal lay.

We are unable to agree with the decision of the learned District Judge. It is now settled law that when after an application for adjournment is rejected the party's Pleader states that he has no further instruction that is equivalent to the absence of the party from the hearing. This follows from the decision of the Full Bench in the case of *Satish Chandra Mukerjee v. Ahara Prasad Mukerjee* (1). Consequently when the Subordinate Judge on the 21st July 1924 dismissed the plaintiff's suit for default this must be held to have been a dismissal under r. 8 of O. IX which would be made applicable by r. 2 of O. XVII. Consequently the petitioner was entitled to make an application under O. IX, r. 9 and an appeal lay to the District Judge against the order refusing that application.

We accordingly make this Rule absolute. We set aside the order of the District Judge of Midnapore, dated 10th January 1925 dismissing the petitioner's appeal and we direct that the appeal be heard on the merits.

The costs of this Rule will be costs in the appeal. We assess the hearing-fee at two gold mohurs.

N. H.

Rule made absolute.

(1) 34 O. 403; 5 C. L. J. 247; 2 M. L. T. 123; 11 O. W. N. 329.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 91
OF 1924.

July 8, 1925.

Present :—Mr. Justice Ross.
ASHLOKE SINGH AND OTHERS—
DEFENDANTS—APPELLANTS

versus

BODHA GANDERI—PLAINTIFF—
RESPONDENT.

Transfer of Property Act (IV of 1882), s. 123—Gift of mango tree, nature of—Tree, whether immoveable property—Registration, whether necessary.

A transfer of mango tree by way of gift must be made by a stamped and registered instrument where it is intended that the donee should enjoy the fruits of the tree for an indefinite period and where the immediate or approximately immediate severance of the tree from the land is not within the contemplation of the parties at the time of the making of the gift. In such a case the tree is immoveable property and its transfer is a transfer of an interest in land. [p. 771, col. 2.]

Appeal from a decision of the Subordinate Judge, Arrah, dated the 2nd of August 1922, reversing that of the Munsif, Arrah, dated the 5th of December 1921.

Messrs. *Lakshmi Narayan Singh* and *Sarjoo Prasad*, for the Appellants.

Mr. *Parmeshwar Deyal*, for the Respondent.

JUDGMENT.—The subject-matter of this suit is a mango tree. The plaintiff-respondent sought a declaration of his right to, and recovery of possession of the tree which he said had been given to him by one of the proprietors of the village by an unregistered and unstamped *chithi*, dated the 12th of *Kartick* 1315. The defendants pleaded that the plaintiff had no right to the tree and that the *chithi* being unstamped and unregistered was not admissible in proof of his title.

The learned Munsif dismissed the suit on the ground that the *chithi* operated as a deed of gift relating to immoveable property, that there was no evidence that the mango tree was taken only as standing timber, but that the possession and enjoyment of the fruits of the tree by the plaintiff went to show that the plaintiff wanted to take an interest in immoveable property, and that therefore the *chithi* ought to have been stamped and registered. The *chithi* was not produced, but it was admitted that it was neither stamped nor registered. The Munsif, therefore, held that the plaintiff had failed to establish his title to the tree. The learned Subordinate Judge reversed this

decision. He held that the plaintiff had been in possession of the tree from 1319 until 1327. As the *chithi* was not produced he was of opinion that the legal position came to this that the plaintiff got the tree under an oral gift accompanied by delivery of possession. He held that under the definitions in the Transfer of Property Act and the Indian Registration Act "standing timber" is not immoveable property, that in this part of the country planks of mango wood are often used for making leaves of doors and windows and similar other purposes, and that therefore the tree was standing timber, and consequently there was no necessity for a stamped and registered instrument. He, therefore, held that the plaintiff acquired a good title by the oral grant and decreed the suit.

The question in the appeal is whether the mangotree is moveable or immoveable property. The learned Advocate for the appellants contended that the question is a question of intention. If the intention was that the plaintiff should enjoy the fruit of the tree and not cut it down as timber, then it was immoveable property and could only be conveyed by a registered instrument. Reference was made to s. 3 of the Transfer of Property Act where it is declared that "Immoveable property does not include standing timber, growing crops or grass" and it was argued that these three terms must be treated as *ejusdem generis* with the common idea of immediate severance. In Shephard and Brown's Commentary on the Transfer of Property Act, the learned Commentators say: "In excepting standing timber, growing crops, and grass from the category of immoveable property, regard has probably been had to the fact that they are all things usually contemplated as severable or intended to be severed, from the soil. When such severance is not intended, but on the contrary it is contemplated that the purchaser of the trees should derive some benefit from their further growth, it is an interest in immoveable property that the purchaser takes". In s. 2 of the Indian Registration Act "Immoveable property" is defined as including certain things, "but not standing timber, growing crops nor grass". Rustomji in his Commentary on this Act says "If trees are sold with a view to the purchaser's keeping them permanently standing and enjoying them by taking their fruits or otherwise, the sale would be a sale of immoveable property".

The matter was very fully discussed in *Marshall v. Green* (1), where the question was whether a contract for the sale of growing timber was within the fourth section or the seventeenth section of the Statute of Frauds, that is, whether it was for a sale of an interest in land or of a chattel. In his judgment in that case Lord Coleridge, C. J., said: "I find the following statement of the law with regard to this subject, which must be taken to have received the sanction of that learned Judge, Sir Edward Vaughan Williams, in the notes in the last Edition of Williams' Saunders upon the case of *Duppa v. Mayo* (2). The principle of these decisions appears to be this, that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold from further vegetation and from the nutriment to be afforded by the land, the contract is to be considered as for an interest in land; but where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, and the contract is for goods"..... Here the contract was that the trees should be got away as soon as possible, and they were almost immediately cut down. Apart from any decisions on the subject, and as a matter of common sense, it would seem obvious that a sale of twenty-two trees to be taken away immediately was not a sale of an interest in land, but merely of so much timber". Brett, J., said in his judgment "If the thing, not being fructus industrials is to be delivered immediately, whether the seller is to deliver it or the buyer is to enter and take it himself, then the buyer is to derive no benefit from the land, and consequently the contract is not for an interest in the land, but relates solely to thing sold itself. Here the trees were timber trees, and the purchaser was to take them immediately, therefore, applying the test last mentioned, the contract was not within the 4th section". Grove, J., said "It seems to me that in determining the question whether there was a contract for an interest in land, we must look to what the parties intended to contract for. In all the cases this has been made the test. In

(1) (1876) 1 C. P. D. 35; 45 L. J. C. P. 153; 33 L. T. 404; 24 W. R. 175.

(2) (1845) 1 Wms. Saund. 275 at p. 276; 85 E. R. 336 at p. 343.

the case of *Smith v. Surman* (3), it was argued by Russel, Serjt, that 'a sale of crops, or trees, or other matters existing in a growing state in the land may or may not be an interest in land according to the nature of the agreement between the parties and the rights which such an agreement may give' and that view was adopted by the Court in giving judgment..... Here the trees were to be cut as soon as possible, but even assuming that they were not to be cut for a month, I think that the test would be whether the parties really looked to their deriving benefit from the land, or merely intended that the land should be in the nature of a warehouse for the trees during that period. Here the parties clearly never contemplated that the purchaser should have anything in the nature of an interest in the land; he was only to have so much timber, which happened to be affixed to the land at the time, but was to be removed as soon as possible, and was to derive no benefit from the soil". The same view was taken in *Seeni Chettiar v. Santhanathan Chettiar* (4) by the Full Bench where Collins, C. J., said "It has long been settled that an agreement for the sale and purchase of growing grass, growing timber or underwood, or growing fruit, not made with a view to their immediate severance and removal from the soil and delivery as chattels to the purchaser, is a contract for the sale of an interest in land". Subramania Ayyar, J., said "It is scarcely necessary to observe that though standing timber is, under the Registration Act III of 1877, moveable property only, still parties entering into a contract with reference to such timber may expressly or by implication agree that the transferee of the timber shall enjoy, for a long or short period, some distinct benefit to arise out of the land on which the timber grows. In a case like that, the contract would undoubtedly be not one in respect of mere moveables, but would operate as a transfer of an interest in immoveable property". It is true that a somewhat different view was taken in *Krishnarao v. Babaji* (5), where in a case very much like the present their Lordships observed "No doubt by the term 'timber' is meant properly such trees only as are fit to be used in building and repairing

houses. A mango tree, which is primarily a fruit tree, might not always come within the term, but in this respect the custom of a locality has to be considered" and it was held with reference to the local custom that a mango tree was a timber tree and, therefore, an unregistered deed was admissible to prove its transfer.

The learned Advocate for the respondent relied on the finding of the Subordinate Judge that in this part of the country mango trees are timber and he also referred to a decision of this Court in Second Appeal No. 955 of 1922 where this was held to be common knowledge. That, however, was a case relating to trees which had been cut as timber. The present case is a case of a conveyance of a growing mango tree of which, according to the finding of the Subordinate Judge, the plaintiff continued to be in possession and to enjoy the fruits for a period of eight years. In these circumstances, it seems to me impossible to hold that the tree was conveyed as standing timber. The parties intended that the plaintiff should enjoy the fruits of the tree for an indefinite period. The immediate, or approximately immediate, severance of the tree from the land was not within the contemplation of the parties as the subsequent events proved. Therefore, in my opinion, this tree was not sold as standing timber, but the transfer was a transfer of an interest in the land. The deed of gift, therefore, required to be stamped and registered and the transfer could not be effected by an unregistered *chithi*, or by an oral gift. In my opinion, therefore, the plaintiff had no title to this tree and the decision of the learned Munsif was right.

I would, therefore, allow this appeal, set aside the decision of the Subordinate Judge and dismiss the plaintiff's suit with costs throughout.

Z. K.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 24 OF 1925.

March 12, 1925.

Present :—Mr. Justice Wallace.

K. K. S. MAMUNDI KONAR—

PETITIONER

versus

P. SHAMSUDDIN SAHIB BAHADUR

—RESPONDENT.

Madras District Municipalities Act (V of 1920)—
Rules for decision of disputes as to validity of elec.

(3) (1829) 9 B. & C. 561; 4 Man. & Ry. 455; 7 L. J. K. B. (o. s.) 296; 109 E. R. 209; 33 R. R. 259.

(4) 20 M. 58; 6 M. L. J. 281; 7 Ind. Dec. (N. S.) 41.

(5) 24 B. 31; 1 Bom. L. R. 489; 12 Ind. Dec. (N. S.)

tions, r. 11—Validity of vote—Returning Officer, whether final authority—Election Court, jurisdiction of—Ballot paper, marks on, effect of—Electoral Roll—Two persons corresponding to description—Voting by one, validity of—Revision.

Rule 11 of the rules under the Madras District Municipalities Act of 1920 gives the Election Court jurisdiction to decide for itself whether the Returning Officer's rejection or refusal of a vote was proper, and, if it was not proper, and the result of the election has been materially affected thereby, it may set aside the election and order a fresh one, or, if the result of the scrutiny is to give a majority to another candidate, it may declare that candidate duly elected. [p. 773, col. 1.]

In the matter of a decision as to the validity of a vote, the Election Court and not the Returning Officer is the final authority. [p. 772, col. 2.]

Woodward v. Sarsons, (1875) 10 C. P. 733 at p. 748; 44 L. J. C. P. 293; 32 L. T. 867, followed.

The right point of view from which the question of the validity of a vote by ballot is to be considered by the Polling Officer is to see whether any reasonable ground has been shown for concluding that by the marks on the voting paper, the voters might be identified. [p. 773, col. 1.]

Where on a ballot paper, besides the cross mark against the name of one of the candidates, there were lines scoring out the names of the other candidates and the Election Court held that the vote was valid:

Held, on revision, that the decision on the question of the validity of the vote was within the jurisdiction of the Election Court, and that there was neither lack of jurisdiction nor irregular exercise of it, which would give the High Court authority to interfere under s. 115 of the C. P. C. [p. 773, cols. 1 & 2.]

Where the description of a voter on an Electoral Roll was "Murugesan, fitter" and a person who corresponded to the description presented himself for voting and was allowed to do so but on an election petition it was sought to be shown that there was another person who corresponded to the description in the Electoral Roll and, therefore, the vote as recorded was invalid, but the Election Court held the vote to be valid:

Held, that there was no irregularity and that in the absence of proof that the person who voted was not the voter mentioned in the Electoral Roll, there was no ground for interference in revision. [p. 773, col. 2.]

A Petition, under s. 107 of the Government of India Act, 1915, and s. 115 of Act V of 1908, praying the High Court to revise an order of the Court of the Subordinate Judge, Trichinopoly, dated the 23rd December 1924, T. P. No. 31 of 1924 on its file.

A. Krishnaswami Iyer, for the Petitioner.

Mr. T. V. Ramanatha Iyer, for the Respondent.

JUDGMENT.—This civil revision petition is a petition praying that this Court will interfere and set aside a finding of the Election Court of the Subordinate Judge of Trichinopoly in the matter of an election petition before it. At an election for a Councillor for the first ward in Trichinopoly Municipality held on 26th Sep-

tember 1924, the Chairman, who was the Returning Officer, declared that the present petitioner was elected, having polled 71 votes as against 70 votes for the respondent. The latter filed an Election Petition in the Subordinate Judge's Court, and on enquiry, the Subordinate Judge decided that the correct number of valid votes was 72 for the respondent and 71 for the petitioner, and declared the respondent duly elected. The petitioner applies for revision of the finding and declaration.

Only two points are pressed before me *firstly* that the votes, Exs. G and G-1, are invalid votes, and were, therefore, wrongly counted in favour of the respondent and *secondly*, that the vote of P. W. No. 5, one Murugesan, was not a valid vote.

As to the first point Exs. G and G-1 appear to show, besides the cross marks against the name of the respondent, lines scoring out the names of the other candidates. The Returning Officer did not take these votes into consideration in respondent's favour apparently because of these lines. The Election Court held them to be valid in spite of these lines. Before me, the petitioner contends that the Election Court had no jurisdiction to go behind the decision of the Returning Officer in a matter of this kind, that the Election Court is not a Court to which any authority is given to decide, as a question of fact, whether a vote is or is not valid, and that the proper scope of the Election Court's jurisdiction is limited to an enquiry whether the Returning Officer had or had not exercised the jurisdiction vested in him of deciding whether or not a vote was valid; in other words petitioner contends for the position that in the matter of the validity of a vote, the Returning Officer is the final authority. This contention seems to me justified neither by the Rules governing the conduct of the election or enquiries by the Election Courts nor by reported decisions of Courts of Law, either in this country or in Great Britain. Rule 11 of the rules for the decision of disputes as to the validity of an election held under the Madras District Municipalities Act, 1900, clearly lays down that, in an enquiry of this kind, the Election Court has to decide whether or not "the result of the election has been materially affected by the improper reception or refusal of a vote". To restrict this to an enquiry whether the Returning Officer's reception or refusal of a vote was or was not within his jurisdiction is to

make the rule almost otiose. The Rule plainly gives the Election Court jurisdiction to decide for itself whether the Returning Officer's rejection or refusal of vote was proper, and, if it was not proper, and the result of the election has been materially affected thereby, it may set aside the election and order a fresh one, or, if the result of the scrutiny is to give a majority to another candidate, it may declare that candidate duly elected. The case-law referred to by the petitioner's learned Vakil seems to me to be entirely against him. The leading case on the point in *Woodward v. Sarsons* (1) distinctly lays down that the decision in each case, namely, whether a ballot paper is void or not, is, "upon a point of fact, to be decided first by the Returning Officer, and afterwards by the Election Tribunal on petition" and the Election Court proceeded in that case to decide for itself, whether or not certain marks on the ballot papers did or did not invalidate the votes. The same course was followed in the *Stepney case* (2) and the *Wigtown case* (3) and numerous other cases might be quoted to the same effect. Section 2 of the Ballot Act, 1872, 35 and 36 Vict. Ch. 33 distinctly lays down that "the decision of the Returning Officer as to any question arising in respect of any ballot paper shall be final, subject to reversal on petition questioning the election or return." It has not been suggested and no authority is quoted before me for the proposition that the law is different in this country. Election Courts in this country have from time to time in deciding such questions as to the validity of votes held a scrutiny of votes, etc., and I do not re-call any instance in which their jurisdiction to do so has been questioned. It is plain that the lower Court had ample jurisdiction to decide, as a question of fact, whether Exs. G and G 1 were valid votes. It has considered the question of their validity from the right point of view, namely, whether any reasonable ground had been shown for concluding that by the marks on the votes, the voters might be identified, and decided that they could not, and it held that the votes were valid. Such a decision was within its jurisdiction, and there is in that decision neither lack

of jurisdiction nor irregular exercise of jurisdiction, which would give this Court authority to interfere under s. 115 of the C. P. C. It cannot be reasonably contended here that this Court has to decide for itself on the question of fact as to whether the votes were or were not invalid. This Court, in a civil revision petition, has only to see that the lower Court exercised its jurisdiction properly. I find, therefore, that there is nothing to be said in favour of the petitioner's first point.

As to the second point, the question of fact for decision was whether P. W. No. 5 was or was not entered on the Electoral Roll as a voter. The petitioner urges that, as both P. W. No. 5 and R. W. No. 3 answer to the description, namely, "Murugasen fitter," therefore, the Roll so far as this name is concerned, is a document ambiguous or defective, within the meaning of s. 93 of the Indian Evidence Act, which prohibits evidence being taken to remove ambiguity or defect. I do not see what application s. 93 has to this case. All that the Polling Officer had to see when the voter presented himself to him was whether the name of the voter was on the Roll. It cannot reasonably be contended that the Polling Officer has to wait to the end of the day in respect of every vote in order to see if any one else of the same name appears and claims that he is the voter on the Roll. P. W. No. 5 appeared to vote. His name corresponded with the name on the Roll and he was allowed to vote. There was no irregularity in the procedure. It was open to the petitioner to prove, that P. W. No. 5 was not the person on the Roll; but that he did not do; nor does R. W. No. 3 claim that he is the person on the Roll. There was no lack of evidence on which the lower Court could conclude that P. W. No. 5's vote was valid; and there is no case here either for interference under s. 115, C. P. C.

I, therefore, dismiss the petition with costs.

V. N. V.

S. D.

Petition dismissed.

(1) (1875) 10 C. P. 733 at p. 748; 41 L. J. C. P. 293; 32 L. T. 867.

(2) 4 O'M. & H. 37.

(3) 2 O'M. & H. 215.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1313
OF 1922.

March 17, 1925.

Present:—Mr. Justice Suhrawardy and
Mr. Justice Duval.

Srimati ACHOLA SUNDARI DEBI—
DEFENDANT No. 3—APPELLANT

versus

Srimati DOMAN SUNDARI DEBI—

PLAINTIFF AND OTHERS—*Pro forma*

DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 20—Interest, payment towards—Character of payment, proof of—“As such”, “person liable to pay”, meaning of—Co-mortgagor, payment by—Extension of limitation—Transfer of Property Act (IV of 1882), s. 59—Mortgage—Attestation, proof of—Scribe, whether attesting witness.

Where a payment is made towards a debt but there is nothing to show whether it was made in respect of principal or interest, the Court is entitled to find out on the evidence for what purpose the payment was made. [p. 774, col. 2.]

Hem Chandra Biswas v. Purna Chandra Mookerjee, 35 Ind. Cas. 638; 44 C. 567; 22 C. W. N. 190 and *Charu Chandra Bhattacharjee v. Karam Buxa Sikdar*, 43 Ind. Cas. 812; 27 C. L. J. 141, referred to.

The expression ‘as such’ in s. 20 of the Limitation Act means that the payment must be made on account of interest which may be proved from the circumstances of the case from which payment as interest may be distinctly inferred and may be established by evidence. [*ibid.*]

The expression ‘person liable to pay’ in s. 20 of the Limitation Act does not mean the entire body of persons liable to pay the debt but each individual debtor who would be liable for the whole debt. Under the law each co-mortgagor is liable for the entire debt secured by the mortgage, and a payment by any one of them towards interest would operate to extend limitation. [p. 775, col. 1.]

It cannot be said as a matter of law that a scribe cannot be an attesting witness of a mortgage-deed. It is a question of fact which must be determined by a Court of fact. [*ibid.*]

Appeal against a decree of the Subordinate Judge, Burdwan, dated the 20th of February 1922, modifying that of the Acting Munsif, Additional Court at Katwa, dated the 6th of August 1920.

Babus *Hemendra Nath Sen* and *Gopendra Nath Das*, for the Appellants.

Mr. *Mahendra Nath Roy* and *Babu Charu Chandra Ganguly*, for the Respondents.

JUDGMENT.

Suhrawardy, J.—This is an appeal by defendant No. 3 arising out of a mortgage suit brought by the plaintiff on a mortgage dated the 2nd *Jaistha* 1306 (1899) executed by defendant No. 1 and one *Lakhan Chandra Dey* since dead. The defendant No. 3 is a transferee of *Lakhan*’s interest in the mortgaged properties. The plaintiff purchased the mortgage in 1919 and brought

a suit on it for recovery of amount then due thereon by a sale of the mortgaged properties. The defendant No. 1 admitted the mortgage and his liability under it. The defendant No. 3 among other pleas raised the plea that the suit was barred by limitation. The plaintiff’s case was that several payments were made by the debtors, the last being a payment of Rs. 30 in 1908. The First Court did not believe this payment and dismissed the plaintiff’s suit as against all the defendants except defendant No. 1. On appeal the learned Subordinate Judge has found that the payment of Rs. 30 was proved and that the amount was paid an account of interest. On this finding he decreed the plaintiff’s suit in full against all the defendants.

Several points have been taken before us in support of the appeal. It is first argued that as the endorsement of this payment of Rs. 30 on the back of the bond does not show that the payment was made on account of interest, the Court below was wrong in law in allowing the plaintiff to prove by oral evidence that the payment was made on account of interest. This point seems to be concluded by authority and cannot be raised now. In the case of *Hem Chandra Biswas v. Purna Chandra Mookerjee* (1), it has been held that where payments are made for the debt, but there is nothing to show whether they have been made in respect of the principal or interest, the Court is entitled to find out on the evidence for what purpose the payments were made. The same view was taken in the case of *Charu Chandra Battacharjee v. Karam Buxa Sikdar* (2). There are other decisions on this point and it must now be taken to be firmly settled that the words “as such” in s. 20 of the Limitation Act mean that the payment must be made on account of interest which fact may be proved from the circumstances of the case from which payment as interest may be distinctly inferred and may be established by evidence. In the present case the endorsement shows the payment of Rs. 30 over the signature of *Lakhan Chandra Dey*. The learned Judge has found that at the time when this payment was made there was about Rs. 230 due on account of interest and principal. Deducting the amount of principal the balance was due on account of interest. This fact was taken into con-

(1) 35 Ind. Cas. 638; 44 C. 567; 22 C. W. N. 190.

(2) 43 Ind. Cas. 812; 27 C. L. J. 141.

consideration in believing other evidence that the amount was paid on account of interest. He further remarked that no body on the side of the defendant said that the payment was made on account of principal. On a consideration of the evidence and the circumstances of the case he says as follows: "I, therefore, see no reason to disbelieve the plaintiff's evidence that Rs. 30 was paid on account of interest. This finding based on the evidence decides this point."

The next question raised is that according to s. 20 of the Limitation Act, the payment must be made by the person liable to pay the debt; and as there were two mortgagors in order to bring the case under s. 20, the payment must be made by both the mortgagors together and that payment by one only was not such as was contemplated by that section. No authority has been cited for this proposition of law which to my mind is a novel one. There can be no question that Lakhan, one of the mortgagors, was a person liable to pay and that he could not only pay his share of the debt but could have paid the entire debt under the mortgage-deed; and under the law every mortgagor is liable for the entire debt secured by the mortgage. I do not think that the expression 'person liable to pay' means the entire body of persons liable to pay the debt.

The third point argued is that the bond was not properly and legally proved. This point was raised in the defendants' written statement and an issue was joined in the First Court which was in these terms: "Was the bond in suit executed and attested according to law?" The learned Trial Court went into the evidence and found that it was duly executed and attested. He mainly relied upon the evidence of the scribe who proved execution of the document. The plaintiff appealed against that portion of the decree of the First Court which dismissed the suit as against defendants Nos. 2 to 4 but these defendants did not prefer any cross-appeal or in any way object to the finding of the First Court on this issue. It cannot be said as a matter of law that a scribe cannot be an attesting witness. It is a question of fact which must be determined by a Court of fact. We have not the advantage of the view of the Court of Appeal on this question and we do not think that we should be justified in allowing the appellant to raise this question in

appeal for the first time in this Court. But a prayer was made that the case might be sent to the lower Appellate Court for trial of this issue. We do not think that we should be justified in granting this prayer. The defendants did not choose to take exception to the finding of the Trial Court and it must be taken that they had acquiesced in it. This question cannot, therefore, be re-opened at this stage.

It is lastly contended that there should have been no personal decree against the appellant. It seems to us that this ground is taken on a misreading of the decree passed in the Court below. There can be no personal decree as is evident from the length of time between the execution of the mortgage and the institution of the suit. The decree directs the defendants to pay the amount of the claim with costs of the suit and interest within three months from the date of the decree, failing which the decree shall be made absolute and the decretal amount should be realised from the sale of the mortgaged properties. This decree cannot be considered as a personal decree against the mortgagors.

All the points taken on behalf of the appellant fail and this appeal is dismissed with costs.

Duval, J.—I agree.

Z. K.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 518 OF 1922.

February 11, 1925.

Present:—Mr. Justice Odgers.

YENDLURI NAGABHUSHANAM,

MINOR, BY FATHER AND NEXT FRIEND,

YENDLURI CHENGAYYA—PLAINTIFF—

APPELLANT

versus

YENDLURI JAGANNAIKULU AND

OTHERS—DEFENDANTS Nos. 1, 2 AND 4—

RESPONDENTS.

Procedure—Judgment alleging admission of party—Admission denied—Review.

Where a Judge states in his judgment that one of the parties through his Vakil made an admission in respect of an important fact, if the party affected desires to raise the contention that no such admission was made, it is his duty to apply to the Judge immediately for a review of the judgment when the matter is fresh in the minds both of the Judge and

the Vakil and not to wait for a long time to get affidavits from gentlemen at the Bar as to what took place in Court. [p. 777, col. 1.]

Madhu Sudan Chowdhri v. Chandrabati Chowdhrai, 42 Ind. Cas. 527; 6 L. W. 437; 21 C. W. N. 897; (1917) M. W. N. 518 (P. C.), *Sarat Chandra Maiti v. Bibhabati Debi*, 66 Ind. Cas. 433; 34 C. L. J. 302, and *Mirza Shamsher Bahadur v. Munshi Kunj Behari Lal*, 3 M. L. T. 212; 12 C. W. N. 273; 7 C. L. J. 414, relied on.

Second appeal against a decree of the District Court, Guntur, in A. S. Nos. 68 and 69 of 1921, preferred against that of the Court of the Second Additional Subordinate Judge, Guntur, in O. S. No. 60 of 1919 (O. S. No. 64 of 1919, Temporary Sub-Court, Guntur).

Mr. B. Somayya, for the Appellant.

Mr. Ch. Raghava Rao, for the Respondents.

JUDGMENT.—This is an appeal from the District Court of Guntur, in O. S. No. 60 of 1919, on the file of the Second Additional Subordinate Judge of Guntur.

The suit was brought by a minor (the plaintiff) for the recovery of certain jewels, specified in the A Schedule and for the recovery of promissory notes, eight in number, specified in the B Schedule.

I have, in appeal nothing to do with the jewels, but only with five of the eight promissory notes. Three of the promissory notes have been found to belong to the 4th defendant, Durgamma; and in fact stand in her name. The other five do not stand in the name of the 4th defendant; and the plaint asserts that the promissory notes were endorsed in favour of the 4th defendant, by one Lakshmiddevamma, who died in 1919, having survived her husband, who died in 1903. The plaintiff, a son adopted by Ramakrishnamma and Lakshmiddevamma, was their heir, after the death of the latter.

The written statement of the first defendant, who is the father and guardian of the 4th defendant, states:—

"The case and jewels, etc., given to the 4th defendant by her father and her husband had been given away for interest, by the said Lakshmiddevamma and she was improving or increasing the same and getting promissory notes at first executed in favour of the 4th defendant. When later on, they were to be executed again she got the pro-notes Nos. 6, 7 and 8 executed in favour of the 4th defendant."

Now with regard to the other five, it is pleaded that consideration for them was either the jewels of the 4th defendant, or the personal *stridhanam* of Lakshmi-

devamma and that they were duly endorsed, in favour of the 1st defendant, as guardian of the 4th defendant on 5th January 1919.

On appeal to the District Judge, on this point he held, although he did not believe, that consideration for the five promissory notes in question was provided from Durgamma's money, on the ground, that the practice of Lakshmiddevamma seems to have been to keep her monies and that of Durgamma separate, still, the reason, why Lakshmiddevamma might have endorsed over the promissory notes to the 1st defendant, was to enable him to find funds, for getting a re-transfer of the properties sold by the 4th defendant's husband, who seems to have been a man of reckless character, for very much less than what they were worth.

Now, Mr. Somayya, for the plaintiff-appellant, complains that there were no materials, in the case set up by the plaintiff, on which the District Judge could find as he did. But, I think, that a perusal of that portion of the written statement, para. 3, is sufficient to displace this argument, as also reference to issue No. 3: "Whether the promissory notes in Schedule B, other than items Nos. 6, 7 and 8, were assigned to the 4th defendant? Is the assignment valid and binding on the plaintiff?" Both the alternatives, set out in the written statement, are discussed by Subordinate Judge, in paras. 29 and 30 of his judgment, and, therefore, they must have been presented and argued before the Trial Court.

Secondly, there is a very important statement by the learned District Judge in para. 17 of his judgment:—

"It is conceded before me that if these assignments are found to be genuine, the plaintiff does not contest the validity of the assignments, on the ground that the consideration for the promissory notes formed part of Ramakrishnamma's estate."

Now, this is a very important admission and in fact, practically conclusive as regards the appellant's case. The hearing before the learned Judge was on 8th October 1921, judgment was pronounced on 9th November, the grounds of appeal were prepared on 17th April 1922, and the second appeal was presented on the following day.

Now, three affidavits have been filed, by one side or the other, as to the facts of this

admission having been made. As I have said more than once, I very much deprecate, having to decide on the trustworthiness of statements made on one side or the other, by gentlemen of the Bar. My training and my own feeling is to accept without reserve anything, that is said by a gentleman in the position of a Vakil. I say this, in order to show my unwillingness to go into the matter, which has been raised in these affidavits. The gentleman, who appeared for the plaintiff, in the hearing of the appeal, was Mr. M. Kalidas, a High Court Vakil; while Mr. Seethapathi Rao appeared for the 3rd respondent and Mr. Nagabhushanam, Pleader for the 1st respondent in A. S. No. 69 of 1921. Mr. Kalidas was not present, on all the days, when the appeals were heard and, therefore, his statement that neither he, nor the appellant's guardian made the admission in question may be safely accepted. Mr. Seethapathi Rao states that the admission was made by Mr. Nagabhushanam, in reply to a pointed question by the Court, during the hearing of the appeal, when Mr. Kalidas was absent at Bapatla. Mr. Nagabhushanam states that he does not remember any such admission being made and he is perfectly certain that such admission could not have been made by him. In the face of this evidence, I cannot say, that the learned Judge's statement has been in any way shaken.

There is authority, to which I have been referred, viz., *Madhu Sudan Chowdhri v. Chandrabati Chowdarain* (1) and other cases [*Sarat Chandra Maiti v. Bibhabati Debi* (2) and *Mirza Shamsher Bahadur v. Kunj Behari Lal* (3)] to show that what the appellant should have done, as soon as he found such a damaging statement, in the judgment of the learned Judge, is this:- He should have asked the learned Judge for a review of his judgment, when the matter was fresh in the mind both of the learned Judge and the learned Vakils and not have waited, as he did, for one year and nine months, to get affidavits from gentlemen one of whom did not remember anything about it. I think, therefore, that the admission must stand.

It seems to me that the other points, raised by Mr. Somayya, need not be dealt with by me. It is a little anomalous that

the complaint should be now, that the finger-print expert was not called, for, when the defendant wanted to call him the application was opposed by the plaintiff. The same remark applies to Ex. S.

The whole question discussed in para. 16 apparently goes to the credit of D. W. No. 3, who was cross-examined, regarding the date of Ex. S. However, these two last points are questions of evidence and questions of fact and I am not disposed or entitled to go into them in second appeal.

I, therefore, think that the second appeal must be dismissed with costs.

V. N. V.

S. D.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 514
OF 1922.

June 23, 1925.

Present:—Mr. Justice Ross.

RAMKHELAWAN SAHU AND ANOTHER
—DEPENDANTS NOS. 1 AND 2—APPELLANTS
versus

Lala KULDIP SAHAY AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Landlord and tenant—"Kharij jama", meaning of.

Prima facie the expression "*kharij jama*" imports that the owner of the *kharij jama* land is an independent proprietor and does not hold under the *zemindar*. [p. 778, col. 2.]

Appeal from a decision of the Subordinate Judge, Arrah, dated the 23rd February 1922, affirming that of the Munsif, Sasram, dated the 2nd June 1921.

Messrs. S. M. Mullick and N. N. Sinha, for the Appellants.

Messrs. Akbari, Rai T. N. Sahay and D. N. Verma, for the Respondents.

JUDGMENT.—This is an appeal from a decision of the learned Subordinate Judge of Arrah affirming a decision of the Munsif granting a decree to the plaintiffs in a suit (so far as is now material) for a declaration that they have a right of way from their garden, plot No. 254 of *Khata* No. 45 to the Local Board road in village Rajokher over plot No. 245 belonging to defendants Nos 1 and 2 which intervenes between the garden and the road.

Defendant No. 7 is the landlord and he did not contest the suit. Defendants Nos. 1 and 2 who did contest the suit had

(1) 42 Ind. Cas. 527; 6 L. W. 437; 21 O. W. N. 897; (1917) M. W. N. 518 (P. C.).

(2) 63 Ind. Cas. 433; 34 O. L. J. 302.

(3) 3 M. L. T. 212; 12 O. W. N. 273; 7 O. L. J. 414.

taken settlement of plot No. 245 from defendant No. 7 in 1918. The suit was brought in 1920.

The main contention on behalf of the appellants-defendants Nos. 1 and 2 is that the Courts below have erred in holding that the plaintiffs have acquired this right of way by prescription, because they are tenants of defendant No. 7 and could neither prescribe against their landlord nor against defendants Nos. 1 and 2 who are tenants under the landlord. It is contended that for two years before the suit plot No. 245 was in settlement from the landlord and before that it was *parti* and that consequently the plaintiff must have prescribed against their landlord and his tenants and that this is impossible in law. This argument rests on the fact that in the Record of Rights the plaintiffs are recorded in the *khatian*, and it is argued that, therefore, they must be tenants of the landlord. The Record of Rights shows that the plaintiffs' ancestor purchased the land in 1849 and that the land is *kharij jama*. The Munsif took the view that this meant that the land was excluded and not settled with the *zemindar* at the time of Permanent Settlement and that the title of the plaintiffs was, therefore, independent of that of the *zemindar* of the village. The learned Advocate for the appellants referred to s. 3, cl. (3) of the Bengal Tenancy Act where "Tenant" is defined as "a person who holds land under another person, and is or but for a special contract would be, liable to pay rent for that land to that person." Reference was also made to *Gokkul Sahu v. Jodu Nundun Roy* (1), where it was held that a rent free *brahmotar sanad* operated as a special contract but for which the *brahmotardars* would be liable to pay rent and that the *brahmotardars* were tenants within the meaning of the Act. Now while it is quite clear that the mere fact that no rent is paid does not necessarily mean that the plaintiffs are not tenants of the landlord and while the fact that they are entered in the *khatian* to some extent supports the argument of the appellants, yet the case really turns on the effect of the entry "*kharij jama*." In Wilson's Glossary "*kharij jama*" is translated as meaning "separated or detached from the rental of the State as lands exempt from rent or of

which the revenue has been assigned to individuals or institutions." In N. James' Settlement Report of Patna *kharij jama* is defined as "land allowed free to *zemindars* as reward for some special service, by a Provincial Governor, and so to be distinguished from *altamga* grants." *Prima facie*, in my opinion, the word imports that the owner of the *kharij jama* land is an independent proprietor. The land has been included within the *zemindari* of defendant No. 7, but it has evidently never been resumed and could not now be resumed and consequently the relation of landlord and tenant does not exist between the parties. In his judgment the learned Subordinate Judge has merely referred to the finding of the Munsif on this point and has not discussed the matter further evidently, as appears from a later passage in the judgment, because it was not argued before him. I see no convincing ground for holding that the Munsif was wrong in deciding that the plaintiffs had a title independent of the *zemindar* with regard to this land. This view also finds some support from the consideration that the landlord did not contest the case.

It was also argued that the plaintiffs had not proved that they used this path as of right and that there is no evidence of this. The learned Munsif went into this part of the case fully and came to the conclusion from the nature of the user that the enjoyment had been as of right. The learned Subordinate Judge disbelieved the evidence that was given by the defendants that the user had been with the permission of the landlord and found that the evidence of the plaintiffs' witnesses proved that the user of the passage by the plaintiffs was as of right. This was an inference which it was open to the Courts below to draw and I see no reason to doubt the correctness of their finding.

The appeal is dismissed with costs.

Z. K.

Appeal dismissed.

[90 I. C. 1925]

AMEER MIRZA BEG V. UDIT PERSHAD.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST EXECUTION OF DECREE APPEAL No. 30
OF 1925.

September 4, 1925.

Present:—Mr. Wazir Hasan, A. J. C., and
Mr. Simpson, A. J. C.

AMEER MIRZA BEG—JUDGMENT-
DEBTOR—APPELLANT

versus

M. UDIT PERSHAD—DECREE-
HOLDER—RESPONDENT.

*Oudh Civil Digest, s. 279—Title claimed by inheritance—Compromise—Antecedent title recognized—
"Ancestral land".*

If a dispute in which a person claims to succeed to certain landed property by right of inheritance, based on an alleged custom, results in a compromise which recognises the claimant's antecedent title to the property, his interest in such property is "directly or indirectly inherited", and, therefore, "ancestral land" within the meaning of s. 279 (a) of the Oudh Civil Digest. (p. 781, cols. 1 & 2.)

First appeal against an order of the First Additional Subordinate Judge, Lucknow, dated the 17th April 1925, in Execution Case No. 106 of 1924.

Mr. R. K. Bose, for the Appellant.

Mr. Hargobind Dayal Srivastava, for the Respondent.

JUDGMENT.—The respondent, Babu Adit Prasad, holds a decree for a sum of Rs. 61,814 odd against the appellant, Amir Mirza Beg. In execution of that decree he desires to sell through the Civil Court, which passed the decree, one-third share in the following properties as belonging to his judgment-debtor, the appellant:—

- (1) Lands in Malihabad.
- (2) Shops and houses in Mirzaganj in the town of Sandila.
- (3) A certain number of villages comprised within the *taluka* of Aurangabad in the District of Sitapur.
- (4) A bungalow in Sitapur.
- (5) Shops in Thomsonganj in the City of Sitapur.
- (6) A house and certain shops in Griganj, in Sitapur.

Against the proceedings in execution of the decree the only objection taken by the judgment-debtor was that the execution of the decree should be transferred to the Collector under the notification of the Local Government No. 1887-1-238, dated the 7th October 1911. This notification is incorporated in paras. 178 and 179 of the Oudh Civil Digest. The notification is that "the execution of decree in case

in which a Civil Court has ordered any ancestral land situated in the United Provinces of Agra and Oudh or any interest in such land to be sold shall be transferred to the Collector." The contention of the judgment-debtor is that the immoveable property which the decree-holder desires to sell is ancestral land within the meaning of the notification. This contention has been rejected by the Court below. In appeal before us it is reiterated on behalf of the judgment-debtor.

At the hearing of the appeal the appellant's learned Pleader abandoned his contention in respect of all properties except the villages comprised within the Aurangabad estate. Our decision, therefore, must govern the question as to the judgment-debtor's interest in those villages only.

According to para. 179 of the Oudh Civil Digest the term "ancestral land" in the notification mentioned above means.—

"(a) land, forming a *mahal* or share in or portion of a *mahal* which has been owned continuously, in Agra from the first of January 1860, or in Oudh from the Summary Settlement of 1858-1859 or from the conclusion of the first Regular Settlement, by the proprietor, which term shall include an "under-proprietor" in Oudh as defined in s. 15 of the United Provinces Land Revenue Act, 1901, or by the person or persons from whom such proprietor has directly or indirectly inherited such land;

(b) land forming an estate or part of an estate as defined in the Oudh Estates Act, 1869".

In the present case we are not concerned with the cls. (c) and (d). Those clauses have consequently not been reproduced in this judgment. The argument advanced on behalf of the judgment-debtor is that his one-third interest sought to be sold is ancestral land within the meaning given to it in each of the cls. (a) and (b). We propose first to dispose of the argument founded on cl. (b).

We are of opinion that the learned Additional Subordinate Judge, from whose order this appeal has been preferred, is right in his conclusion that the property in question does not fall within cl. (b). The estate of Aurangabad within which the villages in question lie was held as an estate within the definition of that term as given in the Oudh Estates Act I of 1869 by Mirza Agha Jan whose name

was entered at No. 77 of the First List and at No. 26 of the Second List of the lists prepared under s. 8 of the Act. He died on the 18th June 1875 and was succeeded by his eldest surviving son, Muhammad Ali Beg, under a bequest made by him. Agha Jan's eldest son, Nawab Ali beg, had predeceased him. Nawab Ali Beg's son Hamid Mirza Beg had come into existence at the death of Agha Jan and is still alive. Amongst the sons of Agha Jan next to Muhammad Ali Beg in the order of seniority was his son, Ali Mirza Beg. The appellant, Amir Mirza Beg, is the son of Ali Mirza Beg. The youngest son of Agha Jan is Ahmad Mirza Beg. A suit brought by Hamid Mirza Beg against Muhammad Ali Beg claiming title to the Aurangabad estate by virtue of the rule of succession laid down in Act I of 1869 failed. A Bench of this Court held that Muhammad Ali Beg acquired title to the estate under the Will of his father and that in his hands the *taluqa* of Aurangabad by reason of the provision of s. 15 of Act I of 1869 ceased to be an estate within the meaning of the Act. The same conclusion was reached in a decision of this Court in another litigation relating to the estate of Aurangabad. A certified copy of that decision has been produced in this case and is marked as Ex. A-3. We are of opinion that the judgment-debtor's interest in the villages in question is not "ancestral land" without the meaning of cl. (b) mentioned above. This opinion is directly supported by a decision of a Bench of this Court given so far back as the year 1913 in the case of *Asghari Khanan v. Raj Bibi* (1).

We now proceed to consider the appellant's argument in relation to cl. (a), which also we have already quoted. The decision turns on the interpretation of the words "directly or indirectly inherited." The case put forward on behalf of the appellant is that Amir Mirza Beg should be held to have so inherited his one-third share in the villages in question from Muhammad Ali Beg, the last proprietor of the estate. The facts necessary in relation to this part of the case are as follows:—

On the death of Muhammad Ali Beg disputes arose as to the possession of and succession to the Aurangabad estate. Amongst the claimants for the entry of

names in the Revenue Records by mutation were Hamid Mirza Beg, Amir Mirza Beg, the present appellant, and Ahmad Mirza Beg. In consequence of that dispute proceedings were taken under section 145 of the Cr. P. C., also. This controversy was eventually settled by a compromise which was incorporated in a document dated the 12th July 1909. This document was also registered. The proceedings relating to the mutation of names and also those which arose under s. 145 of the Cr. P. C., were concluded in terms of this compromise. Those terms are stated in the decision of this Court in the case of *Bisheshwar Nath v. Hamid Mirza Beg* (2) and both sides have relied on the report of that decision in proof of the compromise and its terms. In the proceedings which ended with the compromise mentioned above Hamid Mirza Beg claimed title to the entire estate by virtue of the provisions of Act I of 1869 relating to succession. Ahmad Mirza Beg claimed the entire estate under the same Will of Agha Jan on which Muhammad Ali Beg had claimed and established his title to the whole estate of Aurangabad. As against each of these claimants Amir Mirza Beg based his title to the succession of the estate as an heir to Muhammad Ali Beg under a custom which authorized Muhammad Ali Beg to nominate his successor and claimed that he was so nominated by Muhammad Ali Beg. The compromise, which in other words was a family settlement, precluded an enquiry into one and all of these three claims. The argument on the side of the respondent is that the interest which Amir Mirza Beg got by virtue of the Settlement of the 12th July 1909 must be taken to have been obtained by him under a transfer from the other two parties to the compromise and, therefore, Amir Mirza Beg has not 'directly or indirectly inherited' that interest. The learned Subordinate Judge has accepted this argument of the respondent.

It is obvious that if the compromise can reasonably be construed to be a transfer to one from the other two of the three parties to the compromise the respondent must succeed. In our judgment the Settlement of the 12th July 1909 cannot be so construed. The learned Additional Subordinate Judge observes in his judgment under appeal that the title

(1) 22 Ind. Cas. 267; 16 O. C. 277.

(2) 48 Ind. Cas. 20; 5 O. L. J. 582.

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on which Amir Mirza Beg claimed succession to the Aurangabad estate "not having been established it is clear that the judgment-debtor could never inherit the property." But the whole object of the settlement was to altogether close the doors of inquiry into the validity or otherwise of the claims put forward by these three persons and it would be stultifying the settlement if we were now to permit such an inquiry. The conclusion that the compromise amounts to a transfer from one of the parties to another is clearly based on an unfounded assumption that the transferor had a title to convey. The settlement in question creates no such title in favour of any one of the three parties to it. Our interpretation of the settlement is that the interest which these persons obtained under the terms of the settlement was in virtue of the recognition of the antecedent claim of each by the other or others. This claim, as we have already stated, was founded by Amir Mirza Beg on his right to succeed by inheritance under an alleged rule of custom. That a settlement of controversy between two persons may amount to a transfer from one to the other may be conceded but the Settlement of the 12th July 1909 is clearly not of that nature. We think that the view taken by the learned Judges of the High Court of the N.-W. P., who decided the case of *Lalla Oudh Beharee Lall v. Rane Mewa Koonwer* (3) is peculiarly applicable to the settlement with which we are concerned. It is as follows:

"The true character of the transaction appears to us to have been a settlement between the several members of the family of their disputes, each one relinquishing all claim in respect of all property in dispute other than that falling to his share, and recognizing the right of the others as they had previously asserted it to the portion allotted to them respectively. It was in this light, rather than as conferring a new distinct title on each other; that the parties themselves seem to have regarded the arrangement and we think that it is the duty of the Courts to uphold and give full effect to such an arrangement." In delivering the judgment of their Lordships of the Privy Council in the case of *Rani Mewa Kunwar v. Rani*

Hulas Kuwar (4), the Right Honourable Sir Montague E. Smith said:—"The compromise is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is." The view of the learned Judges of the High Court in the case mentioned above was adopted and the observation of the Right Honourable Sir Montague E. Smith was quoted with approval by their Lordships of the Privy Council in the case of *Khunni Lal v. Gobind Krishna Narain* (5). We hold, therefore, that the judgment-debtor's one-third interest in the villages in question is "ancestral land" within the meaning of cl. (a) of para. 279 of the Oudh Civil Digest.

We accordingly allow this appeal, set aside the order of the lower Court and accept the objection of the judgment-debtor-appellant so far as the villages in question are concerned with costs in both the Courts.

Appeal allowed.

S. D.

(4) 1 I. A. 157; 13 B. I. R. 312; 3 Sar. P. C. J. 354; Rafique & Jackson's P. C. No. 27 (P. C.).

(5) 10 Ind. Cas. 477; 33 A. 356; 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575; 13 Bom. L. R. 427; 10 M. L. T. 25; (1911) 1 M. W. N. 432; 21 M. L. J. 645; 38 I. A. 87 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 155
OF 1923.

May 13, 1925.

Present :—Justice Sir Ewart Greaves, Kt.,
and Mr. Justice Mukerji.

Bibi JABEDA KHATUN AND ANOTHER—
DEFENDANTS—APPELLANTS

versus

Syed MAHOMMAD MOZAFFAR ALI
MUSANI AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Muhammadan Law—Wakf—Mutwalli, if can grant permanent lease—Lessee if can acquire adverse possession—'Istimrari mokarrari,' meaning of—Landlord and tenant—Permanent tenure—Burden of proof.

A mutwalli of a wakf estate cannot create a leasehold interest to endure beyond his life unless authorised by the kazi. [p. 783, col. 2.]

The lessee of a mutwalli acquires no title by adverse possession against the succeeding mutwalli, and if the latter recognizes the interest of the lessee, a new enancy is thereby created. [p. 783, col. 2; p. 784, col. 1.]

Vidya Varuthi Thirtha Swamigal v. Balusami Ayyar, 65 Ind. Cas. 161; 48 I. A. 302; (1921) M. W. N. 449; 41 M. L. J. 346; 44 M. 831; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 26 C. W. N. 537; 24 Bom. L. R. 629; 20 A. L. J. 497; (1922) A. I. R. (P. C.) 123 (P. C.), followed.

Where a tenancy created by a *mutwalli* is not challenged for over 70 years and the rent remains unchanged, applications for enhancement having failed, the Court can presume the grant to be of lawful origin and of a permanent and heritable nature. [p. 784, col. 2.]

The words '*istimrari mokarrari*' do not necessarily mean permanent and heritable. The nature of an *istimrari mokarrari* grant is to be determined from the circumstances of the case. [*ibid.*]

When the relation of landlord and tenant is admitted, the onus of proving a permanent tenure at a fixed rent is on the tenant. [p. 784, col. 1.]

Case-law considered.

Appeal against a decree of the Officiating Subordinate Judge, Dinajpur, dated the 29th of March 1923.

Sir P. C. Mitter (with him Babus Bejoy Kumar Bhattacharji and Khagendra Nath Mitter), for the Appellants.

Sir B. C. Mitter and Babu [Jotindra Mohan Choudhuri, for the Respondents.

JUDGMENT.

Greaves, J.—This is an appeal by defendants Nos. 1-4 against a decision of the Officiating Subordinate Judge of Dinajpur.

The suit out of which this appeal arises was originally instituted by the Receiver of a *wakf* estate for a declaration that the father of the defendants had no right to enjoy the property in suit which consisted of 1440 *bighas* of *nishkar* land, at a permanent and invariable rent, for a declaration that neither Syed Sadaruddin-Al-Musari or any other *mutwalli* of the *wakf* estate had any right to permanently settle the land in suit and that if Syed Sadaruddin had so settled it, the plaintiff is not bound by the settlement and asked that it should be set aside, that the defendants might be ejected and the plaintiff given *khas* possession and a decree for mesne profits. There was an alternative prayer for enhancement of rent if a decree for ejectment was not passed.

The plaintiff became *mutwalli* of the *wakf* subsequent to the institution of the suit in the year 1325 and he was substituted as plaintiff in place of the Receiver.

The plaintiff states in his plaint that according to his information long after the Permanent Settlement during the time of Syed Sadaruddin-Al-Musari, the father of Syed Abdulla-Al-Musari, the last *mutwalli*, a non-permanent, non-heritable tenure was

created without consideration and for a fixed term of the land in suit and that one Gafuruddin *mukhtear*, father of the defendants, purchased at a rent execution sale in the year 1902 a *jote* (being the lands in suit) at a *jama* of Rs. 387-11 annas 14½ *gandas* which was described in the sale-certificate as *istimrari*.

The defendant in his written statement claims that the *jote* is a transferable and heritable permanent tenure with the rent fixed in perpetuity and that the *jama* has never been altered and that this had been admitted unconditionally by the *mutwallis* who had treated the *jote* as a transferable and heritable *istimrari jote* with the rent fixed in perpetuity. They further claimed to have been in possession for more than 12 years as *bona fide* transferees for value and that the suit was barred by Arts. 134, 142 and 144 of the Limitation Act and by estoppel arising from the conduct of the plaintiff and his predecessors. They further claim that Gafuruddin Ahmed made a *wakf* of the property by executing a *tauliatnama* of which defendant No. 2 is *mutwalli* and that the suit is not maintainable against him as he is not sued as *mutwalli* of the *wakf*.

By a *sanad* of the Emperor Shah Alam dated the 9th April 1772 the *tauliat* of the shrine of Onsub-ul-Aquetali together with *wakf mehals* appertaining thereto, which included the lands in suit, was granted to Syed Suduruddin and it was thereby provided that the *mutwalli* was not competent to grant *istimrari* or *mokarrari* or to lease at a low *jama* anything appertaining to the *Pargana*. Similar *sanad*, which, however, did not include this last provision, were granted to Syed Suduruddin by the Nawab Nazim of Murshidabad on the 1st September 1772 and by the East India Company on the 14th September 1773. The learned Judge in the Court below declared the plaintiff's title to the land in dispute and passed a decree for *khas* possession and for mesne profits for the three years 1325 to 1327. He states in his judgment that it was admitted that the tenure formed part of the endowment of the *wakf* and he finds that the endowment was founded in the 14th or 15th century. He further finds that the tenure was held at an unvaried rent for more than 100 years and that it was allowed to descend from father to son and that it was treated by most of the *mutwallis* as *istimrari mokarrari*. He finds that there

was nothing to show that the tenure was created with the leave of the Court of the *kazi* and he holds that a *mutwalli* cannot permanently transfer a property by way of lease. The following points were urged before us on behalf of the appellants.

(1) That they or their predecessors have acquired a title by adverse possession having been in possession of the tenure at any rate since 1860 or thereabouts and it is urged that the claims of any *mutwalli* were barred under the Limitation Act of 1859, which is said to govern the case, s. 10 and Art. 134 of the present Limitation Act having no application.

(2) That the present plaintiff is estopped by the representations of his predecessors made in sale proclamations when the tenure was sold for arrears of rent that the tenure was *istimrari mokarrari*.

(3) That the onus is on the plaintiff to show that the tenure was created after the *sanad* of the 9th April 1772 and that as the plaintiff has not discharged this onus, there is nothing to show that it was not created prior to 1772.

(4) That from the recognition by previous *mutwallis* of the tenure as *istimrari mokarrari* during a long period of years the Court should assume a legal origin and that it was created with the leave of the *kazi*.

(5) That as a *wakf* has been made of the tenure the *mutwalli* of this *wakf* should have been sued and that in his absence no valid decree could be passed.

(6) That under the provisions of s. 10 of the Bengal Tenancy Act a tenure-holder can only be ejected on breach of a condition.

Before dealing with these contentions it will be convenient to state what evidence there is on the record as to the existence of the tenure and who were the *mutwallis* of the *wakf* from the date of the *sanad*. As already stated the first *mutwalli* was Syaruddin to whom the *sanad* was given in 1772. There is no evidence one way or other as to whether the tenure was in existence prior to the grant of the *sanad* and there is no evidence either as to the dealing of Syaruddin with the *wakf* estate. Syaruddin was succeeded by Syed Gafuruddin but there is no evidence as to the date of his succession or as to his dealings with the *wakf* estate.

He was succeeded by Karimuddin but the date of his succession does not appear. It is clear, however, that the tenure was in

existence during, at any rate, a portion of the time that he was *mutwalli* but whether he created it is not established by the evidence, it is clear, however, that it must have existed in the year 1843 for in the year 1850 (see Ex. L) Karimuddin sued as *mutwalli* for the rent of an *istimrari jote* which is the land in dispute for the years 1843 to *Bhadra* 1257 (1850) at the rate, of Rs. 387-11 odd per annum (the equivalent of Rs. 363-8 *sicca* rupees). In those proceedings the defendants relied amongst other documents on two acquittances of the years 1806 and 1807 which are referred to in the decree Ex. D, these documents are not before us but the appellants rely on them as showing that the *istimrari jote* existed at any rate from the year 1806. In another decree passed in the year 1859 (Ex. G) in favour of the same *mutwalli* the land is described as the ancestral *istimrari jotes* of the defendants the annual rental being Rs. 363-8 *sicca* rupees and in the sale certificate (Ex. 8) in execution of Ex. G, the land is described as *istimrari*.

The successors of Syed Karimuddin were Sadaruddin, Serajuddin and Safiruddin who continued as *mutwallis* to 1904 or 1905. Their successors were Syed Abdul Waris and Syed Abdulla who were succeeded by the present *mutwalli*.

This much, therefore, is clear that the tenure has existed since 1843, that so far as can be ascertained the rent has remained unchanged during three *mutwalliships* and for a period of nearly 70 years. It will now be convenient to deal with the points raised by the appellants.

With regard to the first point I do not think that any question of limitation or adverse possession can arise. These contentions are I think clearly untenable in view of the decision of the Judicial Committee in *Vidya Varuthi Thirtha Swamigal v. Balusami Ayyar* (1). That case deals with a Hindu *math* but the Board state that the principles there laid down apply equally to Muhammadan endowments and it is clear from that case that unless authorised by the *kazi* no *mutwalli* could create a leasehold interest to endure beyond his life, that the lessees acquired no title by adverse possession against the succeeding *mutwalli* and

(1) 65 Ind. Cas. 161; 48 I. A. 302; (1921) M. W. N. 449; 41 M. L. J. 346; 41 M. 831; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 26 C. W. N. 537; 24 Bom. L. R. 629; 20 A. L. J. 497; (1922) A. I. R. (P. C.) 123 (P. C.).

that if the succeeding *mutwalli* recognized the interest, the consent is only referable to a new tenancy created by him and that there is no adverse possession until his death or until a new *mutwalli* takes his place.

With regard to the second point the appellants contend that there is estoppel, as at the Court sales the *mutwalli* represented the deity, but I do not think that it was in the scope of the *mutwalli's* agency to make a representation of this nature if the lease was in the fact granted without the authority of *kazi* and consequently I think no question of estoppel arises.

The third point raises questions of some difficulty. The respondents contend that when as here the position of landlord and tenant exists, the onus of proving the existence of a tenure is on those who set it up and that this is always so, the only exceptions being in the case of *raiyats* or *lakhraj-dars*.

What the respondents in effect say is this, by admitting you are a tenant, you admit that these lands are part of the permanently settled estate and as such liable to rent, which you acknowledge you are liable to pay, and that it is, therefore, for you, the tenant, to show that you hold a lease of these lands which entitles you to hold them in perpetuity at a fixed rent.

The appellants, on the other hand, rely on the cases of *Hurryhur Mookhopadhyaya v. Madub Chunder* (2) and *Bipradas Pal Chowdhury v. Kamini Kumar Lahiri* (3), the principles laid down in which, they say, are not to be confined to cases of *lakheraj* land and they cited authority to show that a *lakheraj-dar* was a lease-holder, *Gokhul Sahu v. Jodu Nundun Roy* (4), and reliance was also placed on s. 3 (3) of the Bengal Tenancy Act. It was further contended that the existence of a tenancy was admitted in the plaint and that it was for the respondents who sought to eject the appellants to show that it had determined. I am inclined to agree with the respondent's contention as to the onus, but I do not think that this disposes of the suit or that it is possible to ignore the fact that the tenure has existence since at any rate 1843 at a uniform rate of

rent and that it has not been questioned by three generations of *mutwalli*.

I now come to the fourth contention raised by the appellants. In this connection we were pressed with the decision in *Chockalingam Pillai v. Rayandi Chettiar* (5). In that case the manager of a Hindu temple had granted a permanent lease in 1813 which was continued by a fresh grant in 1832, the lessees being described as persons with an hereditary right to cultivate. There was no evidence to prove the purpose of the lease but it had existed unchallenged from 1832 down to 1893 when the suit was brought.

The Court in that case presumed a lawful origin having regard to the long period during which the lease existed.

The respondents contend that assuming this can be done in the case of a Hindu temple, having regard to the rights of the managers to grant permanent leases in cases of necessity, no such assumption can be made in favour of grantees from a *mutwalli* who can only make such a grant with the leave of the *kazi*. I do not think, however, that such a presumption is impossible in the case of a Muhammadan endowment and I think that the Court under the circumstances of the present case should make the assumption that the grant was in its origin lawful having regard to the fact that the lease has existed unchallenged since at any rate 1843, that the rent has remained unchanged, that applications for enhancement have been made and failed and that no *mutwalli* has challenged it for a period of over 70 years. The respondent contends that *istimrari mokarrari* does not necessarily mean permanent and heritable but that it means permanent during the life of the grantee and that in the years 1859 and 1860, it was used in the sense of a grant for life and we were referred to the case of *Narsingh Dayal Sahu v. Ram Narain Singh* (6) and *Ram Narain Singh v. Chota Nagpur Banking Association* (7). These cases lay down that the meaning of the term is not necessarily permanent and heritable but that the nature of the grant is to be determined from the circumstances and I think we should from the circumstances here infer that the grant was permanent and heritable.

(2) 14 M. L. A. 152; 20 W. R. 459; 8 B. L. R. 366; 2 Suth. P. C. J. 484; 2 Sar. P. C. J. 713; 20 E. R. 743.

(3) 36 Ind. Cas. 674; 48 I. A. 499; 41 M. L. J. 638; 15 L. W. 180; 30 M. L. T. 138; 26 C. W. N. 465; 49 C. 27; (1922) A. I. R. (P. C.) 48; 4 U. P. L. R. (P. C.) 53 (P. C.).

(4) 17 C. 721; 8 Ind. Dec. (N. S.) 1023.

(5) 19 M. 485; 6 M. L. J. 247; 6 Ind. Dec. (N. S.) 1043.

(6) 30 C. 883.

(7) 36 Ind. Cas. 321; 43 C. 332.

I do not think that the fifth contention raises any difficulty and if necessary the title and plaint could have been amended. As to the sixth point, in my opinion, s. 10 of the Bengal Tenancy Act has no application as the argument based on it assumes that the tenure is permanent, if it was not validly created, in my opinion, it is not permanent. It follows from what has been stated before that the rent is not enhanceable.

In the result, the appeal succeeds and the suit will stand dismissed except as to the prayer for declaration of title and the claim for rent for the years 1324 to 1327.

The defendants contend that the rent for the year 1324 has in fact been paid. There is no decision on this point and, accordingly the matter will go back to the lower Court in order that this question may be decided.

As to the rents for the years 1325 to 1327 they have admittedly not been paid and there will accordingly be a decree in favour of the plaintiff for rent for these years. But a question arises as to whether the rents for these years were tendered or not and whether, therefore, the interest is payable. This question again has not been decided and this matter must also go back for the decision of the lower Court. The Judge in the Court below will finally dispose of these questions as to rent.

The appellants will be entitled to their costs both of this Court and of the Court below.

The costs of the remand will be decided by the Court below.

Mukerji, J.—I agree.

N. H.

*Appeal allowed:
Case remanded.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1220
OF 1922.

June 24, 1925.

Present:—Mr. Justice Adami and
Mr. Justice Sen.

NATHAN PRASAD SHAH—DEFENDANT—
APPELLANT

versus

KALI PRASAD SHAH—PLAINTIFF
—RESPONDENT.

Construction of document—Ijara deed, whether

mortgage—Suit to recover haq ajiri—Interest, whether can be claimed—Ijaradar, rights of—Set-off—Time-barred debt, whether can be set off.

Under the terms of an *ijara* deed it was agreed that the *ijaradar* should remain in possession of the *ijara* property and that out of the fixed annual rent he should pay Government revenue and road-cess into the Government Treasury every year, should deduct and appropriate to himself a certain sum in lieu of interest on the *zarpeshgi* money and should pay the balance as *haq ajiri* to the owner. In a suit to recover the *haq ajiri* in respect of several years:

Held, (1) that the *ijara* deed was a deed of usufructuary mortgage and that the *ijaradar* held possession not as tenant but as mortgagee and that the *haq ajiri* was not a payment in the nature of rent and that, therefore, in the absence of a stipulation in the deed for payment of interest thereon, the plaintiff was not entitled to recover any interest on the arrears of *haq ajiri*; [p. 786, col. 2; p. 787, col. 1.]

(2) that the defendant as *ijaradar* was not entitled to remove any portion of the soil of the land held in *ijara* and that, therefore, damages recovered by the plaintiff from a third person in respect of an injury done by the latter to the soil could not be claimed by the *ijaradar* and could not be set off against the plaintiff's demand. [p. 787, col. 1.]

A time-barred debt can be claimed by way of equitable set-off. [*ibid.*]

Appeal from a decision of the District Judge, Santhal Parganas, dated the 14th July 1922, confirming that of the Subordinate Judge, Rajmahal, dated the 5th May 1922.

Messrs. D. C. Verma and Ram Prasad,
for the Appellant.

Messrs. Rai G. S. Prasad and N. C. Sinha,
for the Respondent.

JUDGMENT.—In 1907 the plaintiff who is proprietor of village *kasba* Syedpur in the Santhal Parganas, executed and registered an *ijara* deed granting certain proprietary rights in the village in favour of the defendant for a term of seven years in consideration of an advance of Rs. 26,000. Under the terms of the deed it was agreed that the *ijaradar* "should remain in possession of the *ijara* property, and out of Rs. 1,630-8 the fixed annual rent, he should pay Rs. 411-5-6 as Government revenue and road-cess into the Government Treasury every year, should deduct and appropriate to himself every year Rs. 975 in lieu of interest on the *zarpeshgi* money and should pay the remaining sum of Rs. 294-3-0 every year as *haq ajiri*" to the plaintiff.

The defendant failed to pay the *haq ajiri* for several years in succession and, therefore, the plaintiff instituted the suit out of which this second appeal arises, claiming the *haq ajiri* for the years 1320 to 1325 *Faslis* both inclusive together with interest at the rate of 12 per cent. per annum. After

the defendant had filed his written statement the plaintiff amended the plaint, withdrawing the claim in respect to the year 1320 *Fasli*.

The defendant did not deny that the *haq ajiri* was due for the years 1321 to 1325 *Faslis* but he contested the claim for interest and also sought to set-off against the demand in respect of *haq ajiri* certain payments alleged to have been made by him to the plaintiff. Of these it is only necessary to mention two, namely, (1), a payment of Rs. 150 realized from one Rai Bahadur Baikuntha Nath Sen, who had excavated a tank in the village without permission and (2) a sum of Rs. 240-5-6 due as rent for the six years in respect of lands in the village held by the plaintiff as *raiya*t under the *ijaradar* and Rs. 120 due as interest on the said arrear rents. The other items sought to be set-off have been disallowed by the lower Courts and no appeal is pressed before us in regard to them. This defendant also set up the bar of limitation against the claim for *haq ajiri* for 1320 to 1323, and urged that *Musammata* Sita Sahuan should have been joined as plaintiff.

The Subordinate Judge found that the plaintiff was entitled to the *haq ajiri* claimed for the years 1321 to 1325 inclusive and that, though the *ijara* deed contained no stipulation for the payment of interest thereon, the *haq ajiri* being rent, the usual rate of 12 per cent. ought to be paid. With regard to set-off, the Subordinate Judge disallowed all the items except that relating to the rent of the plaintiff's *raiya*t holding, but even that claim was found excessive, since the rent for 1320, 1321 and 1322 was not recoverable, the claim being barred by limitation. A sum of Rs. 117 was allowed to be set-off as rent, cess and interest.

On appeal the learned District Judge held that the *haq ajiri* was rent and as such, according to the custom in the Santhal Parganas, interest was payable on arrears at the rate of 12 per cent. He upheld the decision of the Subordinate Judge that the proprietor and not the *ijaradar* was entitled to the Rs. 150 paid by Rai Bahadur Baikuntha Nath Sen, and rejected the claims to set-off other than that allowed by the Trial Court. He thus dismissed the appeal.

The only points pressed in appeal before us are (1) that *haq ajiri* is not rent and,

there being no stipulation for interest on it, the Courts below were wrong in allowing interest; (2) that, though the defendant would not be able to seek his remedy by suit in respect of the arrears of rent for 1320 to 1323 that remedy being barred by limitation, the debt still subsisted and he was entitled to have the arrears of all six years set-off against the plaintiff's claim and (3) that the defendant, as *ijaradar* with full proprietary rights granted by the *ijara* lease, was entitled to the Rs. 150 paid as compensation for the wrongful excavation of a tank.

At first sight, since the *ijara* speaks of the *haq ajiri* as being one of the component parts of the Rs. 1,630-8 which is described as the fixed annual rent, there would be an inclination to decide that the lower Courts were correct in finding that interest was payable on it as rent. It is argued that *zerpeshgi* lease is not a mere contract for cultivation but it also provides security for money advanced, and in the present case it was arranged that the appropriation of Rs. 975 every year by the *ijaradar* furnished the security for the advance, while the Rs. 294-3 took the form of rent for the right to cultivate or to collect rent from the *raiya*ts. The question, however, whether in such a case as this, *haq ajiri* is rent has been decided by this Court in the case of *Barhamdeo Narain Singh v. Ramanand Prasad Singh* (1). That case was similar to the present one; there, in consideration of Rs. 12,000 certain *zemindari* rights were made over to a person who made the advance at what was described as a fixed annual rental of Rs. 803-4. Out of this Rs. 803-4 the person who made the advance was to deduct Rs. 620 on account of interest on the *zerpeshgi* and was to pay Rs. 83-4 annually to the person who received the advance, Chapman and Atkinson, J.J., held that this *haq ajiri* payment of Rs. 83-4 was not rent, that the deed was a usufructuary mortgage and that the person in possession held as mortgagee and not as tenant; the *haq ajiri* was due from him as mortgagee under an arrangement with the mortgagor and was not due from him as tenant. We see no good reason to differ from the above decision and, following it, must decide that, the *haq ajiri* not being rent, no interest was payable on

(1) 40 Ind. Cas. 594; (1918) Pat. 24; 1 P. L. W. 795,
(2) 32 C. 576; 2 C. L. J. 73.

it, as there was no stipulation in the deed for payment of interest thereon.

As regards the set-off of the arrears of rent payable by the plaintiff to the defendant, the learned Subordinate Judge was clearly mistaken in holding that the set-off of the rent of the years 1920 to 1922, inclusive, was barred by limitation. The case of *Sheo Saran Singh v. Mahabir Parshad Shah* (2) is an authority for holding that in a suit like the present one the rent of lands held by the mortgagor and forming part of the mortgaged property can be set-off and that such rents may be set-off, even though they may be barred by limitation. *Gajadhar Mahto v. Raghubar Gope* (3) and *Ramdhari Singh v. Parmanund Singh* (4) also decide that a time-barred debt may be claimed by way of equitable set-off. The defendant-appellant must be allowed to set-off the rent of the six years 1320 to 1325 *Faslis* at the rate of Rs. 29-8 a year, that is to say Rs. 177 and road, cess and interest at the rate of 12 per cent. per annum.

The last point pressed before us is with regard to the sum of Rs. 150. It appears that Rai Bahadur Baikuntha Nath Sen without permission excavated a tank in the village; both the plaintiff and the defendant took proceedings in Court against him, but the matter was settled by the payment of Rs. 150 which the plaintiff received. It is contended that, as the deed of *ijara* gave to the defendant all the rights of the proprietor during the term of the *ijara*, the defendant was entitled to get the money as temporary proprietor, and, because the excavation of the tank deprived him of part of the usufruct, he is entitled to compensation. If he was entitled to compensation on this ground he would have to seek it from the plaintiff who mortgaged the property to him and not from the stranger who trespassed. The contention cannot be supported, the damage was damage to the corpus of the property, and the *ijaradar* would not be allowed to take away any portion of the soil.

On the findings I have come to the appeal must be allowed in part and the decree of the lower Court must be modified to this extent, that the plaintiff-respondent will be declared to be not entitled to interest and the sum of Rs. 705 will

be deducted from the amount decreed; also the appellant will be declared to be entitled to set off Rs. 177 as rent of the plaintiff's holding for the six years 1320 to 1325, both included, with road-cess and interest at the rate of 12 per cent. per annum; this sum of Rs. 177 and the road-cess and interest will be further deducted from the sum decreed as payable to the plaintiff by the lower Courts.

The parties will get costs proportionate to their success in all the Courts.

Z. K.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1081 OF 1925.

July 22, 1925.

Present:—Mr. Justice Sulaiman and
Mr. Justice Boys.

JEUT KOERI AND ANOTHER—PLAINTIFFS
—APPELLANTS

versus

MATHURA KOERI AND OTHERS—
DEFENDANTS—RESPONDENTS.

Mortgage, usufructuary—Profits appropriated to interest on portion of mortgage-money—Balance to carry interest—Redemption on full payment with interest—Clog on redemption—Mortgage—Second mortgage to same mortgagee—Simultaneous redemption, provision for, effect of.

A mortgage-deed provided that the mortgagee would be entitled to appropriate the profits arising out of the mortgaged property in lieu of interest on a portion of the mortgage-money and that the payment of the balance along with interest at a certain rate shall be compulsory at the time of redemption:

Held, (1) that the agreement with regard to the payment of interest on the balance of the mortgage-money did not operate as a clog on the equity of redemption;

(2) that the intention of the parties was that no redemption should take place without payment of the entire mortgage-money plus interest at the rate provided for in the deed on that portion of the mortgage-money which carried interest.

Obiter.—Where money is borrowed on the security of property which is already mortgaged to the same creditor and there is a stipulation in the subsequent deed that without payment of the two sums the property is not to be redeemed the effect of the clause is to create a further mortgage and to make the property security for the additional debt.

Second appeal from a decree of the Subordinate Judge, Ghazipur, dated the 6th March 1925.

(3) 12 Q. W. N. 60.

(4) 21 Ind. Cas. 716; 19 C. W. N. 1183.

Messrs. A. P. Pandey and Ram Nama Prasad, for the Appellants.

JUDGMENT.—This is an appeal arising out of a suit for redemption. On the 5th August 1899, the plaintiffs' predecessors borrowed a sum of Rs. 592-8-0 from the predecessors of the defendants and executed a single document for it. As found by the lower Appellate Court, the probability is that the profits of the property sought to be mortgaged were not sufficient to cover the interest on the whole amount, and accordingly there was a provision in the document that the mortgagees were entitled to appropriate the profits of the property in lieu of interest on a sum of Rs. 392-8-0. As to the balance, it was provided that the payment of this sum along with interest at 2 per cent. per annum shall be compulsory at the time of redemption.

The plaintiffs offered to redeem the property on payment of Rs. 392-8-0, whereas the defendants claimed that they must pay Rs. 200 plus interest. The Court below has accepted the contention of the defendants and has passed a conditional decree for payment of the entire amount before redemption. In appeal the learned Vakil for the appellants has argued that the payment of Rs. 200 was not made a charge on this property and that, therefore, the defendants are not entitled to insist on its payment before redemption. It is further urged that even if it were to create a charge on the property, the covenant was a clog on redemption and was not enforceable.

Reliance has been placed strongly on the remark of the lower Appellate Court that it does not appear that there is any charge on the property so far as the sum of Rs. 200 with interest was concerned. The learned Judge was forced to make these remarks in view of the ruling cited before him, which is reported as *Sheo Shankar v. Parma Mahton* (1). The facts of that case are, however, different, inasmuch as there were two different documents. It must also be borne in mind that the question whether a particular document does or does not create a charge depends on its particular terms, and, therefore, cases as regards other documents are not always a good guide. But, if by that case it was intended to lay down that when there is a subsequent contract that there should be no redemption of a prior mortgage before payment of the amount due

on the second document, entered into at a subsequent period and for an additional consideration, it is either a clog on the redemption of the first mortgage, and, therefore, unenforceable, or does not create any charge at all, then the view is not quite in consonance with the opinions expressed in several other cases of this Court, viz., *Ranjit Khan v. Ramdhan Singh* (2), *Brij Lal Singh v. Bhawani Singh* (3) and *Bhikam Singh v. Shankar Dayal Singh* (4) and it must be deemed to have by implication been overruled by the Full Bench case of *Har Pershad v. Ram Chunder* (5). In that case in the judgment of Banerji, J., with which Wallach, J., fully agreed it was clearly laid down that where in a subsequent document there was a stipulation that without payment of the two sums the property was not to be redeemed, the effect of the clause was to create a further mortgage or the property was made security for the additional debt.

In the present case, the whole amount was advanced as one transaction. The profits not being equal to the interest of the entire amount, some provision had to be made for payment of the interest on the balance, but there can be no doubt that the intention of the parties was that the property was not to be allowed to be redeemed unless the whole amount borrowed, together with interest that would have accrued, were paid. The learned Vakil for the appellants contends that the covenant was that 'the payment of Rs. 200 with interest shall be compulsory at the time of redemption' does not mean the same thing as the clause 'that there shall be no redemption without payment of such sum' and this is a supposed distinction by which he wishes to distinguish the present case from the one which was before the Full Bench. We fail to discover any difference in the intentions as disclosed by the language employed in the two documents. It is manifest that the mortgagees would never have advanced the whole amount unless they had at least the security of the property covered by the deed. When the payment of Rs. 200 was made compulsory at the time of redemption, the only intention there could have been was that there would be

(2) 2 Ind. Cas. 859; 31 A. 482; 6 A. L. J. 654.

(3) 7 Ind. Cas. 115; 32 A. 651; 7 A. L. J. 821.

(4) 1 Ind. Cas. 345; 6 A. L. J. 255.

(5) 63 Ind. Cas. 750; 19 A. L. J. 807; 3 U. P. L. R. (A.) 139; 44 A. 37; (1922) A. I. R. (A.) 174.

(1) 26 A. 559; 1 A. L. J. 282; A. W. N. (1904) 123.

no redemption without payment of this sum.

It cannot be contended that this was a clog on the equity of redemption. It was open to the mortgagor to pay the whole amount the very next day if he chose to do so and if the money was ready in hand. There was no obstacle in his way either. The fact that now the interest has accumulated to a very large extent is due to his own delay in making a payment; but at the time when the transaction was entered into, there was no covenant which could necessarily postpone his right of redemption to a very indefinite period or which would create an insuperable difficulty in his way.

We, therefore, absolutely fail to find any reason why the mortgagor's representatives should not be held bound by the covenant which they entered into with their eyes open and for a valid consideration. This covenant is a part of the transaction of the mortgage. When it was provided that the sum of Rs. 200 would be paid at the time of redemption, it cannot even be contended that the claim is barred by time. We accordingly uphold the decree of the Court below and direct that the plaintiffs should pay the whole amount before redemption. The appeal is dismissed under O. XLI, r. 11.

N. H. & Z. K.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 454 OF 1923.

February 20, 1925.

Present:—Mr. Justice Venkatasubba

Rao and Mr. Justice Madhavan Nair.

K. R. MUTHUALAGAPPA CHETTIAR

—PLAINTIFF—APPELLANT

versus

AHMED IBRAHIM ALIM SAHEB—

—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XX, r. 12—Mesne profits subsequent to suit—Decree for fixed amount, whether proper—Decree, whether final or only preliminary.

Order XX, r. 12 (1) (c), C. P. C., contemplates only an inquiry as to the amount of subsequent mesne profits, and not a decree for a particular and definite amount. Where, however, in a case the Court after

ascertaining such mesne profits passes a decree for the sum without directing an inquiry, the decree is not preliminary but final and further proceedings under the decree are in execution and not in suit. [p. 789, col. 2; p. 790, col. 1.]

Subbe Goundan v. Krishnamachari, 68 Ind. Cas. 869; 45 M. 449 at p. 454; 30 M. L. T. 217; 42 M. L. J. 372; 15 L. W. 537; (1922) M. W. N. 269; (1922) A. I. R. (M.) 112, relied on.

Appeal against an order of the Court of the Subordinate Judge, Negapatam, in M. A. No. 562 of 1923, in E. P. No. 131 of 1923 (in O. S. No. 4 of 1913, on the file of the Temporary Sub-Court, Tanjore).

Mr. Watrap Subrahmanya Iyer, for the Appellant.

Messrs. K. Bashyam Iyengar and K. S. Desikan, for the Respondent.

JUDGMENT.—The learned Subordinate Judge has set aside various orders on the ground that they were passed without jurisdiction. We understand that the question has since again been raised in this very suit before the same Judge and that he has come to a different conclusion in view of certain recent decisions of this Court. We are, however, not concerned with this. There is an obvious point in this case to which unfortunately his attention was not drawn. If the decree in question was a preliminary decree, the subsequent proceedings now impeached would be merely proceedings in the suit. If, on the other hand, the decree was final, they would be proceedings in execution. It is not seriously disputed that the Court which heard the applications and made the orders which are said to be invalid, was a Court which had jurisdiction to execute the decree. The question, therefore, that has to be decided is, was the decree dated 12th January 1916 in O. S. No. 4 of 1913 preliminary or final? It contains a direction that the defendants shall deliver to the plaintiff possession of the property. Mesne profits up to the date of suit are fixed at Rs. 13,912-9-10 and thus there is no inquiry directed in regard to the present mesne profits. Under O. XX, r. 12, C. P. C., it is open to the Court either to pass a decree for the past mesne profits or to direct an inquiry as to such profits. In this case, the first course was adopted. The decree then awards subsequent mesne profits in respect of wet lands at 100 *kalam*s of paddy per *veli* per year, in respect of dry lands 6 annas per *mah* per year. Here must point out that there is a deviation from the terms of the section. Order XX, r. 12, (1) (c), C. P. C. contemplates only an

inquiry as to the amount of subsequent mesne profits. But the decree does not direct such an inquiry but decides the measure of the defendant's liability. We fail to see how this can be called a preliminary decree. It is final in every sense of the word. Section 2, C. P. C., says that a decree is final when the adjudication completely disposes of the suit. Herein every point regarding mesne profits (past and future) was decided and there remained nothing for further decision in the suit.

If we turn to the decree of the High Court, passed in appeal, what do we find? It modified the decree of the Subordinate Court substantially only in one particular. For the joint liability for mesne profits of the defendants, it substituted separate liability of the various defendants in proportion to the extent of the land in their occupation. There is no further interference with the decree of the first Court. Order XX, r. 12, cl. (2) runs thus:—

"Where an inquiry is directed under cl. (b) or cl. (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry". It follows from this, that if the Court after ascertaining mesne profits passes a decree for the sum without directing an inquiry, the decree is not preliminary but final. See the observations of Kumaraswami Sastri, J., in *Subbe Goundan v. Krishnamachari* (1).

In this view, no question of defect of jurisdiction arises. The orders were rightly passed and are valid. The appeal, is, therefore, allowed with costs throughout.

V. N. V.

S. D.

Appeal allowed.

(1) 68 Ind. Cas. 869; 45 M. 449 at p. 454; 30 M. L. T. 217; 42 M. L. J. 372; 15 L. W. 537; (1922) M. W. N. 269; (1922) A. I. R. (M.) 112.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 393 OF 1923.

July 22, 1925.

Present:—Sir B. K. Mullick, Kt., Acting Chief Justice, and Mr. Justice Kulwant Sahay.

EAST INDIAN RAILWAY Co.—

DEFENDANT—APPELLANT

versus

GOBARDHAN DAS—PLAINTIFF—

RESPONDENT.

Railway Company—Carriage of goods—Risk Note

Form "B"—Suit to recover damages for loss of goods—Loss, proof of—Wilful neglect, meaning of.

In a suit to recover damages from a Railway Company in respect of the loss of goods consigned to the Company for carriage under Risk Note Form "B", in order to make the Risk Note applicable, it is sufficient that the plaintiff pleads loss to himself, it is not necessary for the Company to give evidence that the goods have been lost to it also. If the plaintiff admits the loss then all that the Company has to do in its written statement is to plead the contract. It is not required to bring any evidence to support its plea. [p. 791, col. 1.]

"Neglect" means the omission to perform a duty and implies that a person does something which ought either to be done in a different manner or not at all or that he omits to do something which ought to be done. But wilful neglect goes further than this and implies that the person charged with such neglect knew that he should do a particular act or that he should refrain from doing a particular act and that he deliberately abstained from doing it or deliberately did it. In order to prove wilful neglect it must be shown that the neglect was not accidental and that the person charged with such neglect knew that mischief would result from his conduct or that there was an indifference to his duty to ascertain whether such conduct was mischievous or not. [p. 792, cols. 1 & 2.]

Second appeal from a decision of the Subordinate Judge, Ranchi, dated the 20th January 1923, confirming that of the Munsif, Giridih, dated the 12th April 1922.

Messrs. N. C. Sinha and N. C. Ghosh, for the Appellant.

Mr. S. Dayal, for the Respondent.

JUDGMENT.

Mullick, Actg. C. J.—On the 24th February 1921 the plaintiff consigned to the defendant Company 25 bags of coriander seed at Howrah and on the 20th September 1921 he consigned 125 bags of sugar at the Kidderpore docks for delivery at Giridih to himself. It is admitted by the plaintiff that 16 bags of sugar and one bag of coriander seed were lost and the present claim is for Rs. 782 as damages.

The defendant set up a Risk Note in Form "B" and declined to give any account of what had become of the goods.

The Munsif decreed the suit and on appeal the Subordinate Judge affirmed that decree.

The present second appeal is preferred by the defendant.

The sole question is whether the Risk Note absolves the defendant from liability. The Subordinate Judge thought that the Risk Note did not apply because this was a case not of loss but of non-delivery and in his opinion a loss to the plaintiff is not sufficient and the defendant must give proof of loss to himself. He relied on the case of *Ghela Bhai Punsu v. East Indian Railway Company* (1). But it has been

(1) 63 Ind. Cas. 241; 45 B. 1201; 23 Bom. L. R. 525.

held in *Great Indian Peninsular Railway Company v. Jitan Ram-Nirmal Ram* (2), that in order to make the Risk Note applicable it is sufficient that the plaintiff pleads loss to himself and that it is not necessary for the defendant to give evidence that the goods have been lost to him also. Reference was made in that case to the judgment of the House of Lords in *Smith Ltd. v. Great Western Railway Company* (3) and *Ghela Bhai's case* (1) was dissented from. The same view has been taken in other cases in this Court and I think we must follow the *cursus curiæ*.

Our attention has been drawn to *East Indian Railway Company v. Firm Sukhdeo Das-Gobardhan Das* (4), where a learned Judge of this Court sitting alone held that the Risk Note did not apply because the defendant had not pleaded loss within the meaning of the special contract. It would seem that the decision in that case turned upon the special language used in the written statement. But the *Great Indian Peninsular Railway Co. v. Jitan Ram-Nirmal Ram* (2) is quite clear and lays down the following rules, (1) Where a contract contains an exception and a proviso the party who desires to take the benefit of the exception must (if the contract requires it) not only plead the exception but prove it, and when that has been done the other party who desires to take the benefit of the proviso, which is in reality an extrinsic covenant by way of defeasance, must prove that the subject-matter is not within the exception, (2) Upon the special contract in Risk Note "B" the burden of proof lies in the first instance upon the defendant to show that there was such loss as is contemplated by the Risk Note and the onus is then shifted upon the plaintiff to show that the loss was due to the wilful neglect of the defendant.

Therefore, if the plaintiff admits the loss then all that the defendant has to do in his written statement is to plead the contract. He is not required to bring any evidence to support his plea. If, as is frequently the case, the plaintiff is astute to plead not loss but only non-delivery,

even in the case the defendant need only plead the contract and he will be relieved from the duty of calling evidence.

The question, really turns upon the construction of the Risk Note. Does it intend that loss to the plaintiff only will be sufficient to bring it into operation or does it intend otherwise. In my opinion the answer is that the decision in *Great Indian Peninsular Railway Co. v. Jitan Ram-Nirmal Ram* (2) was correct and the contract requires that loss to the plaintiff is sufficient to bring it into operation. If the goods are being wrongfully withheld by the Railway Company and have not been lost to them, I see no hardship to the plaintiff in construing the Risk Note to cover such a case. The plaintiff would then be entitled to an immediate decree on the ground that the goods have been lost to him by reason of the wilful neglect of the defendant to deliver. If the defendant has good ground for detaining the goods he must prove them. Therefore, in my opinion, the learned Subordinate Judge's finding that the failure of the defendant to give any account of the disappearance of the goods proves that the goods have not been lost within the meaning of the Risk Note cannot be supported, and the Risk Note also applies where the plaintiff only pleads non-delivery. In truth in most cases the real object of asking the defendant to call evidence of loss to himself is not to test the correctness of the defendant's allegation but to get by cross-examination some evidence of wilful neglect so as to found a claim under the proviso.

A contrary view has recently been taken in the Calcutta High Court in the *East Indian Railway Company v. Jagpat Singh* (5). In arriving at the conclusion that loss to the plaintiff is not sufficient the learned Judges in that case have relied upon the language of the English Carriers Act of 1830 and the decision of Baron Parke in *Hearn v. London & South Western Railway Company* (6). But my respectful opinion is that the English Carriers Act is not in *pari materia* with the Indian Railways Act; and having regard to the fact that a carrier under the English Act is an insurer which a Railway Company in India

(2) 72 Ind. Cas. 440; 2 Pat. 442; (1923) Pat. 82; 4 P. L. T. 173; 1 Pat. L. R. 169; (1923) A. I. R. (Pat.) 285.

(3) (1921) 2 K. B. 237; 90 L. J. K. B. 644; 125 L. T. 44; 26 Com. Cas. 84; 65 S. J. 172; 37 T. L. R. 117.

(4) 74 Ind. Cas. 431; 4 P. L. T. 443; (1924) A. I. R. (Pat.) 25.

(5) 79 Ind. Cas. 126; 28 O. W. N. 1001; 51 O. 615; (1924) A. I. R. (O.) 725.

(6) (1855) 10 Ex. 793; 3 O. L. R. 597; 24 L. J. Ex. 1800; 1 Jur. (N. S.) 236; 159 E. R. 660; 102 R. R. 833.

is not I do not think we are compelled to give the word 'loss' the same meaning here as in the Carriers Act.

If then the Risk Note applies is the plaintiff entitled to succeed on the ground of wilful neglect on the part of the Railway? The learned Subordinate Judge's judgment on this point is as follows:—"The position of the plaintiffs was such that it was not possible for them to make anything more than a general statement of the fact of negligence as inferred from all the circumstances. And they are not to blame if they have not been able to make out by means of cross-examination the specific acts of negligence because the available evidence on the question of loss has not been placed before the Court." If that is the position, I cannot see upon what evidence the learned Subordinate Judge comes to the finding that there has been wilful neglect. "Neglect" means the omission to perform a duty and implies that a man does something which ought either to be done in a different manner or not at all or that he omits to do something which ought to be done. Here the defendant's duty was that of a bailee, namely, to take such care of the goods as a prudent man would have taken of his own goods. The degree of care required depends on the circumstances of each case. The plaintiff must show that the defendant did something which a prudent man in his circumstances and having regard to the previous course of dealing would not have done. There is such evidence.

The defendant in cross-examining one of the plaintiff's witnesses suggested that the plaintiff had, as a matter of fact, locked the wagons with his own locks but that was denied. The learned Subordinate Judge does not find that it was the defendant's duty to supply locks to the wagons and there is no evidence that the defendant did not take that care which he would ordinarily take of his own goods or of the goods of his other consignors in transit.

Then the learned Subordinate Judge says that if the goods were stolen before they were loaded there must have been neglect. That does not follow. He also says that if they were delivered to a wrong party there must have been neglect. There is no proof that they were delivered to a wrong party.

There is, therefore, no legal evidence of neglect at all.

But wilful neglect goes far beyond this

and implies that the defendant knew that he should do a particular act and that he deliberately abstained from doing it. There may be cases where neglect may be deliberate and yet not wilful as for instance when the act is not that of a free agent. Apart from such cases it may be said that every omission is wilful because everyone must be presumed to have intended the ordinary consequences of his act. But the mere presumption of law for the purpose of fixing responsibility is not sufficient. The plaintiff must show that the neglect was not accidental and that the person knew that mischief would result from his conduct or that there was an indifference to his duty to ascertain whether such conduct was mischievous or not. In *Lewis v. Great Western Railway Company* (7), the question was whether there had been wilful conduct in packing certain cheeses in London and Lord Justice Bramwell expressed himself on the subject as follows:—"I cannot, however, say that there was evidence here to show that the packers who were in London, which is not a great place for the exportation of Cheshire cheeses, knew that they were doing wrong, or at all events that they were aware that there might be mischief resulting from it, and that they improperly did not inform themselves as to whether there would be, or would not be, mischief resulting."

In my opinion there was no legal evidence of wilful neglect here and, therefore, the plaintiff is not competent to succeed.

The result is that the appeal will be decreed with costs throughout.

Kulwant Sahay, J.—I agree.

Z. K.

Appeal decreed.

(7) (1878) 47 L. J. Q. B. 131; 3 Q. B. D. 195; 37 L. T. 774; 26 W. R. 255.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 33 OF 1925.

August 31, 1925.

Present:—Mr. Dalal, J. C.

RAJ BAHADUR LAL—PLAINTIFF—
APPELLANT

versus

SURAJ BAX SINGH AND OTHERS—
DEFENDANTS—RESPONDENTS.

*Registration — Mortgage — Invalid registration—
Simple money-decree, whether can be passed.*

When the registration of a mortgage-deed is invalid with respect to the property mortgaged it is invalid for all purposes and even a simple money-decree cannot be passed on it on the ground that there was an acknowledgment of the debt evidenced by the deed.

Kalka v. Mathura Das, 50 Ind. Cas. 220; 21 O. C. 341, referred to.

Appeal against the judgment and decree of the Sub-Judge, Sultanpur, dated the 18th October 1924, upholding that of the Munsif, Sultanpur, dated the 30th November 1923.

Mr. Bishambhar Nath, for the Appellant.

Mr. H. K. Ghose, for the Respondents.

JUDGMENT.—The two Subordinate Courts held the deed of mortgage in suit to be invalid on the ground that it was not properly registered. The father of the defendants Nos. 1 to 4 mortgaged the property in suit to one Debi Bakhsh who is a transferor of his interest to the plaintiff. The defence was that one property situated within the ambit of the jurisdiction of the Sub-Registrar of Sultanpur was fictitiously included in the deed with a view to commit fraud on the Registration Department and get the document executed in Sultanpur instead of at Amethi where the property really mortgaged was situated.

This is a second appeal and I am bound by the finding of fact arrived at by the lower Appellate Court. It was argued that the lower Appellate Court has only found that the mortgagor committed fraud in including the Sultanpur property and that there was no finding that the mortgagee was also aware of the fact. Such is not the case. The lower Appellate Court has distinctly stated that the property being *banjar* and far away from the house of the mortgagee, he could not have entered into a transaction of mortgage as a genuine transaction. The lower Court also pointed out that this property did not belong to the mortgagor and was ostensibly purchased by him under a deed which was registered at the same time that the deed in suit was. As is to be expected the Trial Court went further into the matter and held as a finding of fact that the mortgagor did not possess or intend to mortgage this particular piece of *banjar* property and that the mortgagee did not intend that this property should form part of his security. These are clear findings of fact and I cannot go behind them.

The next argument was that a simple money-decree may be passed on the ground that there was an acknowledgment of the

debt within six years of the institution of the suit. This contention is met by a Single Judge ruling of this Court that when registration is invalid with respect to the property mortgaged it is invalid for all purposes. *Kalka v. Mathura Das*, (1). I am not prepared to refer this matter to a Bench of two Judges.

I dismiss this appeal with costs.

S. D.

Appeal dismissed.

(1) 50 Ind. Cas. 220; 21 O. C. 341.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 964 OF 1923.

May 28, 1925.

Present:—Justice Sir Ewart Greaves, Kt., and Mr. Justice Mukerji.

RAJANI KANTA BISWAS AND OTHERS
—PLAINTIFFS—APPELLANTS

versus

PANCHANON MONDAL AND OTHERS
—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3, operation of—Dispossession by landlord—Constructive dispossession.

In order that Art. 3 of Sch. III to the Bengal Tenancy Act may apply to a suit for recovery of tenancy land, there must be actual dispossession of the tenant by the landlord. The operation of the Article cannot be extended to the case of so-called constructive dispossession, where the landlord has never allowed the tenant to take possession of the land. [p. 794, cols. 1 & 2.]

Nabin Chandra Shaha v. Wajid, 58 Ind. Cas. 598; 24 C. W. N. 382; 31 C. L. J. 199, distinguished.

Appeal against a decree of the Subordinate Judge, Nadia, dated the 29th of November 1922, reversing that of the Munsif, Second Court at Kushtia, dated the 25th of November 1921.

Babus Jogesh Chandra Roy and Bansori Lal Sarkar, for the Appellants.

Babu Ramgati Sarkar, for the Respondents.

JUDGMENT.

Greaves, J.—This is an appeal by the plaintiffs against a decision of the Subordinate Judge of Nadia reversing a decision of the Munsif, Second Court of Kushtia. The plaintiffs sued to recover possession of *mourasi mokarrari* lands alleging that they belonged to one Mohan Pramanik and that on his death it devolved on his widow Bama Sundari and that upon her death in

1913 the plaintiffs as reversionary heirs of Mohun were entitled to the properties.

Defendants, on the other hand, contended that they had purchased the lands from Bama Sundari for legal necessity and they further asserted that they were co-sharer landlords and that two years' period of limitation provided by Art. 3 of Sch. III to the Bengal Tenancy Act applied, and that the suit was, therefore, barred by limitation.

The Munsif decided the suit in favour of the plaintiffs. He held that there was no necessity for the sale by Bama Sundari and that no question of limitation arose as there was no dispossession by the landlords. The learned Judge in the Court below has, as I already stated, reversed the decision of the Munsif and he has done so on the ground that the suit is barred by the special Law of Limitation provided by Art. 3 of Sch. III of the Bengal Tenancy Act. He has not gone into the merits of the appeal and has simply decreed the appeal on this ground.

The plaintiffs were never in possession of the lands in suit and were never dispossessed by the landlords. No relation of landlord and tenant ever existed between the plaintiffs and the defendants. But it is urged on behalf of the respondents in this appeal that there has been dispossession by reason of the fact that the landlords refused to allow the plaintiffs to take possession of the lands in suit and it is said that there has, therefore, been what I may describe as constructive dispossession by the landlords on this ground. Reliance is placed on the case of *Nabin Chandra Shaha v. Wajid* (1) to which we have been referred. Now, as I have already stated the defendants went into possession by virtue of their purchase from Bama Sundari and before her death and they were in possession by virtue of that purchase. The plaintiffs were never in possession and accordingly were never dispossessed. The respondents contend that there has been constructive dispossession. But it has been pointed out more than once in the decisions of this Court that this doctrine should not be extended so as to make Art. 3 of Sch. III applicable thereto. Therefore, for the Article to operate there must be actual dispossession by the landlord of the tenant. This being so, in my opinion, Art. 3, Sch. III,

(1) 58 Ind. Cas. 598; 24 C. W. N. 382; 31 C. L. J. 199.

has no application. So far as the case of *Nabin Chandra Shaha v. Wajid* (1) is concerned one has only got to look into the facts to see that it is quite different from the present case. In that case the heirs had gone into possession of the land on the death of their predecessor-in title and had been dispossessed from the land. Consequently in that case there was dispossession of the tenants within the meaning of Art. 3 of Sch. III of the Bengal Tenancy Act. For the reasons which I have stated I think the learned Subordinate Judge was wrong in saying that the suit was barred by the provisions of Art. 3 of Sch. III. If any limitation applies it would be the ordinary rule of 12 years' limitation.

I accordingly set aside the decree of the learned Subordinate Judge. As he has never gone into the merits of the appeal the matter must go back to him in order that he may deal with it on the merits.

Costs of this appeal will abide the result.

There is an application in connection with this appeal, it has not been pressed. The respondents Nos. 4, 5 and 6 are not properly represented in the appeal, it is, therefore, dismissed so far as they are concerned.

Mukerji, J.—I agree.

M. H.

*Appeal allowed:
Case remanded.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 222 OF 1922.

November 20, 1924.

Present:—Mr. Justice Wallace and
Mr. Justice Madhavan Nair.

P. K. VEERARAYAN *alias* UNNI
ANUJAN RAJAH AVERGAL AND OTHERS
—COUNTER-PETITIONERS NOS. 3 AND 4
—APPELLANTS

versus

AYYAKUTTI *alias* VENKATACHALAM
PATTAR—PETITIONER—RESPONDENT.

Appeal—Suit of small cause nature—Execution—Appellate Court, order of.

No appeal lies to the High Court against an order of an Appellate Court in a matter of execution in a suit of small cause nature.

Aithala v. Subbana, 12 M. 116; 4 Ind. Dec. (N. S.) 430, *Mavulu Ammal v. Mavula Maracoir*, 30 M. 212; 17 M. L. J. 376, *Amba Prasad v. Mushtaq Husain*, 54 Ind. Cas. 432; 42 A. 200; 18 A. L. J. 167; 2 U. P. L. R. (A.) 69 and *Sant Prasad v. Bhawani Prasad*, 60 Ind.

Cas. 831; 43 A. 403; 19 A. L. J. 72; 2 U. P. L. R. (A) 416, followed.

Appeal against an order of the District Court of South Malabar, dated the 16th December 1921, in A. S. No. 687 of 1921, preferred against that of the Court of the Subordinate Judge, South Malabar at Calicut, in E. P. No. 159 of 1921, in O. S. No. 457 of 1912 on the file of the Court of the District Munsif, Ottapalam.

Messrs. K. P. Ramakrishna Iyer and N. P. Narasimha Iyer, for the Appellants.

Mr. T. S. Anantharaman, for the Respondent.

JUDGMENT.—No appeal lies in this case, as this is of the nature of a second appeal in a matter of execution in a suit which is of the nature of small cause suit: *vide Aithala v. Subbana* (1), *Mavulu Ammal v. Mavula Maracoir* (2), *Amba Prasad v. Mushtaq Husain* (3) and *Sant Prasad v. Bhawani Prasad* (4). It is dismissed with costs.

V. N. V.

S. D.

Appeal dismissed.

(1) 12 M. 116; 4 Ind. Dec. (N. S.) 430.

(2) 30 M. 212; 17 M. L. J. 376.

(3) 54 Ind. Cas. 432; 42 A. 200; 18 A. L. J. 167; 2 U. P. L. R. (A) 69.

(4) 60 Ind. Cas. 831; 43 A. 403; 19 A. L. J. 72; 2 U. P. L. R. (A) 416.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 284 OF 1922.

March 25, 1925.

Present :—Justice Sir Hugh Walmsley, Kt., and Mr. Justice Mukerji.

Munshi FAZLE AHMED—PLAINTIFF
—APPELLANT

versus

RAJENDRA NATH ROY CHOUDHURI
AND OTHERS—DEFENDANTS—RESPONDENTS.

Vendor and purchaser—Agreement of sale—Date fixed for completion of sale—Time, whether of essence of contract—Purchaser, when entitled to possession—Earnest money—Forfeiture—Defect of title discovered subsequently, whether entitles purchaser to recover money forfeited.

In the absence of an express stipulation to that effect and of circumstances implying such an intention, the date fixed for the completion of a sale of immoveable property in the agreement for sale cannot be regarded as of the essence of the contract. It may, however, be made so by either party giving proper notice to the other to complete within a reasonable time, provided that at the time of the notice there has been some default or unreasonable delay by that other.

There is an implied repudiation if the purchaser fails to complete the sale on the day he is bound to complete under the contract, otherwise, if the purchaser is in default the vendor can make time of the essence of the contract by giving the purchaser notice to complete at a reasonable date and threatening forfeiture of the deposit on non-completion on that date. [p. 798, cols. 1 & 2.]

Where the stipulation in the agreement is that possession would be given by evicting tenants, on completion of the conveyance, the purchaser's right to possession is coincident with the right to the execution of the conveyance by vendor. [p. 798, col. 2.]

A deposit paid under a contract of sale serves two purposes; if the sale is carried out it goes against the purchase-money but primarily it is a security for the performance of the contract. Even if there is no express provision in the agreement for sale to that effect the vendor would be entitled to retain the deposit as forfeited when the contract goes off by the default of the purchaser. [p. 799, col. 1.]

If the purchaser has, by his default in completion after he has accepted the title, given the vendor the right to rescind the contract and retain the deposit as forfeited and such right has been exercised the forfeiture is final. A subsequent discovery of any defect in the vendor's title does not confer on the purchaser the right to recover the deposit. [*ibid.*]

Appeal against a decree of the Subordinate Judge, Third Court, 24-Pargannas, dated the 30th of June 1922.

Mr. M. N. Roy, Babus Sitaram Banerji and Surjya Kumar Aitch, for the Appellant.

Dr. J. N. Kanjilal, Babu Binode Lal Mukerji for Babus Panchanan Ghosal and Probodh Kumar Das, for the Respondents.

JUDGMENT.

Mukerji, J.—The plaintiff instituted this suit for recovery of Rs. 6,250 made up of Rs. 5,501 as earnest-money in connexion with the contract for sale of a plot of land, 22 bighas in area, and Rs. 749 being the amount of damages and interest. The suit has been dismissed by the Subordinate Judge, and hence this appeal.

The plaintiff's case as laid in the plaint was that the defendants Nos. 1, 2, 7 and 8 proposed to sell the land to him for Rs. 13,200 and a *bainapatra* was executed by them in his favour on the 28th September, 1919, on receipt of Rs. 501 as earnest-money that later on he came to know that there were other owners who were unwilling to part with the property, and that at last he had to agree to increase the consideration to Rs. 20,100, upon which all the defendants executed in his favour another *bainapatra* on the 16th July 1920 on receipt of a further amount of Rs. 5,000 as earnest-money. The plaintiff alleged that the defendants had stipulated to convey a good title to the properties and to obtain the requisite permission of the District Judge and

make over vacant possession of the property at the time of the transfer; but that the title of the defendants was defective and the defendants had failed to produce their title-deeds in spite of requisition and were negligent in completing the transaction.

The case put forward on behalf of the defendants was that the first contract was made with one Sricharan Prosad Shaha, who was not the plaintiff's *benamdar* as alleged on behalf of the plaintiff, that there was no representation made by them, that there were no other owners, but, on the other hand, Sricharan knew full well that there were other owners, that the plaintiff was very eager to purchase the property and came to a settlement with Sricharan, paid him up and got his consent to negotiate the sale for himself; that the plaintiff was satisfied with the title which the defendants were able to show, approved of the same and thus the second *bainapatra* was executed; that the defendants obtained the necessary permission from the District Judge and ejected the tenants who were on the land at considerable cost; that by this time the plaintiff had changed his mind or was unable to complete the transaction as had failed to secure a buyer and so put the matter off repeatedly and on false and frivolous pretexts; and that accordingly the plaintiff was not entitled to a refund of the earnest money, nor any damages or interest.

The plaintiff has come to Court with a story, a large portion of which cannot possibly be accepted. Whether Sricharan was a *benamdar* for the plaintiff or not in the matter of the *bainapatra* that was first executed need not be considered for the purposes of the appeal. It appears that the transaction was entered into at a time when there was a land boom in Calcutta and its suburbs. The plaintiff's conduct in offering to complete the purchase within seven days, provided all the co-sharers joined in the conveyance (Ex. A-4) and the fact that he got this offer accepted by the defendant's Pleader on the very day that he made it (Ex. A-5) amply indicates that he was extremely eager to make the purchase. There is evidence to show that on that very day the rent receipts produced by the defendants were examined, and a statement as to the names of the owners of the property and their respective shares therein was also inspected and the transaction was about to be completed it being understood

that there were to be two conveyances, one to be executed by the adults and the other by the guardian of the minors. Draft conveyances were made over to the defendants' Pleader for approval and were returned to the plaintiff after approval, subject to some additions and alterations. The plaintiff then insisted on having the permission of the District Judge with regard to the share of the minors and wanted to have vacant possession, and that is why the completion of the transaction was deferred and the second *bainapatra* was executed. The plaintiff's conduct in paying as earnest-money such an unusually large sum of Rs. 5,000 also points to his great eagerness to purchase the property at the time, and unmistakeably shows his story as to his not having approved of the defendants' title to be untrue. There is in the second *bainapatra* a clear statement that the purchaser's Pleader had approved of the defendants' title. The plaintiff's case that this statement was put in without his knowledge cannot be accepted; and the positive evidence on the record is to the contrary. The plaintiff is neither illiterate nor of immature understanding, but holds the responsible post of an Auditor in a Government Office. It is clear upon the evidence that he set about negotiating for the purchase of the property with the full knowledge that, at least, one previous contract, namely, that with Mr. Cohen for its sale had fallen through on account of defect of title, or imperfect title. Apart from the other evidence, that of his own Pleader Jogesh Babu and of the defendants' Pleader Ashu Babu clearly shows that the plaintiff was not at all anxious to look into the defendants' title beyond what the latter were able to make out upon the scanty materials which they had at their disposal. There is a very important statement in the deposition of Mr. Mahabul-ul-Huq, who acted as plaintiff's Pleader at one stage of the proceedings, namely, before the second *bainapatra* was executed and before Jogesh Babu came upon the scene. He states that on one occasion he came to Ashu Babu's *shertsta* at the request of the plaintiff to examine what documents the defendants had produced for examination, and that for some days there was talk going on between the plaintiff and the defendants about the examination of title-deeds. He says that he was not satisfied about the defendants' title and asked for the *patta*, but Ashu

Babu gave him to understand that he was to produce the rent-receipts only for plaintiff's examination. We find upon the evidence of Ashu Babu also that when he showed the rent-receipts to the plaintiff's Pleaders he told them distinctly that he would not be able to produce any other documents in respect of the property. The conclusion that one must come to upon the entire evidence in the case is that when the second *bainapatra* was executed, the title had already been approved by the plaintiff and the defendants were to convey the property after having obtained the permission of the District Judge in respect of the shares of the minors and after taking such steps as were necessary for getting rid of the tenants in order that the plaintiff might have vacant or *khas* possession of the land.

The District Judge granted the permission by an order dated the 17th December 1920 and the fact was communicated to the plaintiff by the defendants' Pleader by a letter Ex. 3 (c) dated the 23rd December 1920. On the 28th December 1920 the plaintiff's Pleader replied to the defendants' Pleader (Ex. A) asking information about the date of the Judge's order, and impressing upon the latter that the deed of sale should be executed and registered within 15 days of the date of the permission so that he might get *khas* possession when he would take possession at the time of registration, and enquiring if tenants had been actually evicted and stating that if that had not been done, it should be done within the period mentioned in the second *bainapatra*. It will be seen that the period mentioned therein was 15 days from the date of the Judge's order. The concluding paragraph of the letter is important as it was stated that time was of the essence of the contract and that the plaintiff was not prepared to grant an extension on any account. It is noteworthy that no objection was taken in this letter on the ground of defect of title or the imperfect nature of the title-deeds that had been produced. This letter is somewhat curious in that it suddenly thought of treating time as of the essence of the contract when, as a matter of fact, such a long time had elapsed since the execution of the *bainapatra*. The defendants' Pleader on the 27th January 1921, Ex. 3 (a) replied to the above letter, giving the date of the Judge's order and stating that the defendants had obtained vacant possession by securing *istafa* from all the

tenants and undertaking to make over vacant possession immediately after execution and registration of the conveyance. The defendants appear to have felt somewhat surprised at the statement that time was of the essence of the contract and characterised it as a mere plea to avoid completion of the contract. By this letter the defendants definitely gave the plaintiff notice that if he did not get the conveyance completed, that is to say executed and registered, they would regard the contract cancelled and the earnest-money would be forfeited. The plaintiff's Pleader then, on the 2nd February 1921, gave a reply (Ex. 3b) condemning the defendants' long silence over the letter of the 28th December, 1921, insisting that time was of the essence of the contract, and saying that the plaintiff was willing to forego his right to refund of earnest-money and damages if the defendants would send the draft conveyance for approval within 24 hours and execute the conveyance by the 5th February 1921. It further stated that the plaintiff wanted to be taken to the land in order to be satisfied about the *istafa* executed by the tenants. It was also stated that a certain reversioner had written to the plaintiff warning him of his rights. Lastly, and this is most important, it was stated that the defendants were to produce the original title-deeds which they had undertaken to produce at the time of the agreement, and if they were not produced the plaintiff would not make the purchase. To this letter there was a stern reply (Ex. I) given by the defendants' Pleader on the 7th February 1921 complaining that the plaintiff was setting up, one excuse or another to avoid completion of the transaction as he was unable to find a purchaser though he was hunting for one, explaining that the objection as to defect of title was unreasonable, frivolous and without foundation, and insisting that the draft *kabala* should have been sent by that time and expressing willingness to take the plaintiff to the land at such time as he would appoint for the purpose. The letter concluded with a threat of forfeiture and a sale to somebody else for the consequences of which the plaintiff would be held liable. There was no further correspondence between the parties after this letter and the suit was instituted on the 22nd February 1921.

The impression left upon one's mind by the correspondence referred to above is that

the plaintiff was setting up frivolous pretexts and resorting to new devices at every step in order to get rid of the contract. He neglected intentionally to fulfil his part of the contract and was trying his best to wriggle out of it. A claim for damages or interest under such circumstances is entirely out of the question.

The question then remains as to whether the plaintiff is entitled to a refund of the earnest-money. In the second *bainapatra* there is a stipulation which runs in these words: "We shall execute and register in your favour or in favour of your nominee within 15 days of the receipt of permission of selling the share of the said minor on receiving Rs. 14,599 the balance of the consideration from you and shall give you *khas* possession of the land by evicting the tenants from it. If inspite of receipt of permission from the District Judge we fail to execute a *kabala* within the said date, on taking the balance of the consideration, then you shall take *khas* possession of the said property by depositing the balance of the consideration in Court. If, on the other hand, you fail to get a *kabala* executed by us on paying the balance of the consideration within the same time, then we shall forfeit your earnest-money." The permission of the Judge was obtained on the 17th December 1920 and by the letter of the 23rd December 1920, Ex. 3 (c), the defendants called upon the plaintiff to complete the sale-deed within a fortnight. In his reply of the 29th December 1920 (Ex. A) the plaintiff stated that time was of the essence of the contract. The defendants' letter of the 27th January 1921 (Ex. 3 (a)) clearly gave notice to the plaintiff that if he did not get the deed of sale completed (i.e., executed and registered) within 10 days from the date thereof, the defendants would regard the contract as cancelled and the earnest-money would be forfeited. The plaintiff replied (Ex. A-1) on the 2nd February 1921 noting that time was of the essence of the contract and raising certain objections and asked for a draft conveyance to be sent for approval which, in the absence of a stipulation to the contrary, it is the duty of the purchaser to tender. The defendants' letter (Ex. I) of the 7th February gave the plaintiff a further chance which he did not avail of. The position then is this: A date was fixed in the *bainapatra* for the completion of the purchase, but in the absence of an express

stipulation to that effect and in the absence of circumstances implying such an intention, the date cannot be regarded as of the essence of the contract. Although, however, time is not originally the essence of a contract in this respect, it may be made so by either party giving proper notice to the other to complete within a reasonable time provided that at the time of the notice there has been some default or unreasonable delay by that other. There is an implied repudiation if the purchaser fails to complete on the day on which he is bound to complete. This is the day, if any, fixed by the contract for completion, if time, in this respect, is of the essence of the contract; otherwise if the purchaser is in default the vendor can make time of the essence of the contract by giving the purchaser notice to complete at a reasonable date and threatening forfeiture of the deposit on non-completion on that date. These conditions were fulfilled on the date on which the 10 days mentioned in the letter Ex. 3 (a) of the 27th January 1921 expired and on such expiry the right of forfeiture of the deposit arose.

It has been urged that the learned Subordinate Judge was wrong in holding that the plaintiff had no money with which he could buy. That is perhaps so. It is also true that the conduct of the defendants was not altogether free from blame. It would appear that the two *istafas* Ex. H and Ex. H-1 were executed on the 18th January 1921, and the three tenants Krishna Chandra Mandal, Kartik Chandra Ghose and Pashupati Ghose gave evidence to the effect that they did not vacate the land till March or April that is to say about a month and a half after the institution of the suit. The eviction of the tenants, however, was not a condition precedent to the completion of the transaction; it was only stipulated in the *bainapatra* that the *kabala* will be executed and registered and *khas* possession would be given by evicting the tenants. The purchaser's right to take possession, in a case like this, arises coincidentally with the right to the execution of a conveyance by the vendor. In this case, there was no attempt made by the plaintiff to get the conveyance—no tender of consideration money, no tender of draft conveyance, and in fact all the circumstances indicate that he was trying to back out of the contract. There is nothing to show that if the conveyance had been completed

the defendants would have been unable to make over vacant possession.

The conduct of the defendants also in connexion with this transaction does not appear to be altogether fair: they too seem to be speculators though perhaps in a lesser degree; they entered into a contract with Mr. Cohen while the contract with Sri-charan was yet in force; their title to this property was found defective and not accepted as satisfactory. It, therefore, seems rather unreasonable that they should be allowed to stick to the whole amount obtained by them as earnest-money. They have, no doubt, spent some money in getting the permission of the Judge and in getting the tenants to vacate, but the figure at which they put down their expenses seems exorbitant. For these reasons, I feel no sympathy for them; but at the same time I am unable to hold that any considerations of equity can arise in this case. A deposit paid under a contract of sale serves two purposes; if the sale is carried out it goes against the purchase-money, but primarily it is a security for the performance of the contract. Even if there was no express provision the vendors would be entitled by virtue of the purpose of the deposit, to retain it as forfeited, when the contract went off as I hold it did, by the default of the purchaser. The question of defect of the vendor's title is not material; for if the purchaser has, by his default in completion after he has accepted the title, given the vendor the right to rescind the contract and retain the deposit as forfeited and such right has been exercised the forfeiture is final. A subsequent discovery of any defect in the vendor's title does not confer on the purchaser the right to recover the deposit.

The appeal accordingly must be dismissed, but under the circumstances, without costs.

Walmsley, J.—I agree.

Z. K.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 52
OF 1925.

June 19, 1925.

Present:—Justice Sir John Bucknill, Kt.,
and Mr. Justice Ross.

DEONARAYAN SINGH—JUDGMENT-
DEBTOR—APPELLANT

versus

Babu RAM PRASAD AND ANOTHER
—DECREE-HOLDERS—RESPONDENTS.

*Limitation Act (IX of 1908), s. 29 (1) (b), Sch. I,
Art. 182—Bengal Tenancy Act (VIII of 1885), Sch. III,
Part III, Art. 6—Execution of decree—Sale in execu-
tion—Sale set aside—Fresh application for execution,
nature of—Limitation.*

Respondent, a co-sharer landlord, obtained a decree for rent against the appellant on 24th July 1920. On 21st May 1923 respondent presented a petition for execution of the decree and for certain reasons the Executing Court held that the decree could not be executed as a rent-decree and execution was allowed to proceed as for a money-decree. On 19th November 1923 some property belonging to the appellant-judgment-debtor was sold. The sale was confirmed on 20th December and the case was dismissed on full satisfaction. On the same day the appellant put in a petition to set aside the sale under the provisions of O. XXI, r. 90 of the C. P. C., and the sale was eventually set aside on the 8th March 1924. On 24th March 1924 respondent applied once more to execute his decree as a rent-decree:

Held, (1) that the second application for execution was one in continuation of the first application inasmuch as the prayer in both the applications made by the respondent was that the decree should be executed as a rent-decree; [p. 800, col. 2.]

(2) that in any case the sale in execution of the first decree having been set aside, the respondent's right to execute the decree revived and the second application having been made within three years of the date on which the sale had been set aside was not barred by limitation. [p. 801, col. 1; p. 802, col. 1.]

Appeal from an order of the District Judge, Gaya, dated the 18th December 1924, confirming that of the Munsif, Gaya, dated the 26th July 1924.

Mr. S. N. Roy, for the Appellant.

Mr. Ragho Prasad, for the Respondents.

JUDGMENT.

Bucknill, J.—This was a second appeal. The appellant was a judgment-debtor in a suit brought by the respondents who were decree-holders. The present appeal arises out of certain execution proceedings. Apparently as long ago as 24th July 1920 the respondents obtained a decree against the appellant. On the 21st May 1923 the decree-holders presented a petition for execution and on the 19th November 1923 it would appear that a sale took place of the property. I may say that it would seem that this decree was obtained by the respondents as co-sharer landlords and notice

had been issued by them against other co-sharer landlords under the provisions of the Bengal Tenancy Act. For some reason or other this notice was stated not to have been properly served and the Munsif, before whom the matter in execution then was, insisted that the execution should proceed as a money-decree and not as a rent-decree. It appears to have proceeded in that way. The sale was actually confirmed on the 20th December 1923 and we are told that the case was dismissed on full satisfaction. However, according to the information before us, on the same day, (that is on the 20th December 1922), the judgment-debtor put in a petition to set aside the sale under the provisions of O. XXI, r. 90. Now, we are told that the ground upon which it was asked that the sale should be set aside was that the price in the sale proclamation at which the property was valued was not adequate. Eventually on the 8th March 1924 the sale was set aside and on the 24th of the same month the decree-holders then applied once more to execute their decree. They still asked to execute the decree in precisely the same manner as they had asked to execute it in the first instance namely, as a rent-decree. Now to this, the judgment-debtor objected on the principal ground that the application was more than three years from the date of the original decree. As I have said the original decree was dated the 24th July 1920, the first application for execution was dated the 21st May 1923 and this last application for execution was dated the 24th March of last year. Now, the decree-holders have maintained that limitation does not apply. They contend that the present application should be treated as essentially a continuation of the preceding application. The Munsif of Gaya after hearing the parties came to the conclusion that this present application was rightly to be regarded as a continuation of the preceding one and accordingly by his order dated the 26th July 1924 disallowed the objection which had been made to the present application for execution. The judgment-debtor appealed from this decision to the District Judge of Gaya who on the 18th December confirmed the Munsif's decision. Now, before the District Judge, it would seem that not only was this point as to the present application being not in continuation of the previous application urged but also that the present application

was not of the same character as the first application. I think it is simplest to deal with the latter of these two questions first.

It is quite clear that the first application for execution was an application to execute the decree as a rent-decree. It seems true that owing to the decision of the Munsif at that time and owing to the fact that he found that there had been some failure of service on the co-sharers the actual decree which was executed was a money-decree, but, as has been pointed out by the learned District Judge, the present application for execution is to renew the application for execution as a rent-decree and not as a money-decree and I presume that the service will be properly effected upon this occasion. I am, therefore, unable to see how it can be seriously contended that the first and the second applications are not the same.

With regard to first point I think that it is important to observe that during all material periods under consideration the decree-holders had *de facto* and *de jure* obtained the realisation of their decree. It was not until the 8th March 1924 that it was possible for them to have taken any further step. According to the position as it then stood their claim had been satisfied by a sale of the property. It was not until that satisfaction was negatived, as I have just mentioned, that he was then in a different position. He could have taken no step in the *interim* to apply for further execution or for a renewal of execution, for, had he done so, he would obviously have been met with the re-joinder that as matters stood his decree had already been realised in full satisfaction that he should be prevented when the sale was set aside from applying to obtain what was justly due to him by execution would obviously to my mind be a gross inequity.

However, the learned Advocate, who has appeared for the appellant here, has suggested that the present application is not in law a continuation of the preceding application. I should like, however, to point to a case which has been decided in this Court, *Kaniz Zohra v. Syam Kisen* (1) in which the position which obtains here (except in one point to which I propose presently to refer) was there substantially the same. In that case decided by the then Chief Justice (Sir Edward Chamier) and Mr. Justice Jwala Prasad it would

(1) 39 Ind. Cas. 89; 2 P. L. J. 115; 1 P. L. W. 73; (1917) Pat. 133.

appear that a decree had been obtained by the plaintiff in a suit on the 20th June 1905. In August 1906 the first application for execution was made. It would seem that this application for some reason was dismissed; probably, (although it is not clear from the report) because it was not proceeded with. A second application was made in July 1909 and the judgment-debtor's immovable property was sold in satisfaction of the debt on the 14th December 1909. But on the 12th February 1910 the sale was set aside at the instance of the judgment-debtor; on what ground I do not find it stated. On the 10th December 1912 the decree holders made their third and last application asking the Court to sell the identical property in satisfaction of their decree (which, of course, still subsisted) which had been sold on the 14th December 1909. It was contended in that case by the judgment-debtor who objected to the proposed third application for execution that the application could not be regarded as a continuation of the preceding application and that it was out of time. The learned Chief Justice in referring to this argument has dealt with the position as it appears to him to exist in cases where this same difficulty arises as it often must. He remarks:—

"It may often happen that proceedings taken upon an application for execution remain pending in an original Court or Court of Appeal for several years and may result in an order setting aside a sale of immovable property many years after the application for execution was presented and many years after any of the dates indicated in the third column of Art. 182 of the First Schedule of the Limitation Act. This has often been pointed out by the Courts and in order to get over the difficulty some Courts have held that a subsequent application should be treated as an application made in continuation of the application made before the sale and other Courts have held that such an application is governed by Art. 181 of the First Schedule to the Limitation Act and that the decree-holder is entitled to three years from the date on which the sale is set aside within which to make a further application. It seems certain that the Legislature could not have intended that further execution of a decree should be prevented by the fact that execution proceedings remained pending in the Courts for many years."

I think (if I may be permitted to say so) that those words express the equitable views of the position which should obtain in a case such as that which is now before us. The learned Advocate for the appellant has suggested that although the remarks, to which I have referred, of the then Chief Justice of this Court may be applicable to what he calls execution under the general law, they are not applicable to cases where the execution relates to suits which fall within the ambit of the Bengal Tenancy Act. He points to s. 29 of the Limitation Act and shows how it indicates in sub-cl. (b) of cl. (1) that "nothing in the Limitation Act shall affect or alter any period of limitation specially prescribed for any suit, appeal or application by any special or local law now or hereafter in force in British India." He points to the Bengal Tenancy Act and in particular to item No. 6 of Part III, Sch. III. He observes that there is a period of limitation given. I may point out that clearly the period which is there given is one of three years. This period refers to an application made under the Act in a suit between landlord and tenants and not being decreed for a sum of money exceeding Rs. 500. Now he points out that in this case the sum did not exceed Rs. 500. He then refers to the times from which the period of limitation begins to run. They are (1) the date of the decree or order or (2) where there has been an appeal the date of the final decree or order of the Appellate Court; or (3) where there has been a review of judgment, the date of the decision passed on the review. He suggests that in the case of setting aside of an execution proceeding, (that is to say, in this case the setting aside of the sale which has taken place in an execution proceeding) none of these three categories (except perhaps the first) apply. Whether this is so or not (that is to say, whether it may come under sub-s. (3) or not) does not to my mind matter. If there was no provision in this Part III, Sch. III for a case such as that which is before us, then it seems clear that s. 29 of the Limitation Act has no application and the matter falls within the provisions of the ordinary law as has been laid down by the late Chief Justice of this Court in the case to which I have referred. Obviously it would be a matter of the greatest hardship if, in circumstances such as those which have been disclosed in the present case, a decree

holder, not clearly through his own fault and certainly not by fraud but for one reason or another, should have his sale, which has been carried out in execution of his decree under which he was entitled to recover from the judgment-debtor what was due to him, set aside, and should on that account be prevented from eventually recovering by further execution proceedings the sums to which he was entitled. In my view, therefore, the District Judge and the Munsif were quite right in the orders which they made.

The appeal must, therefore, be dismissed with costs.

Ross, J.—I agree.

Z. K.

Appeal dismissed.

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CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 280 OF 1923.

March 27, 1925.

Present:—Mr. Justice Suhrawardy
and Mr. Justice Duval.

AMIR CHAND KHANNA—CREDITOR
—APPELLANT

versus

ANUKUL CHANDRA BHANDARI

AND OTHERS—INSOLVENTS—RESPONDENTS.

Provincial Insolvency Act (V of 1920), ss. 33 (3), 50
—Schedule of creditors—Name when to be added or
deleted—Duty of Court.

Under s. 33 (3) of the Provincial Insolvency Act the name of a creditor should not be entered in the Schedule until the Court has considered any cause that might be shown against so doing. [p. 803, col. 1.]

The Court is bound to come to a judicial finding before it enters the name of any creditor under s. 33 or before it refuses to remove a name under s. 50 of the Provincial Insolvency Act after considering the report of the Receiver and any other evidence adduced as to whether the debts are really due or not. [*ibid.*]

Appeal against the orders of the Additional District Judge at Howrah, dated the 30th of May, 13th of June, the 4th of July and the 10th of July 1923.

Babus Pyari Mohan Chatterji, Rupendra Kumar Mitter and Tarakeswar Pal Choudhury, for the Appellant.

Babu Dharma Das Sett, for the Respondents.

JUDGMENT.—This appeal arises out of certain orders passed in an insolvency proceeding. One Jogesh Chandra Chatterji presented a petition to be adjudicated an insolvent on the 7th January 1922 and to

his petition attached a schedule giving a list of 12 creditors. He was adjudicated an insolvent on the 5th April 1922 and a Receiver was appointed who appears to have sold up the assets and thereby collected funds for part payment to the creditors. Thereafter in February and March 1923 six persons Anukul Chandra Bhandari, Bhola Nath Mitra, Amarendra Nath Mallik, Naran Chandra Ghose, Kunja Behari Manna and Fazley Huq Sheikh, who were not among the creditors mentioned in the schedule, applied to be entered therein and the learned Additional District Judge ordered *ex parte* that their names be so entered. On the 27th April 1923, the present appellant who is a creditor mentioned in the schedule put in a petition stating that those debts were bogus debts, and the Judge then ordered the Receiver to report in the matter. The Receiver went to the spot and after taking certain evidence prepared a report which was put up to the learned Additional District Judge who, on the 30th May 1923, recorded his order as follows: "Read Receiver's report which I accept *in toto* as regards the persons reported on. The name of Amarendra Nath Mallik to whom the obligation of insolvent was incurred after adjudication will be expunged from the schedule. The names of the rest will be incorporated in the schedule with the debts due to each according to "Receiver's report." There is nothing to show that this order was passed in the presence of any of the parties. In fact on the 1st June 1923 Amarendra Nath Mallik made an application praying for having a chance of being heard and for the order of the 30th May 1923 being reversed. On the 13th June the learned Additional District Judge heard his application *ex parte* and then admitted Amarendra Nath Mallik as a person whose name should be entered in the schedule. Amir Chand (the present appellant) applied to have these orders set aside or re-considered as they were passed in his absence. This application was refused and the present appeal is against this order.

In appeal it is urged on behalf of Amir Chand that the procedure under s. 33 (3) of the Provincial Insolvency Act has not been observed. That section provides that any creditor of the insolvent whose name is not in the original schedule may apply to have his name entered therein; and then the Court after causing notice to be served

on the insolvent and the other creditors who have proved their debts after hearing their objection, if any, shall comply with or reject the application. As to this, it is clear that no notice was issued at all before the names were so entered; (on the date no one of the scheduled creditors had proved his debt) but subsequently Amir Chand appeared and prayed for expunging the names of certain creditors under the provisions of sub-s. (1) of s. 50, Provincial Insolvency Act. Now it is perfectly clear that the names of those creditors should not have been entered in the schedule until the Court has considered any cause that might have been shown against so doing and this was not done.

It is next urged that the Additional District Judge had no jurisdiction to give over the whole matter to the Receiver and simply accept his report. He was bound to come to a judicial finding either before he entered the names of some of the creditors under s. 33 or before he refused to remove the names under s. 50 after considering the report of the Receiver, as to whether or not each or any of those debts were really due. We agree with this contention. Various other points were raised, such as whether some part of the debts was barred by limitation, whether the debt of Anukul Chandra Bhandari under the handnote—the handnote being dated three months after the application for adjudication and three days before the adjudication—is a valid debt in view of s. 34 (2) read with s. 28 (7); and further whether Jogesh Chandra Chatterji was ever liable for the alleged debt of his father Umesh Chandra Chatterji on an old *hat-chitta* and whether the *hat-chitta* that he executed two months after the adjudication in July 1922 in favour of Anukul Chandra Bhandari can be put in the schedule in view of the provisions of s. 34 (2). On these matters we come to no adjudication in this proceeding. In our opinion the Judge did not come to any judicial determination as to whether all or any of these debts are debts which should be entered in the schedule but had practically only acted on the Receiver's report, without having issued necessary notices before passing his orders. We hold that he must proceed according to the Statute and determine judicially in the presence of the appellant and after notices to other scheduled creditors on the validity of each claim to be entered in the schedule. We

do not say that he cannot consider the Receiver's report and the evidence recorded by him but he must come to a judicial decision on each debt set out.

The result is that this appeal is allowed, the order of the Court below set aside and the case sent back to that Court to be dealt with in accordance with the direction indicated above. The appeal is allowed with costs, one gold *mohur* against each set of the appearing respondents.

Z. K.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1225 AND 1226 OF 1923.

August 29, 1924.

Present :—Mr. Justice Devadoss.
VAVARU AMBALAM AND OTHERS—
DEFENDANTS—APPELLANTS

versus

PRESIDENT, TALUK BOARD OF
RAMNAD—PLAINTIFF—RESPONDENT.

Landlord and tenant—Land outside water-spread of tank—Rain water, use of, for raising nanja crops—Sarasari, ryots' liability to pay.

In the case of lands outside the water-spread of a tank and which are cultivated purely by rain water, the landlord is not entitled to charge the tenant with *sarasari* for raising wet crops. The tenant is liable to pay only the usual *punja* rates.

A tenant is entitled to catch and use rain water as it falls on his land and the landlord has no right to it till it leaves the tenant's land and flows in to his tank or into a channel which leads water into his tank.

Arunachalam Chettiar v. Mangalam, 35 Ind. Cas. 329; 40 M. 640; 20 M. L. T. 70; 4 L. W. 37; 31 M. L. J. 168, distinguished.

Second appeals against the decrees of the District Court of Ramnad at Madura, in A. S. Nos. 41 and 42 of 1921, preferred against those of the Court of the Special Deputy Collector of Ramnad at Manamadura, in S. S. No. 766 of 1919 respectively.

Messrs. Watrap S. Subrahmaniam Iyer and A. S. Srinivasa Iyer, for the Appellants.

Mr. S. Soundararaja Iyengar, for the Respondent.

JUDGMENT.—The only point argued in these second appeals is whether the plaintiff was entitled to levy *sarasari* in respect of the lands, in the possession of the defendants. It has been held that in

the case of *kulamkawai* lands, that is, lands situated within the water-spread of the tank, if the tenant raises a *nanja* crop by putting up ridges all round, thereby preventing the flow of water into the tank, or by retaining water, which would flow into the tank, when the level of the tank goes down, he is bound to pay *sarasari*. But in this case, the finding is that the lands in question are not *kulamkawai* lands. These lands are outside the water-spread of the tank. The question is whether what applies to *kulamkawai* lands should also be held applicable to lands outside the water-spread of the tank. Mr. Soundararaja Iyengar, who appears for the respondent, contends that water, which would have flowed into the tank, has been obstructed by the defendant putting up ridges round the lands. He relied upon the decision of the High Court in Second Appeal No. 1034 of 1919 as supporting his contention. In that case, the District Judge found that the tenants not only put up ridges and obstructed flow of surplus water, but also diverted water of certain *odais* into their lands, for the purpose of raising wet crops. In this case, there is no finding that any such *odai* or water flowing in a defined channel has been diverted into the defendant's lands. What the defendants have done is to catch rain water as it fell on their lands. The landlord has no right to the rain water, till it flows in a defined channel. He is not entitled to the rain water, which falls on a tenant's lands, till that water leaves the tenant's land and flows into a tank or into an *odai* or channel, which leads water into his tank. The decision in *Arunachalam Chettiar v. Mangalam* (1) has, therefore, no application to the present case and the facts in this case are different from the facts in Second Appeal No. 1034 of 1919. The question, therefore, is whether in the case of lands, which are cultivated purely by rain water, which falls on them, they should be charged *sarasari*. There is no warrant for saying that such lands should be charged *sarasari*, if wet crop is raised. No doubt, by putting up ridges all round the lands, the defendants have to some extent obstructed the flow of water into the plaintiff's tank; but that by itself would not give the

plaintiff right to charge *sarasari* rate, in the case of lands outside the water-spread.

In the result, the appeals are allowed and the decrees, of the lower Courts are reversed and the suits dismissed. The appellants will have their costs throughout.

The defendants' liability to pay *punja* rate is not denied; the plaintiff, therefore, is entitled to get it in a proper proceeding.

V. N. V.
S. D.

Appeals allowed.

ODUH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 47 OF 1923.

September 7, 1925.

Present:—Mr. Dalal, J. C.

HARI HAR BAKHSH SINGH AND OTHERS
—DEFENDANTS—APPELLANTS

versus

MOHAMMAD USMAN KHAN—
PLAINTIFF—RESPONDENT.

Ejectment of trespasser—Suit by one co-sharer on behalf of all—Maintainability of suit.

One co-sharer can sue a trespasser in ejectment on behalf of himself and his other co-sharers.

Thakurji v. Hira Lal, 75 Ind. Cas. 335; 20 A. L. J. 603; 44 A. 634; (1922) A. I. R. (A.) 408 and *Ahmad Sahib Shutari v. The Magnesite Syndicate Ltd.*, 29 Ind. Cas. 60; 39 M. 501; 2 L. W. 460; 17 M. L. T. 387; 28 M. L. J. 598, referred to.

Appeal against a decree of the Additional Subordinate Judge, Lucknow, dated the 6th August 1923.

Mr. Bisheshar Nath Srivastava, for the Appellants.

Messrs. Daya Kishan Seth and Zahur Ahmad, for the Respondent.

JUDGMENT.—The plaintiff Usman Khan sued for the ejectment of the defendants on the ground that he was the sole *taluqdar* to whom belonged the jungle in suit. During the course of an inquiry by the lower Court it was found that Usman Khan was owner only of 10 annas 8 pies share while a brother and a sister of his owned the rest of the *taluqdari*. The lower Court passed a decree in favour of the plaintiff for possession of the jungle in suit and for damages for trees feloniously cut by the defendants and ordered that the decree was in favour of the plaintiff and his co-sharers as well.

(1) 35 Ind. Cas. 329; 40 M. L. T. 70; 4 L. W. 37; 31 M. L. J. 168.

In this Court it was argued (1) that the plaintiff alone was not entitled to sue for possession of the entire area of land in suit and at best could obtain a decree for 10 annas 8 pies share; (2) that the defendants were owners of the produce of the jungle and (3) that the plaintiff had not proved his possession of the jungle within the period of limitation while the defendants had proved adverse possession.

It is well-settled law on the basis of rulings of High Courts that one co sharer can sue a trespasser in ejectment on behalf of himself and his other co-sharers. This principle was laid down as far back as 1901 by the Allahabad High Court. A reference to this ruling is given in a Bench case of the Allahabad High Court *Thakurji v. Hira Lal* (1). There is a Bench ruling of the Madras High Court *Syed Ahmad Sahib Shutari v. The Magnesite Syndicate Ltd.* (2) in which reference is given to a long series of rulings of the Calcutta and Allahabad High Courts in support of this proposition of law dating as far back as 1881.

The learned Counsel for the defendants appellants sought to distinguish this principle on the ground that the plaintiff had come to Court asserting his title to the entire property. That may be a question in dispute between him and his co-sharers. The decree is granted by the lower Court in favour of both the plaintiff and his co-sharers and I see no point of distinction so far as the defendants are concerned between this case and the principle enunciated above. This plea in the grounds of appeal must fail.

[The rest of the judgment proceeds only on facts and is, therefore, omitted. —Ed.]

S. D. Appeal dismissed.

(1) 75 Ind. Cas. 335; 20 A. L. J. 602; 41 A. 634; (1922) A. I. R. (A.) 408.

(2) 23 Ind. Cas. 60; 33 M. 501; 2 L. W. 460; 17 M. L. T. 387; 26 M. L. J. 598.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2110
OF 1922.

May 18, 1925.

Present:—Mr. Justice Cuming and
Mr. Justice Chakravarti.

PURUSOTTAM MAHESRI AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

PANCHANAN MAZUMDAR AND OTHERS
—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 182—Lease

for purpose of shop—Right of occupancy—Transfer of Property Act (IV of 1882), s. 111.

Section 182 of the Bengal Tenancy Act does not apply to a land let out to an occupancy ryot for the purpose of a shop in a Bazar. [p. 806, col. 1.]

Such leases are governed by the Transfer of Property Act. [ibid.]

Appeal against a decree of the Subordinate Judge, Rangpur, dated the 22nd May 1922, reversing that of the Additional Munsif, Kurigram, dated the 30th of July 1921.

Dr. Sarat Chandra Basak and Babu Asita Ranjan Ghose, for the Appellants.

Mr. Atul Chandra Gupta and Babu Radhika Ranjan Guha, for the Respondents.

JUDGMENT.

Cuming, J.—In the suit out of which this appeal has arisen the plaintiffs sued to eject the defendants under s. 111 of the Transfer of Property Act, on the ground that their lease had expired. The facts of the case are these: the defendants first of all took a lease of some 5 *kanis* of land in 1310 in Lal Manirhat Bander for a term of five years for the purpose of establishing a shop on it. The defendants then took one additional *kani* of land at a total rental of Rs. 69 per annum for 6 *kanis* of land and there was a fresh lease for five years. At the expiry of the term the plaintiffs demanded an enhancement of rent and a fresh lease was given for another five years from 1322 to 1326 at a rental of Rs. 78 per annum. The defendants executed a *kabuliyat* in the plaintiffs' favour on the 1st *Jaistha* 1322. This lease expired in 1326 and the defendants were asked by the plaintiffs to evacuate the land. This they refused to do and hence this suit. The case of the defendants was that they were settled on the land in 1307 as *raiya*s and that the *kabuliyat* was merely a confirmatory lease which did not set forth the real purpose for which the lands were taken, that the defendants were governed by the Bengal Tenancy Act being occupancy *raiya*s and were not liable to be ejected.

The first Court held that the lands had been taken for the purpose of a shop and that s. 182 of the Bengal Tenancy Act had no application. In appeal the learned Subordinate Judge held that the defendants had failed to prove their case that they took the land for agricultural purpose in the year 1307. He found that they took the land for the purpose of establishing a shop. He further found that they subsequent to the taking of the land for the

shop had acquired certain other occupancy *jotes* in the vicinity and hence he held that under the provisions of s. 182 of the Bengal Tenancy Act they must be considered to be holding the lands that had been taken for the purpose of a shop as occupancy *raiya*t and hence they could not be evicted. The learned Subordinate Judge in coming to this conclusion relied upon the case of *Bhikariram Bhagat v. Maharaj Bahadur Singh* (1).

Dr. Basak, who has appeared for the appellants, contends that s. 182 has no application to the present case and that the ruling relied upon by the learned Subordinate Judge of the lower Appellate Court is clearly distinguishable for in that case the tenant had already been a *raiya*t before he took the land for the purpose of a shop and the finding was that the land was taken for a shop and also for cultivating as a *raiya*t other lands using the land in suit a homestead. This case is clearly distinguishable from the present case. I do not think that the provisions of s. 182 of the Bengal Tenancy Act can be held to apply to the present case. The land in this case was admittedly taken not for the purpose of a homestead from which the defendants were to cultivate their *jotes* but was taken for the purpose of a shop and is still used for that purpose. It is situated in a part of Lal Manirhat Bander which is a large Bazar. The defendants admittedly had another homestead and it would be straining the law if I were to hold that they were holding this land as their homestead. Their lease shows that it was for the purpose of a shop that the land was taken and had been used for that purpose only. Therefore, it cannot be said that the defendants have been holding this land as homestead. In my opinion, s. 182 has no application to the present case and this land is governed by the provisions of the Transfer of Property Act and not by the provisions of the Bengal Tenancy Act.

In that view the appeal must succeed. The decree of the lower Appellate Court is set aside and that of the First Court restored. The appellants will get their costs of this Court as also of the lower Appellate Court.

Chakravarti, J.—I agree with my learned brother in the order which he has proposed to make. I wish only to add a few words. The learned Advocate for the respondents relied upon the case of *Bhikari-*

(1) 34 Ind. Cas. 152; 43 C. 195; 25 C. L. J. 357.

ram Bhagat v. Maharaj Bahadur Singh (1) upon which the lower Appellate Court also relied. That case is distinguishable from the facts of the present case. The learned Judges in the course of their judgment in the case cited laid down the law in these words "But supposing that during the first two or three years during which the defendants merely held their shop and resided on the disputed land, and held *jotes* at Malhati, they could not invoke the aid of s. 182 of the Bengal Tenancy Act, there can be no manner of objection under a long course of rulings of this Court to their claiming the protection of that section after they became agriculturists at Sanko and carried on agriculture from their residence at Sanko which was also used as a shop." Now in the present case, the learned Subordinate Judge has found that the land was taken for the purpose of establishing a shop and not for the purpose of carrying on agricultural operation as was claimed by the defendants. The learned Judges in the case cited pointed out that the land in that suit was taken primarily for the purpose of carrying on cultivation and the use of it as a shop was only incidental use. In the present case, the lease when it was taken was clearly one governed by the provisions of the Transfer of Property Act. The main purpose or the only purpose for which it was let out by the landlords was for the defendants to establish a shop in a Bazar. In these circumstances I agree with my learned brother in the judgment just delivered that s. 182 of the Bengal Tenancy Act has no application to this case.

M. B.

Appeal allowed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1500 OF 1922.

June 23, 1925.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Macpherson.

Mahanth TOKH NARAYAN PURI—

DEFENDANT—APPELLANT

versus

RAM RACHHYA SINGH AND OTHERS

—PLAINTIFFS—RESPONDENTS.

Muhammadan Law—Pre-emption—Person entitled to pre-emption associating stranger in suit, effect of—

Person qualified to enforce right of pre-emption associating pre-emptor who is not qualified, effect of—Sale of dominant tenement—Owner of servient tenement, whether can pre-empt—*Talab-i-ishtish-had*, when to be made—Delay in making demand, effect of.

Where a person entitled to claim pre-emption under the Muhammadan Law joins with himself as co-plaintiff a person who has no such right, he forfeits his own pre-emptive right and the suit must be dismissed as against both. [p. 808, cols. 1 & 2.]

Where, however, several persons who join as plaintiffs in a suit for pre-emption have an equal right of pre-emption, but some of them have qualified themselves under the Muhammadan Law to enforce such right and the others have not, the suit is maintainable at the instance of the former and is not liable to dismissal merely because some of the plaintiffs have not so qualified themselves. [p. 808, col. 2.]

Where a dominant tenement is sold the owner of the servient tenement has a right to pre-empt the sale under the Muhammadan Law as a *shafi-i-khalit*. [p. 809, col. 2.]

The *talab-i-ishtish-had* required by the Muhammadan Law of Pre-emption must be made with the least practicable delay and the question whether that formality has been duly and sufficiently observed with regard to the time at which it should have been observed is a question to be decided in each case by the Court which has to deal with the facts. [p. 810, col. 1.]

Unless the purchase price is known to the person entitled to pre-emption, he has not all the facts before him to enable him to decide whether he will exercise his right of pre-emption. He must, however, take immediate steps to ascertain the price and then make the *talab-i-ishtish-had* forthwith and any unreasonable delay in ascertaining the particulars or in making the demand would operate as a forfeiture of his claim. [*ibid.*]

Second appeal from a decision of the District Judge, Monghyr, dated the 8th September 1923, reversing that of the Subordinate Judge, Monghyr, dated the 15th April 1920.

Messrs. P. Dayal and R. T. N. Sahay, for the Appellants.

Messrs. S. Ahmad and S. N. Ray, for the Respondents.

JUDGMENT.

Miller, C. J.—This is an appeal from a decision of the District Judge of Monghyr dated the 8th September 1922. The appellant Mahant Tokh Narayan Puri is the defendant first party in a pre-emption suit instituted by some of the respondents as plaintiffs against the appellant as purchaser and the defendants second party, also respondents, as vendors of an estate in Mouza Beiman bearing *Tauzi* No. 7094 on the rolls of the Collector of Monghyr. Some years ago by a Collectorate *batwara* Mouza Beiman was partitioned amongst the co-sharers and divided into several separate revenue paying estates bearing separate *tauzi* numbers. *Tauzi* No. 7094 which constitutes the property in dispute in this

case fell to the *patti* of certain co-sharers now represented by Jagdip Narain Singh and others, the second party defendants in the suit. *Tauzi* No. 3814 and *Tauzi* No. 7093 fell to the *patti* of those who are now represented by the plaintiffs. These two estates are contiguous with the estate in suit lying immediately to the south and east thereof respectively. The appellant (defendant first party) is the proprietor of *Mauza* Bindaban which lies immediately to the west of the estate in suit. On the 13th December 1918 the defendants second party, who may be conveniently referred to as the vendors, sold their interest in *Tauzi* No. 7094 to the appellant, who may be referred to as the purchaser, for Rs. 3,775 and a further sum of Rs. 125 to cover the arrears of rent then due. The plaintiffs as proprietors of *Tauzi* Nos. 3814 and 7093 claim the right of pre-emption on payment of the price agreed between the vendors and purchaser and instituted the present suit to enforce their claim.

The Muhammadan Law relating to pre-emption applies also to Hindus in Bihar. The right of pre-emption applies in the case of three classes of persons. The first class are the co-sharers in the vended property known as *shafi-i-sharik*. The second class are sharers in the appendages or appurtenances of the vended property, *shafi-i-khalit*. The third class derive their right from vicinage and the right applies in favour of neighbouring proprietors holding contiguous property. They are known as *shafi-i-jar*. The plaintiffs claimed originally as the owners of the adjoining property but by an amendment of their plaint they alleged that the *pattis* of the plaintiffs and the vendors had all along been irrigated from water of the same *ahar* and *pynes* and they also claim as sharers in the appurtenances common to both properties (*shafi-i-khalit*).

The purchaser resisted the suit on various grounds. He contended that the plaintiffs were not entitled to pre-emption on the ground of vicinage as he also was a neighbouring proprietor; that the plaintiffs were not entitled to the right of *shafi-i-khalit* as they were not in fact sharers in appurtenances common to the two estates, and, further, that such a right had not been properly claimed in the plaint, that the ceremonies necessary to be performed in order to found a right of pre-emption had not been properly performed, and that such

ceremonies, if performed, had been performed by the plaintiff No. 4 alone, and by adding other plaintiffs in the suit who were strangers having no claim to pre-emption he had forfeited his right.

The learned Subordinate Judge before whom the case came for trial appears to have found all the facts in favour of the plaintiffs but considered that although the plaintiffs were entitled to pre-emption as *shafi-i-jar* and *shafi-i-khalit* they could not enforce their right as they were not actual co-sharers in the vended property.

On appeal the learned District Judge of Monghyr without considering the questions of fact which had been determined by the Trial Court upheld the decision of Subordinate Judge.

An appeal was preferred to the High Court, but as the facts had not been found by the lower Appellate Court the case was remanded to that Court for re-hearing and for decision after coming to a finding as to what the facts were.

The learned District Judge on remand has found that the ceremonies were properly performed by the plaintiff No. 4, that the plaintiffs other than the plaintiff No. 4 were not strangers and were entitled to be added; that they could not succeed merely as *shafi-i-jar* because the purchaser was also a neighbouring proprietor but that they had established their right as *shafi-i-khalit*, sharers in appendages, a right the purchaser did not enjoy, and he passed a decree for pre-emption in favour of the plaintiffs.

The purchaser has appealed from that decision which he challenges upon three grounds, (1) that the plaintiff No. 4 who performed the ceremonies has lost his right to claim pre-emption by joining as plaintiffs other persons who had not joined in the ceremonies and who were strangers as that expression is understood in Muhammadan Law, (2) that the plaintiffs having claimed on the ground of vicinage only should not have been given a decree as sharers in the appendages and (3) that delay in performing the *talab-i-ishtish-had* was fatal to the validity of that ceremony without which the right could not be asserted.

As to the first point it is well-settled that if a person entitled to claim pre-emption joins with himself as co-plaintiff a person who has no such right, he forfeits his own pre-emptive right and the suit

must be dismissed as against both: (see Wilson's Anglo Muhammadan Law, 5th Edition 388). The basis of this rule appears to be that as the right of pre-emption only exists in favour of those who are co-sharers either in the vended property or in the appurtenances, or who are proprietors of adjoining property, as against persons who are not so qualified, it would be manifestly unjust as against the vendee to allow persons who do not possess the necessary qualifications to assert a right of pre-emption. In the present case the plaintiffs are all members of the same family and are all proprietors in *Tauzi* Nos. 3814 and 7903. They do not, therefore, come under the category of strangers as understood for this purpose in Muhammadans Law. It was contended, however, on behalf of the appellant that nobody could be joined as a plaintiff who, although otherwise qualified, had not himself performed the preliminary ceremonies of *talab-i-mowasibat* and *talab-i-ishtish-had* but no authority was produced in support of this proposition. As pointed out by Banerji, J., in *Wajid Ali v. Shahban* (1) in almost all the cases in which it has been held that a person possessing the right of pre-emption forfeits it by joining a stranger, the person joined was a stranger to the co-parcenership body and a total outsider and reference is made to the case of *Chhotu v. Husain Baksh* (2) in which it was held that the mere joining by a person having a right of pre-emption of persons who have an equal right of pre-emption, but have not qualified themselves according to the Muhammadan Law to enforce it, and who are not strangers, will not disentitle the person entitled to maintain a suit for pre-emption, if he had sued alone, from maintaining a suit brought by him so far as he himself was concerned. In that case pre-emption was claimed by several persons one of whom Chhotu only had performed the preliminary demands and it was held that Chhotu had not forfeited his right of pre-emption by joining with him the other plaintiffs in bringing the suit. The point appears to have been settled by that decision. Moreover, the learned Judge whose judgment is under appeal states that this point was not pressed before him by the purchaser

(1) 3 Ind. Cas. 820; 31 A. 623; 6 A. L. J. 887; 6 M. L. T. 352.

(2) A. W. N. (1893) 25.

and I do not think we should in the circumstances allow the appellant to raise the point afresh. In any case were it necessary to do so I should hold that the suit is not bad for misjoinder of parties.

With regard to the second point it is true that in the relief portion of the claim the plaintiffs ask for a declaration that they have the right of pre-emption as they are proprietors of the adjoining *pattis*. But by the amendment of para. 15 in the body of their plaint they do allege that the *pattis* of themselves and the vendors have all along been irrigated from water of the same *ahar* and *pynes* and at the trial as well as in the lower Appellate Court, the question whether the plaintiffs were entitled to come in under the second class of pre-emptors was raised and decided.

The facts with regard to this part of the case are found by the learned District Judge on remand. There is an *ahar* of considerable extent in the plaintiff's *patti*, *Tauzi* No. 3814, and the vendors as proprietors of *Tauzi* No. 7094 have rights of taking water for the irrigation of their own land from this *ahar*. The learned Judge finds that the proprietors of the two *pattis* have joint rights over this *ahar* and that in fact the owners of the vended *patti* have a right of easement over the *ahars* and water-courses situated in the plaintiffs' *patti*. The result is that the plaintiffs' *patti* is a servient tenement. Such a case has always, so far as I am aware, been treated as bringing the owner of the servient tenement within the right of *shafi-khalit*. It was contended, however, that the *ahar* in question had been left *ijmal* at the time of the *batwara* and that it was not an appendage or appurtenance to either of the two *pattis* over which the parties had common rights and the case of *Keshao Singh v. Bansi Singh* (3) was referred to. In that case an estate had been partitioned into several *mahals* but certain roads and a well and a tank and other properties had been left undivided and remained the joint property of the proprietors of the different estates. It was found that the fact that this joint property remained enjoyable by the proprietors of each of the separate *mahals* was not sufficient to give any of them a right of pre-emption in the second degree or *khalit* as the joint property was

not an appurtenance of any of the estates but a separate property owned by the proprietors jointly. In the present case the facts appear to be different. The *ahar* in question is within the plaintiffs' *patti* and the title to it belongs to the plaintiffs alone. It is not shown to be joint property and it is found by the learned District Judge that the right which the proprietors of the vended property have was merely a right of easement in the *ahar*. This being so I think the plaintiffs come within the second class of pre-emptors, namely, *shafi-khalit*.

With regard to the third point it may be stated that Muhammadan Law requires that the pre-emptor immediately on hearing of the sale should make known his intention of exercising his option of purchase. He should rise and declare his intention there and then whether witnesses are present or not. The ceremony is known as *talab-i-mowasibat*. Having done this he must also with the least practicable delay make a formal declaration claiming his right of pre-emption before witnesses in the presence of either the vendor or the vendee or on the premises sold. The ceremony is known as *talab-i-ishtish-had*. It is not disputed that the first demand was properly made by the plaintiff No. 4. It is contended, however, that there was a delay of four days in performing the second demand and that this delay is fatal to the plaintiffs' right. The facts found are that the property was sold on the 13th December 1918. The plaintiff No. 4 came to hear of it on the 16th December and immediately declared his intention of exercising his right of pre-emption in the presence of several witnesses. He was not aware, however, of the amount of the purchase price paid for the property and in order to ascertain this he sent his servant Munshi Gajadhar Lal by train on the evening of the same day to Shaikhpura to obtain a copy of the sale-deed. There was some delay in obtaining the copy of the sale-deed owing to the Registration Office being closed. Eventually Gajadhar Lal obtained a copy of the sale-deed on the 19th December and took it to his master at *Mauza Barhi* who, as soon as he received it on the 20th proceeded to the house of the vendors who lived in the same village and there performed the second ceremony of *talab-i-ishtish-had* in the presence of some of the vendors and other witnesses. The same ceremony was performed by him on the vended property

On the following day and in the presence of the purchaser on the 22nd, but these last two ceremonies were not necessary in order to complete his right. The question is whether by waiting until he had ascertained the amount of the purchase-money the plaintiff No. 4 forfeited his right. The learned District Judge considered that the delay was satisfactorily explained and that the plaintiff was justified in waiting until he ascertained the purchase price before performing the second ceremony.

It seems to me on general principles that unless the purchase price is known to the person entitled to pre-emption he has not all the facts before him to enable him to decide whether he will exercise his right. The price when ascertained may be higher than that which he is inclined to pay. There can be no doubt, however, that he would be bound to take immediate steps to ascertain the price and any unreasonable delay in doing so would, in my opinion, operate as a forfeiture of his claim. In the case of *Abadi Begam v. Inam Begam* (4), the opinion was expressed that a claim relinquished upon mis-information of the amount of the sale consideration, or of the property sold, may be resumed when the real facts became apparent. This opinion, however, upon the facts of that case, would appear to be merely *obiter*. It is referred to apparently with approval by Sir Roland Wilson who states "but a person who refrains from pre-empting when he first hears of the sale, owing to being mis-informed of the price, is not estopped from reviving his right on becoming subsequently aware of the true price:" (see *Anglo Muhammadan Law*, 5th Edition, 401). The rule laid down by Sir William Macnaghten and referred to with approval in the case of *Jumeelun v. Luteef Hossein* (5) is that the *talab-i-ishtish-had* should be made with the least practicable delay and it was further laid down in that case by a Full Bench of the Calcutta High Court that the due and sufficient observance of that formality, as to time is a question to be decided in each case by the Court which has to deal with the facts and I do not think that in second appeal we should interfere with the finding of fact on a question of this sort unless the ascertained facts clearly shew that there was no evidence to support the finding. In the case of *Baijnath Goenka v.*

Ramdhari Chowdhary (6), there was a considerable delay between the date (the 20th December 1897) when the pre-emptor first heard of the sale and the 7th January following when he performed the second ceremony of *talab-i-ishtish-had*. The delay between the 20th December and the 4th January was due to the fact that the pre-emptor was during that time endeavouring to procure from the Registration Office a copy of the sale-deed, the office being closed for the Christmas vacation. Their Lordships of the Judicial Committee appear to have assumed that the circumstances were adequate to excuse that delay. The Trial Court had held that the delay was not fatal to the claim. The High Court on appeal had reversed that decision. Their Lordships observed: "There is no question of law in the case. It is clear that the right of pre-emption must be exercised, and the claims necessary to give effect to it must be made, with the utmost promptitude, and that any unreasonable or unnecessary delay is to be construed as an election not to pre-empt. And whether there has been such a delay is a question to be determined upon the facts of each particular case. It is enough for their Lordships to say that, in their opinion, the grounds stated by the learned Judges of the High Court for overruling the decision of the First Court, on a pure question of fact, were insufficient". In my opinion the delay in the present case has been amply explained and I do not think that any sufficient reason has been made out why we should differ from the learned District Judge on a pure question of fact. Indeed had the case come before us in the first instance I should have taken the same view. In my opinion the third objection also fails and this appeal must be dismissed with costs.

Macpherson, J.—I agree.

Z. K.

Appeal dismissed.

(6) 12 C. W. N. 419; 10 Bom. L. R. 253; 7 C. L. J. 318; 18 M. L. J. 116; 3 M. L. T. 349; 35 C. 402; 35 I. A. 60 (P. C.).

(4) 1 A. 521; 1 Ind. Dec. (N. S.) 369.

(5) 16 W. R. F.B. 13; 8 B. L. R. 160.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 304 of 1923.

March 30, 1925.

Present:—Mr. Justice Suhrawardy
and Mr. Justice Duval.JANAKINATH SINGHA ROY—PLAINTIFF
—APPELLANT

versus

NIRODE BARAN ROY AND OTHERS—
DEFENDANTS—RESPONDENTS.*Civil Procedure Code (Act V of 1908), O. XX, r. 12, O. XXII, rr. 4, 9—Limitation Act (IX of 1908), s. 5—Mesne profits, determination of—Application for ascertainment of mesne profits, nature of—Abatement, application to set aside—Questions to be considered.*

An application for the determination of mesne profits is an application in the suit. [p. 811, col. 2]

In an application to set aside an abatement the Court should investigate whether the plaintiff was lawfully prevented from making the application for substitution within the statutory period and should direct its attention to the question whether the plaintiff is entitled to the benefit of s. 5 of the Limitation Act. [ibid]

Appeal against an order of the Subordinate Judge, Burdwan, dated the 30th of May 1923.

Mr. Mohendra Nath Roy and Babu Sitaran Banerji, for the Appellant.

Dr. Dwarkanath Mitra, Babus Satindra Nath Mukherjee and Byomkesh Basu, for the Respondents.

JUDGMENT.—The plaintiff who is the appellant brought a suit for recovery of possession of a certain property and for mesne profits. He obtained a preliminary decree which directed that "the plaintiffs do recover from the defendants *wasilat* from the date of dispossession to the date of recovery of possession, that the amount of *wasilat* may be ascertained later on upon the plaintiff's application". This decree was passed on the 26th September 1918. The plaintiff applied for the determination of the mesne profits and at the same time he filed an application for substitution of the heirs of defendant No. 1 Bepin Krishna Roy in his place who had died before that. This application of the plaintiff was treated as made in execution proceedings. It appears that no definite order was passed upon the plaintiff's application for substitution. But processes were issued against the heirs sought to be substituted and they entered appearance and took part in the proceedings before the Commissioner. In June 1922 the defendants applied for an order that the decree for *wasilat* as against defendant No. 1 had abated on which the Court held that it had so abated,

On the 22nd July 1922 the plaintiff applied to the Court for setting aside the abatement. On the 30th May 1923 the Court dismissed that application. Hence this appeal.

The fight in the lower Court apparently was mainly confined to the question whether the application for the ascertainment of the mesne profits was an application in execution or in the suit. That point the learned Subordinate Judge has correctly decided against the plaintiff. Under the Code of 1908 an application for the determination of the mesne profits is an application in the suit: see O. XX, r. 12, C. P. C.

As regards the question whether the plaintiff had made out a case for setting aside the abatement the learned Subordinate Judge refused his application on the ground that the plaintiff might have applied for the ascertainment of mesne profits earlier, that he should not have waited for two years to make the application and that if he had not waited so long in making his application the present question would not have arisen. But these were not the points which the learned Subordinate Judge was required to enquire into in an application for setting aside the abatement. He should have in the first place investigated whether the plaintiff was lawfully prevented from making the application for substitution within the statutory period and in the second place the learned Subordinate Judge should have directed his attention to the question whether in the circumstances of the present case the plaintiff was entitled to the benefit of s. 5 of the Indian Limitation Act in applying for setting aside the abatement. The learned Subordinate Judge has not considered these questions from the true standpoint.

We, therefore, set aside the order of the Court below refusing the plaintiff's application to set aside the abatement and send the case back to that Court for re-trial. The Court below will enquire (1) whether the plaintiff was prevented by a lawful cause from making the application for substitution in the place of defendant No. 1 Bepin Krishna Roy within the statutory period, and (2) whether the plaintiff was prevented by any sufficient cause within the meaning of s. 5 of the Indian Limitation Act from making an application for setting aside the abatement within the time allowed by law.

The parties will be entitled to adduce fresh evidence on these points.

Costs will abide the result. We assess the hearing-fee of this appeal at three gold mohurs.

Z. K.

*Appeal allowed:
Case sent back.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 126 OF 1923.

July 10, 1925.

Present:—Mr. Justice Adami and
Justice Sir John Bucknill, Kt.
GREAT INDIAN PENINSULA
RAILWAY, THROUGH AGENT—
DEFENDANT—APPELLANT

versus

DATTI RAM AND ANOTHER—PLAINTIFFS—
RESPONDENTS.

Railway Company—Carriage of goods—Risk Note Form "B"—Suit to recover damages for loss of goods—Negligence—Burden of proof.

In a suit to recover damages for the loss of goods consigned to a Railway Company for carriage under Risk Note Form "B" the onus of proving negligence of the Company lies on the plaintiff; the Company is not bound in law to assist the plaintiff in fastening liability on itself. The mere assertion by the plaintiff that the Company's servants must have been negligent because the Company had failed to deliver the goods is by itself of no value as proof of negligence. In such a case it is quite unnecessary for the Company to do anything more than to prove or admit the loss of the goods; having done that the onus of proving that the loss was occasioned under one of the exceptions contained in the Risk Note lies upon the plaintiff. [p. 812, col. 2; 813, col. 1; 815, col. 1]

Second appeal from a decision of the District Judge, Saran, dated the 24th November 1922, modifying that of the Munsif, Chapra, dated the 15th March 1922.

Mr. Muhammad Hasan Jan, for the Appellant.

Mr. B. N. Mitter, for the Respondents.

JUDGMENT.

Bucknill, J.—This was a second appeal from a decision of the District Judge of Saran, dated November 24th 1922 by which he modified a decision of the Munsif of Chapra, dated March 16th of the same year. The appellant was the Great Indian Peninsula Railway through its agent in India; this Company was the defendant in a suit brought by the plaintiffs (the respondents here) who are merchants of Chapra Town. The plaintiffs' suit was of a familiar type;

their firm ordered a bale of cloth from a Bombay merchant; it is admitted it was duly sent under Risk Note "B" and was duly placed in the appellant Company's custody; it is also common ground that it was never delivered.

The plaintiffs sued the appellant Company for the value of the goods lost (Rs. 869-14-9,) the freight (Rs. 5-15) and loss of profit (Rs. 75) or Rs. 948-13 0 in all. They averred that they believed that the bale had been lost through the negligence of the appellant Company's servants.

The appellant Company pleaded various defences; they admitted the loss but alleged that it was due to a "running train theft" and that, therefore, they were absolved by Risk Note "B" from liability. The appellant Company, however, called no evidence whatever in support of their allegation of "running train theft." Whether the plaintiffs' evidence proved any negligence on the part of the appellant Company or not was a matter of difference of opinion between the Munsif and the District Judge.

The case, however, proceeded on the usual lines: the plaintiffs tried to prove negligence on the part of the defendant Company but all that their sole witness could aver was that he supposed that the Company's servants must have been negligent because the plaintiffs had never received their bale of cloth. I need hardly say that such an assertion by itself is of no value as proof of negligence. The Munsif, therefore, holding that the plaintiffs had failed to prove any negligence, dismissed their suit with costs.

The District Judge, when the appeal came before him thought that negligence should be inferred "from all the circumstances": he, therefore, reversed the Munsif's decision and gave judgment for the plaintiffs for the price of the cloth with costs but not for the alleged loss of profit which he did not consider had been proved.

It is important to ascertain on what grounds the District Judge arrived at this conclusion. In the first place he points out how impossible it was for the plaintiffs to prove what happened to the cloth when in the Railway's custody; but this, though I may say at once that it is a constant difficulty in almost every case of this type, does not relieve a plaintiff from proving negligence on the part of the Railway's servants. The District Judge next remarks that the Company alone can know what happened

to the bale whilst in its custody and that, therefore, under s. 106 of the Evidence Act the onus is on the Company of proving what happened to the goods: but this kindly view is contrary to all the Indian and English case-law authority (*vide e.g., Smith, Ltd. v. Great Western Railway Company* (1), the onus of proving negligence in these cases lies on the plaintiff; the Railway Company is not bound in law to assist the plaintiff to fasten liability on itself. The District Judge further observes that the whole consignment was lost and that, although the Railway pleaded theft on a running train, it had made no attempt to prove any such theft; and that, therefore, the onus of avoidance of liability lay, by this plea in defence, upon the Company: it is possible that, more closely examined, there may be some force in this reasoning but I propose to deal with this point at a later stage.

The District Judge then states that the plaintiffs could get no information from the Company as to what had happened to the cloth; but this does not, according to the authorities, relieve the plaintiffs from proving negligence. The District Judge next remarks that, from the plaintiffs' evidence and the admitted facts in the case, the only reasonable conclusion was that the loss was due to the negligence of the Company's servants: but I have already pointed out that the plaintiffs' testimony was of no evidential value; whilst the only material admissions in the case were that the bale was duly given to the Company's custody and was lost in a running train theft; neither of which circumstances threw any liability on the Company.

Lastly, the District Judge seems to think that a plaintiff can in some manner go behind his special contract (*i.e.*, Risk Note "B") with the Company and sue the Company for damages for non-delivery under such normal statutory liabilities as are imposed upon parties to a contract under the Indian Contract Act and upon Railways as carriers under the Indian Railways Act: but this view again is, I fear, contrary to the best authority. There have been so many decisions on cases of this type reported in Indian Law Reports that I think it is as well to try and express very simply a few of the more important features which emerge from them.

What is known as Risk Note "B" is, we are

(1) (1922) 1 A. O. 178; 91 L. J. K. B. 423; 27 Com. Cas. 247; 38 T. L. R. 559.

informed, the ordinary and most usual contract for the carriage of goods entered into between merchants and the Railway Companies in India. It is very simple in its language: it forms a complete special written contract between the consignor and Railway Company. The Railway takes the goods at a rate of freight lower than the ordinary rate; in consideration for so doing the consignor undertakes to absolve the Company from all responsibility for any loss, destruction, deterioration of or damage to the goods whilst in transit from any cause whatever subject to the following exceptions. These exceptions provide that if a whole consignment (or one or more complete packages forming part of a whole consignment) is lost, then the Company will be responsible if the loss is due

(a) to the wilful neglect of the Railway Administration or

(b) to theft by its servants or agents or

(c) to wilful neglect of its servants or agents.

Then there is a proviso that wilful neglect cannot be held under the contract to include

(a) fire,

(b) robbery from a running train,

(c) any other unforeseen event or accident.

A, then, a merchant consigns goods by B, a Railway Company, to C, another merchant, under a contract contained in the Risk Note "B" the goods are never delivered to C. A (or C acting really on A's behalf or as A's principal; for there is no direct contract between B and C) sues B for damages for the loss of his (A's) goods or, if one so likes to phrase it, for damages for breach of contract in that B has not delivered the goods to C as B undertook so to do. What is A's cause of action? it is solely on account of a breach by B of the contract between A and B. What is that contract? it is an agreement between A and B reduced into writing in the form of Risk Note "B". What contract must A sue on? on the only contract existing between A and B, *i.e.*, the Risk Note "B." Can A ignore the Risk Note and sue B for damages for non-delivery basing his claim on statutory liabilities imposed generally upon those who make contracts or particularly upon a Railway Company under the provisions of the Indian Contract Act and the Indian Railways Act respectively? the answer is in the negative; A cannot do so; he has to base his claim on his existing and actual contract with B, *i.e.*, the Risk Note "B." A

then sues *B* upon and for damages for breach of the contract, i. e., the Risk Note "B" made between them. *B* to take the simplest case, admits the loss in the Company's Statement of Defence. By the express terms of the contract *B* is not liable for loss save under certain specified circumstances. Who has to prove those circumstances under which *B* is liable?; clearly not *B* for it can hardly be contemplated seriously that *B* is bound to assist *A* in fastening responsibility upon *B*. So it is *A* upon whom the onus falls of showing that *B* is responsible for the loss.

There have it is true been cases—even of quite recent date—in which it has been held that it is not sufficient for *B* to admit the loss in his Statement of Defence but that *B* must adduce evidence to prove such loss, e. g., *Ghelabhai Punsil v. East Indian Railway Company* (2), *Jamnadar Baldevdas Firm v. Burma Railways Company Ltd.* (3) but these were decisions given prior to the case of *Smith v. Great Western Railway Company* (1); and it is difficult to understand why *B* should be called upon to prove what he expressly admits: the point also has been fully discussed and dealt with in this Court in the decision of *Mullick, J.*, and myself in the *G. I. P. Railway Company v. Jitan Ram-Nirmal Ram* (4) in which we held that the contention was incapable of support. *A*, who may know nothing, and indeed is not likely in most instances to know anything, as to how or where his goods vanished, or why they were not delivered, can aver in his statement of claim what he pleases; he can state if he wishes that the loss was due to any or all of the exceptions under which alone *B* is liable; but, assuming that *B* admits the loss, *A*, if he is to be successful in his claim, must prove that the loss was in fact due to one of the exceptions under which *B* is responsible. It is often asked how he can do so; it is obviously not an easy task as it may well frequently be that *B*, at the mercy of any unscrupulous member of its staff or the victim of clandestine theft by outsiders, knows no more as to the disappearance of the goods than *A* himself: *A*'s only

chance would appear to lie in the administration of searching interrogatories and the calling of servants of *B* as his (*A*'s) witnesses. If he proves nothing his claim must fail: *B* need not say or do anything beyond admitting the loss.

All the above points have been dealt with at length in the recent decision of *Mullick, J.*, and myself to which I have referred above. But it is frequently observed that if the law is as above stated it seems very hard as the position of *A* is almost hopeless. The answer to this comment is very simple; it is that the contract is itself a hard one but that *A* has complete remedy in his own hand, namely, not to seek to have his goods carried at a reduced rate and under the terms of such a hard contract as Risk Note "B" but pay a higher freight and have his goods carried under another form of contract under the terms of which *B* has to assume a far fuller responsibility.

I mentioned at an early stage of my judgment that one of the reasons why the District Judge thought that the appellant should be held responsible was that the Railway Company had pleaded in its defence that the loss was due to a running train theft but that it made no attempt to prove that allegation. There seemed at one stage to be some force in the argument which was thus put forward in support of this part of the District Judge's decision. It was contended for the respondent that this admission by the appellant Company was an admission that there had been a theft and that as the Company failed to prove that it was a theft on a running train (satisfactory evidence of which would clearly have permitted the Company to escape any liability) it might be inferred that the theft was committed by the appellant's agents or servants; or, at any rate, that, as they had admitted a theft it was incumbent upon the appellant Company to show that it was not theft by their own agents or servants but theft either as pleaded on a running train or at any rate by some outsiders not in their service or not their agents. It is, however, impossible upon further consideration to come to the conclusion that this argument is a sound one. In the first place the admission or plea is not of theft at large but of a specific form of theft, i. e., on a running train. In the second place, even if the defendant Company failed to prove or to adduce any evidence in support of such an allegation, it cannot be held that a necessary inference must be

(2) 63 Ind. Cas. 241; 45 B. 1201; 23 Bom. L. R. 525.

(3) 64 Ind. Cas. 395; 10 L. B. R. 354; 3 Bur. L. T. 190.

(4) 72 Ind. Cas. 440; 4 P. L. T. 173; (1923) Pat. 82; 1 Pat. L. R. 169; (1923) A. I. R. (Pat) 235; 2 Pat. 442.

drawn that the theft was committed by the Company's servants or agents; for, although there might have been a theft, it might have been by persons who were or were not the servants or agents of the Company; whilst, in order to prove that the Company was liable to the plaintiffs for the loss; it was primarily necessary (the onus being upon the plaintiffs) for the plaintiffs to show that the theft (whether or not committed on a running train) was effected by the Company's servants or agents; and this, of course, the plaintiffs made, and no doubt could make, no attempt to do. Lastly it was quite unnecessary, according to the authorities, for the Railway Company to do anything more than to prove or admit the loss and, having done that, the onus of proving that that loss was occasioned under one of those exceptions contained in the contract under which alone the Company could be held responsible lies upon the plaintiffs. As a matter of fact this very point appears to have been dealt with by Odgers, J., in the Madras High Court in the case of the *Madras & Southern Mahratta Railway Co., Ltd. v. Krishnaswami Chetty* (5). That case was one in which there appeared, superficially, to exist considerably greater reasons for drawing an inference that the theft had been committed by the Railway Company's servants than would be justifiable in the present case now before this Court. In the case decided by Odgers, J., the Railway Company pleaded in defence robbery from a running train and actually produced evidence in order to try and prove that allegation. The Company, however, failed to prove that the theft was one committed on a running train although they did show that when the train carrying the goods arrived at a certain station the Guard found the doors of one of the covered vans open and the plaintiff's bale of goods missing from it. The learned Judge in his decision remarks:—"One is very much tempted to think that where the Railway Company has 5 or 6 of its servants travelling in the train it is not necessary to look to any outside agency to found a case of theft. But I cannot say that that has been established by evidence. In a similar case in *B. B. & C. I. Railway Company v. Ranchhodlal Chotalal & Co.* (6) which also arose on this Risk Note "B" the learned Judges point out that though the defendants have failed to prove

theft from the running train, the onus is, of course, still on the plaintiff to prove neglect or theft by railway servants. This, they point out, should have been done before any question is reached of robbery from a running train as that, namely, robbery from a running train, is an exception to wilful neglect. It has also been established in *Narayana Aiyer v. South Indian Railway Company, Ltd.* (7) that the onus is upon the plaintiff to establish how the loss or deterioration was caused though there the Risk Note was Form "H." The case in the *Madras & Southern Mahratta Railway Co., Ltd. v. Mattai Subba Rao* (8) cited by the learned Counsel for the defendant does not seem to me to touch the case. I am, therefore, with great reluctance constrained to come to the conclusion that the plaintiff has no remedy on this Risk Note "B" on the evidence as it stands. The suit must, therefore, be dismissed. The question is whether I should inflict costs on the plaintiff. The defendant, as stated, attempted to prove loss by robbery from a running train and assumed that onus at the trial and failed. This is, as I pointed out, wrong. I do not think that the plaintiff suffered any prejudice from that procedure, but, on the whole, I am inclined to dismiss the suit without costs."

The first judgment referred to by Mr. Justice Odgers (*B. B. & C. I. Railway Company v. Ranchhodlal Chotalal & Co.* (6) is precisely to the same effect as that of the learned Judge.

Under these circumstances I fear that this appeal must be allowed and the decree of the District Judge of Saran set aside and that of the Munsif of Chapra restored. One can only observe once again that, although it may seem that the decisions in these cases bear hardly upon those whose goods are carried by Railway Companies in this country under Risk Note "B," the contract is one which involves those who thus confide their goods for carriage to a Railway Company in greatest difficulty in recovering compensation in the case of their loss; the substantial remedy against such a state of affairs lies, however, in the hands of the individual who is in no way bound to enter into a contract of such a type which in effect places him at the mercy of the Railway

(5) 79 Ind. Cas. 137; (1925) A. I. R. (M.) 133.

(6) 52 Ind. Cas. 516; 43 B. 769; 21 Bom. L. R. 770.

(7) 75 Ind. Cas. 260; 18 L. W. 322; (1923) M. W. N. 731; (1924) A. I. R. (M.) 388.

(8) 55 Ind. Cas. 754; 43 M. 617; (1920) M. W. N. 198; 11 L. W. 358; 38 M. L. J. 360; 28 M. L. T. 49.

Company with which he enters into an agreement.

Adami, J.—I agree

Z. K.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 556
OF 1923.

March 30, 1925.

Present:—Justice Sir Ewart Greaves,
Kt., and Mr. Justice Cuming.

HOCHANUDDI AND ANOTHER—DEFENDANTS
—APPELLANTS
versus

ABDUL HAKIM MRIDHA AND ANOTHER
—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 22 (a)—Occupancy holding—Purchase by joint proprietor or tenure-holder, effect of—Lease in favour of third person—Under-raiyat of holding, status of—Lessee, whether entitled to recover rent.

Under s. 22 of the Bengal Tenancy Act when the occupancy right in a holding is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, such person has no right to hold the land as a *raiyat* but holds it as a proprietor or permanent tenure-holder as the case may be. Thereafter the *raiyati* holding ceases to exist and is merged in the superior right of the proprietor or the tenure-holder. Persons holding as under-*raiyats* under the original *raiyat* are in such a case automatically raised to the position of the *raiyats* of the holding under the proprietor or tenure-holder. If the proprietor or tenure-holder subsequently to his purchase lets out the holding to another person the latter does not become a landlord of the under-*raiyats* who have since the date of the purchase become the *raiyats* of the holding, and unless there is a grant of a right to collect rent from the tenants in favour of the transferee he is not entitled to sue the *raiyats* for the rent of the holding. [p. 816, col. 2; p. 817, col. 1.]

Appeal against a decree of the Subordinate Judge, First Court, Bakarganj, dated the 10th of August 1922, affirming that of the Munsif, Sixth Court at Barisal, dated the 16th of January 1921.

Mr. Ganada Charan Sen and Babu Prasanta Bhusan Gupta, for the Appellant.

Babu Bepin Chandra Bose, for the Respondents.

JUDGMENT.

Cuming, J.—This is an appeal in a suit for rent. The material facts are briefly these: One Raseswari held an 8-annas share in certain *taluk*. In this *taluk* there was a certain *karsa* holding held by one Babu Khan and the defendants held an under-*raiyati* under Babu Khan. Raseswari obtained a rent-decree for her share of the rent and put the *karsa* holding to

sale and purchased it herself. She then proceeded to let out the *karsa* right to the present plaintiffs and they have brought this suit for rent against the defendants alleging that they are the *raiyats* and that the defendants are their under-*raiyats*. The defendants resisted the claim of the plaintiffs contending that the relationship of landlord and tenant did not exist between them and the plaintiffs. Their case was that they were *raiyats* and not under-*raiyats* and that the interest conveyed by Raseswari in the plaintiffs' favour was of the same denomination as their own and that, therefore, the plaintiffs are not entitled to sue them for rent. Both the lower Courts have decided against the defendants and the defendants have now appealed to this Court.

Their first contention is that on the purchase of the occupancy holding by Raseswari her *raiyati* interest was merged in the *talqui* interest and the defendants were by this raised to the position of *raiyats* and that the lease granted to the plaintiffs by Raseswari was a *raiyati* lease of the land and of the same denomination as their own and relying on the decision in the case of *Kalam Sheikh v. Panchu Mandal* (1), they contend that the plaintiffs are not entitled to rent from them. I think that this contention must succeed. Section 22, sub-s. (2) of the Bengal Tenancy Act, so far as it is applicable to Eastern Bengal and Assam provides that if the occupancy right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder such person shall have no right to hold the land as a *raiyat* but shall hold it as a proprietor or permanent tenure-holder, as the case may be, and shall pay to his co-sharer a fair and equitable sum for use and occupation of the land. It seems, therefore, quite clear that since the purchase by Raseswari of the *karsa* holding the *raiyati* holding no longer existed but was merged in her superior right. The question then remains what would be the position of the defendants who were under-*raiyats* under the original *raiyats*? It seems clear to me that they were automatically raised to the position of *raiyats* of this holding under the immediate tenure-holders. They cannot be under-*raiyats* because an under-*raiyat* has been defined in s. 4 of sub-s. (3) of the Act as a person

(1) 11 W. R. 128; 2 B. L. R. A. C. J. 252; 1 Ind. Dec. N. S.) 816.

holding immediately under the *raiyat*; and s. 5, sub-cl. (3) provides that a person shall not be deemed to be a *raiyat*, unless he holds land either immediately under proprietor or immediately under a tenure-holder. It, therefore, seems to me that the position of the defendants is that of *raiya*s. That being so, we have now to consider the effect of the *karsa* lease granted to the plaintiffs by Raseswari. The plaintiffs contend that the effect of this lease is to grant them a right to receive rent from the defendants and they rely upon two decisions, one in the case of *Johar Mull Bhutra v. Bhupendra Nath Basu* (2) and the other in the case of *Ram Anant Singh v. Shankar Singh* (3). The defendants-appellants have relied on the case of *Kalam Sheikh v. Panchu Mandal* (1). In the case of *Kalam Sheikh v. Panchu Mandal* (1), the facts were very similar to the facts of the present case. In that case there were two leases of the same land, one subsequent to the other, and the learned Judges held that under such circumstances it appeared that the mere fact that the *zemindar* granted to the plaintiff a lease of the whole of the lands appertaining to the *modufut* of one Jugo Mohan Sircar could not create the relation of landlord and tenant between the plaintiff and the defendant so as to entitle the plaintiff to institute a suit for a *kabuliyat* at an enhanced rate. In other words, they did not create the relation of landlord and tenant between the two lessees. This case was referred to in the case of *Johar Mull Bhutra v. Bhupendra Nath Basu* (2) on which the respondents rely, and it was there distinguished and not dissented from. The facts of the case of *Johar Mull Bhutra v. Bhupendra Nath Basu* (2) on which the respondents relied are different because that case was a case of interposing one tenure-holder between two other tenure-holders and the learned Judges held that there was nothing to prevent them being done.

The other case on which the respondents rely, namely, the case of *Ram Anant Singh v. Shankar Singh* (3) is clearly distinguishable because in that case there was in the second lease an express grant of the right to collect rent from the prior lessee for the remaining portion of the lease. In the case which we are now considering there

is no such grant of a right to collect rent and the principles which were the issue of the decision in the case of *Kalam Sheikh v. Panchu Mandal* (1) would apply to the present case.

We are, therefore of opinion that it has not been proved that the relationship of landlord and tenant does exist between the plaintiffs and the defendants.

The appeal, therefore, succeeds and the plaintiffs' suit is dismissed with costs in all Courts.

Greaves, J.—I agree.

Z. K.

Appeal allowed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1062 OF 1922.

June 2, 1925.

Present:—Mr. Justice Das and Mr. Justice Ross.

SUBEDAR RAI AND ANOTHER—DEFENDANTS
—APPELLANTS

versus

RAMBILAS RAI AND OTHERS—PLAINTIFFS—
RESPONDENTS.

Estates Partition Act (VIII B. C. of 1876), s. 119—Partition between proprietors—Proprietor holding tenure, whether affected by partition.

Where in the course of a partition proceeding under the Estates Partition Act any question arises as to the extent or otherwise of a tenure, the tenure-holder is not in any way affected by the decision which may be arrived at by the Revenue Authorities for the purposes of the partition between the proprietors, and it is immaterial that the tenure-holder happens to be one of the proprietors and is a party to the proceedings in that character. [p. 818, col. 2.]

A partition under the Estates Partition Act deals with the rights of the proprietors and so far as *raiya*ti lands are concerned they are only entitled to a distribution of the rents. It is not the intention of the Act that the rights of tenants should be conclusively determined by the Record of Rights prepared for the purposes of the partition. [p. 819, col. 1.]

Appeal from a decision of the District Judge, Shahabad, dated the 22nd May 1922, reversing that of the Additional Subordinate Judge, Shahabad, dated the 31st July 1921.

Messrs. Sultan Ahmed and Manohar Lal, for the Appellants.

Messrs. S. M. Mullick and P. K. Mukharji, for the Respondents.

JUDGMENT.

Ross, J.—The plaintiffs brought this

(2) 67 Ind. Cas. 108; 34 C. L. J. 79; 49 C. 495; (1922) A. I. R. (C.) 412.

(3) 30 A. 369; A. W. N. (1908) 152; 5 A. L. J. 423.

suit on the allegation that 25 *bighas* of land was their ancestral *guzashta kasht* from before the time when in 1909 their ancestor acquired a half-anna share in the proprietary interest in the village. In certain partition proceedings the Deputy Collector recorded this land as the plaintiffs' *kasht* land; but on appeal the Collector ordered that the land should be recorded in the *khasra* as *zerait* and the partition was made accordingly. The plaintiffs claimed a declaration that the land was their *kasht* land and possession and mesne profits. The defence was that the land was *zerait* and that the suit was barred by the provisions of the Estates Partition Act.

The learned Subordinate Judge held that the plaintiffs had failed to prove their title; and, further, that s. 119 of the Estates Partition Act barred the suit. The learned District Judge reversed both these findings. He held that the plaintiffs had proved that they had possessed this land as *raiya*ts at least since 1899 and that they had acquired the status of occupancy *raiya*ts in the land. With regard to s. 119 he was of opinion that as the order in the partition case which was contested in this suit was made under Ch. VI of the Act, s. 119 had no application, and that there was nothing in the Act that barred the suit which was instituted by the plaintiffs in their capacity of *raiya*ts. The defendants have appealed.

With regard to the first finding it was contended by the learned Counsel for the appellants that inasmuch as the land was under water up to 1908, it was impossible that the plaintiffs could have acquired occupancy rights in the same. Now there is only one piece of evidence which refers to the land being under water, as appears from the judgment of the Subordinate Judge, *viz.*, Ex. A, a written statement by the mortgagee in a suit for redemption. The learned District Judge has dealt with this evidence and has held that a recital of this kind is of no value as evidence of fact. He was entitled to hold that opinion and on that view no objection can be taken to his finding of fact as to the status of the plaintiffs.

The substantial question in the appeal is as to the effect of s. 119 of the Estates Partition Act. Two cases were referred to by the learned Counsel for the appellants [*Kesari Sahai Singh v. Hitnarayan Singh* (1) and

Anil Kumar Biswas v. Rash Mohan Saha (2).] Neither of these cases deals with an order under Ch. VI. They were both cases between proprietors and the substance of the partition was directly in issue in both. Section 119 clearly barred the plaintiffs' suit in both cases and these authorities throw no light on the present case where the plaintiffs are not asserting any right as proprietors but are claiming a *raiya*ti right acquired long before they became proprietors. On the other hand in *Janaki Nath Chowdhry v. Kali Narain Roy Chowdhry* (3), the question was as to a *miras* right held by one who was also a proprietor in the village. In that case also it was argued that there had been a decision of the Revenue Authorities against the plaintiff as to the reality and extent of his tenure and that it was not open to him to have the matter re-agitated in the Civil Court. On this argument their Lordships observed as follows: "No authority has been shown in support of this proposition. On the other hand, there are obvious and weighty reasons upon which such a contention ought to be overruled. It is manifest that if, in the course of a partition proceeding under Act VIII of 1876, any question arises as to the extent or otherwise of the tenure, as the tenureholder is not a party to the proceedings, he is not affected in any manner by the decision which may be arrived at by the Revenue Authorities for the purposes of partition between the proprietors. It is merely an accident that, in the case before us, the tenure is set up by a person who is also a proprietor and is a party to the proceedings in that character. It would, in our opinion, be unreasonable to hold that a party who had appeared before the Revenue Authorities in his character as a proprietor, should be finally concluded by a decision upon a question of title, which would not have been binding upon him if he had been a stranger to the proceedings." This language applies precisely to the present case. Similarly in *Lakhi Chowdhuri v. Akloo Jha* (4), the question was discussed with regard to an order passed under Ch. VI and their Lordships said: "In the second place s. 119 of the Estates Partition Act specifies the

(2) 81 Ind. Cas. 29; 28 C. W. N. 46; (1924) A. I. R. (C.) 245.

(3) 7 Ind. Cas. 881; 37 C. 662; 15 C. W. N. 451

(4) 13 Ind. Cas. 123; 16 C. W. N. 639.

(1) 56 Ind. Cas. 149; 1 P. L. T. 507.

orders of the Revenue Authorities which cannot be questioned by a suit in any Civil Court. An order under s. 45 or s. 46 is not one of the orders mentioned in s. 119. The reason for the exclusion is obvious. The determination by the Revenue Authorities is of a summary character and it cannot be taken to conclude finally a question of title between one of the proprietors and a stranger to the proceeding." The same view has been taken in this Court in *Baldeo Sahai v. Brajnandan Sahay* (5). A partition deals with the rights of proprietors and so far as *raiya* lands are concerned they are only entitled to a distribution of the rents. It could not have been the intention of the Act that the rights of tenants should be conclusively determined by the Record of Rights prepared for the purpose of partition, and that this is so is clear from the fact that Ch. VI and s. 111 are not covered by s. 119. There is, in my opinion, nothing in that section to bar the present suit. The learned Subordinate Judge was of opinion that s. 119 must bar the suit because the effect of decreeing the plaintiffs' suit would be to upset the whole partition. In my opinion that is not so. Section 89 provides for the case of dispossession of the proprietor of a separate estate by a decree of a Court of competent jurisdiction and enacts that in such case the partition shall not be disturbed, but such proprietor shall be entitled to recover from the proprietors of the other separate estates formed by the partition such compensation as may be fair and equitable. That section does not apply in terms to the present case; and there is no reason why the principle should not be applicable. If the value of the defendants' estate is reduced by the declaration of the plaintiffs' *raiya* right in this land, their remedy, in my opinion, would be to seek compensation from the other proprietors, but there is no ground in justice why the fact that a partition has been made on the basis that this land is proprietor's land should debar the *raiya* from asserting his *raiya* right.

I would, therefore, dismiss this appeal with costs. As it appears that during the pendency of the suit possession was delivered and the plaintiffs were dispossessed,

the decree will entitle them to recover possession with mesne profits.

Das, J.—I agree.

Z. K.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 961
OF 1924.

March 13, 1924.

Present:—Mr. Justice Jackson.

E. M. GOPALAKRISHNA KONAR—
PETITIONER

versus

A. VILANGA KONAR AND ANOTHER—
RESPONDENTS.

Injunctions, temporary—Principles applicable—Municipal election—Injunction restraining elected Councillor from sitting in Municipality pending civil proceedings—High Court, jurisdiction of.

It is impossible to lay down an exhaustive rule as to the grant of temporary injunctions but generally speaking such injunctions should be confined to preserving the status quo ante, to preventing irreparable damage or loss to the property in the suit, or to averting substantial injury. [p. 820, col. 1.]

No injunction can ordinarily be granted at the instance of an unsuccessful candidate for Municipal election restraining his duly elected rival from taking his seat in the Municipality, pending the disposal of civil proceedings regarding the election. [*ibid.*]

Quære.—Whether the High Court has jurisdiction to grant injunction in such a case as the above? [*ibid.*]

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an injunction restraining the second respondent herein from taking his seat as Councillor in the Municipal Council of the Municipality of Madura Town pending disposal of C. R. P. No. 182 of 1924 presented to the High Court to revise an order of the Court of the Subordinate Judge, Madura, in O. P. No. 59 of 1923.

Messrs E. L. Thornton for Messrs. C. Krishnaswami Rao, A. V. Visvanatha Sastri and A. Raghunatha Rao, for the Petitioner.

Mr. K. Raja Aiyar, for the Respondents.

ORDER.—This is a petition for issue of an injunction restraining second respondent from taking his seat as Councillor in the Municipal Council of Madura pending disposal of C. R. P. No. 182 of 1924.

Petitioner and respondent were rival candidates in a Municipal election; petitioner was declared, and has since been

(5) 43 Ind. Cas. 353; (1918) Pat. 161; 3 P. L. W. 286.

unseated after the inquiry in O. P. No. 51 of 1923 in the Court of the Subordinate Judge of Madura, and C. R. P. No. 182 of 1924 is preferred against that decision.

I am doubtful whether this Court has jurisdiction to grant an injunction in such a matter. No such power lies with the Judge who holds an inquiry under the election rules, and it is not clear that the High Court acting in revision has any extended power. If a suit is transferred to the High Court, its powers are confined to powers which but for the transfer might have been exercised by the original Court: *Annie Besant v. Narayaniah* (1). However the Calcutta High Court has held that it has general power of granting injunctions: *Rash Behary Dey v. Bhowani Churn Bhose* (2) and *Mungle Chand v. Gopal Ram* (3) and I will proceed on the assumption that the Court has jurisdiction.

Obviously an injunction of the sort prayed for, which can only be based upon a *prima facie* consideration of the case, must be granted with circumspection. It is impossible to lay down an exhaustive rule but generally speaking such injunctions should be confined to preserving the *status quo ante*, to preventing irremediable damage or loss to the property in the suit, or to averting substantial injury. None of these conditions arise in the present case. This Court is not moved to reinstate the unseated Councillor, but to unseat the Councillor declared elected in his stead, and thus create a vacancy in the Municipal Council and an entirely new situation. It may be noted here that in *Aslatt v. Corporation of Southampton* (4), the leading English case which warrants the interference of the Courts in these matters, the Courts' order of injunction preserved the *status quo ante*. Compare also Wallace, J., in *Sarvothama Rao v. Chairman, Municipal Saidapet* (5), "the ordinary Civil Court has the right to grant a proper temporary injunction restraining matter in *status quo ante* until the suit is tried". Nor is there any

question of irremediable damage, or indeed of any damage at all. The injury which is contemplated can at most only be such injury as an inhabitant of Madura town may suffer owing to a Councillor who will ultimately be proved not to have been duly elected temporarily taking his seat in the Council. It is difficult to conceive the circumstances which would give any substance to an injury of this sort; and there is no special allegation to this effect.

Accordingly I see no reason to grant an injunction, and dismiss this petition with costs.

Memorandum of objections will follow.

V. N. V.

N. H.

Petition dismissed.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL NO. 14 OF 1924.

March 18, 1925.

Present:—Justice Sir Ewart Greaves, Kt., and Mr. Justice Cuming.

SATISH CHANDRA GHOSH—

DEFENDANT—APPELLANT

versus

DEBENDRA NATH DE AND ANOTHER—

PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Rent not enhanced for long period—Inference—Holding held at fixed rent in perpetuity.

The fact that a holding has been held for a long period at a rent which has not been changed is a factor to be considered in deciding whether the holding is held in perpetuity at a fixed rent, but the fact that a landlord may not have thought fit to enhance the rent for a long number of years does not by itself make the inference inevitable that the holding is held at a rent fixed in perpetuity. [p. 821, col. 2; p. 822, col. 1.]

Letters Patent Appeal against the judgment of Mr. Justice Mukerji, dated the 24th of March 1924, in Appeal from Appellate Decree No. 2574 of 1921, reported as 85 Ind. Cas. 636.

Dr. Kanjilal and Babu Pramatha Nath Banerjee, for the Appellant.

Babu Hari Charan Ganguli, for the Respondents.

JUDGMENT.

Greaves, J.—This is an appeal under s. 15 of the Letters Patent from a decision of Mr. Justice Mukerji, dated the 24th March 1924. The suit out of which this appeal arises was brought by the plaintiff to eject defendant No. 1 from the land in suit as a trespasser. Defendant No 2 is the

(1) 24 Ind. Cas. 290; 38 M. 807; 27 M. L. J. 30; 18 C. W. N. 1089; 1 L. W. 520; (1914) M. W. N. 585; 16 M. L. T. 165; 20 C. L. J. 253; 16 Bom. L. R. 625; 12 A. L. J. 1155; 41 I. A. 314 (P. C.).

(2) 34 C. 97.

(3) 34 C. 101.

(4) (1881) 16 Ch. D. 143; 50 L. J. Ch. 31; 43 L. T. 464; 29 W. R. 117; 45 J. P. 111.

(5) 73 Ind. Cas. 619; 45 M. L. J. 23 at p. 36; 17 L. W. 431; (1922) M. W. N. 266; 32 M. L. T. 178; (1923) A. I. R. (M.) 475; 47 M. 585.

malik of the land and he granted a permanent lease of the land which consists of two plots to the plaintiff. The plaintiff went to take possession of the land and found the first defendant in occupation of the land. The first plot consists of two *bighas* and 13 *cottas* odd and the second of some 11 *cottas* and 15 *chhataks*. Both are situated in the town of Hooghly and the main contentions addressed to us in this appeal have been with regard to the first plot because I understand that the appellant admits that if he fails in his appeal with regard to the first plot he cannot succeed with regard to the second plot as his contentions with regard thereto are not so strong as with regard to the first plot. The first Court dismissed the suit and held that the Transfer of Property Act applied and not the Bengal Tenancy Act. He held that the bigger plot had been in possession of the appellant or his vendors, for some seven generations at a rent which had not been changed for a period of over 50 years and that the origin of the tenancy was unknown and he finally came to the conclusion that the rent was fixed in perpetuity and that the plots were transferable. The lower Appellate Court held that the Transfer of Property Act did not apply, that the land was *udbastoo bagat* land which means "outside the *bastoo*" and that although the rent had not been changed for a long period as it had not been let out for residential purposes there was no presumption as to the permanency of the tenancy and decreed the suit. Mr. Justice Mukerjee in the appeal to him dismissed the appeal and I understand that the main complaint with regard to his judgment is with regard to his finding on the question of recognition. After coming to the conclusion that the finding of the lower Appellate Court on this point was not sufficient the learned Judge examined the evidence for himself and it is said that instead of so doing he should have remanded the suit for a further finding with regard to recognition.

Three points were urged before us in this appeal. The first is that the Transfer of Property Act applied and not the Tenancy Act and that accordingly, the appellant could not be ejected without notice. Secondly, it was urged that on the facts, namely, holding of the land for some seven generations at the same rent it should have been held that the rent was fixed in perpetuity

and that, therefore, the holding was transferable. The third point is with regard to the course pursued by Mr. Justice Mukerji which, it is stated, is unjustifiable.

So far as the first point is concerned the land is described in the plaint as *udbastoo bagat* land and it is urged before us that it formed part of the compound of the *bastoo* and that the mere fact that vegetables and trees were grown there does not make it a horticultural tenancy but that it was really a part of the homestead and that the Judge in the lower Appellate Court was wrong in saying that the word "*udbastoo*" meant 'outside the *bastoo*' and that it should have been held that these words connote adjoin a '*bastoo*' as a part thereof. It is necessary to turn to the finding of fact of the lower Appellate Court on this point, which to my mind, whether it is right or wrong, disposed of this question as the finding is binding upon us. That finding is that the tenancy was not for residential purposes but that the holding was a horticultural holding governed by the Bengal Tenancy Act and there is this further finding that the evidence does not show that it was let out or even used for homestead or for residential purposes. Having regard to these two findings by the lower Appellate Court we think that the first point is concluded by the findings of fact of that Court.

So far as the second point is concerned we were asked to apply by analogy the provisions of s. 50 of the Bengal Tenancy Act to say that from the fact that the rent had not been altered for a period of 59 years the holding is held at a rent fixed in perpetuity and is, accordingly, transferable. There is no doubt that the fact that the holding has been held for a long period at a rent which has not been changed is a factor which must be taken into account. As has been pointed out by Mr. Justice Mukerji with regard to the two cases, referred to by Mr. Justice Manmatha Nath Mukerji, reported in 22 and 23 C. W. N. this is not the only inference that could be drawn from the holding having been held for a long period at the same rent for as Mr. Justice Mukerji points out in the case in 22 C. W. N., the fact that the landlord may not have thought fit to enhance the rent, as appears in that case for a period of 40 years, does not make the inference inevitable that the holding is held in perpetuity

at a fixed rent. If one turns again to the judgment of the lower Appellate Court it will be found that a good deal of light is thrown upon the question by the findings of that Court. What the Subordinate Judge says is that in the present case it may be observed that there were good reasons why the rent was not sought to be varied and this fact will appear from the Santra's own evidence and the evidence of the Ghosh defendant's brother that for 25 or 30 years the Santras had left the place and the land became overgrown with jungle. Therefore, we think that the lower Appellate Court was justified in saying that it could not draw the inference that it was asked to draw from the fact that there was no change in the rent for a period of over 50 years. Upon the facts and circumstances of the present case no inference can be drawn from that so as to establish that the rent had been fixed in perpetuity and, therefore, if instead of referring to cases upon different facts the facts of the present case are examined it will be found that the lower Appellate Court was justified in the finding at which it arrived on this point.

Then we come to the third point, namely, that there should have been a remand and that the learned Judge should not have investigated the facts for himself. After so doing, Mr. Justice Mukerji came to the conclusion that there was no recognition by the landlord of the present appellant and he stated his reasons for the conclusion at which he arrived. Here again I should like to refer to the judgment of the lower Appellate Court once more on this point and with all respect to Mr. Justice Mukerji I think myself that this judgment is sufficient to dispose of this point of recognition. What the learned Judge says is this: "The evidence regarding recognition consists of the several *dakhilas* obtained on payment of rent after the defendant's purchase. These show no substitution but acceptance of rent as *gujrat*. This appears to have been done after the transfer and the *gomasta* had possibly notice of the transfer. The evidence of Moulvi Izad Bux (father of defendant No. 2) is that when the defendant began to clear the jungle he went there and asked the defendant to take settlement. It appears from the letter of the defendant to the Moulvi that the defendant must have taken time to consider about the matter and finally expressed his

willingness to be recognised on payment of Rs. 25, *nazar* simply without any agreement to pay any enhanced rent as demanded. The Moulvi preferred to make the substitution. The receipt of rent under such circumstances as *gujratdari* or *marfatwari* does not constitute recognition. The Moulvi says that he took his *gomastha* to task for having granted such *dakhilas* without his knowledge and at the earliest opportunity he refused to recognize the transfer. These facts clearly show that there was no recognition. The utmost that can be said is that the rent was taken with the prospective hope of getting *kabuliyat*, *selami* and enhanced rent and not in recognition of the transfer as creating any tenancy in favour of the transferee." Here again we think that we have a sufficient finding of fact that the so-called recognition was not in fact a recognition of the appellant as a transferee of the holding and we think that that finding disposes of the third point.

One further point remains with regard to the smaller plot. In this case the rent had only been paid at a uniform rate for a period of ten years. But it is stated that one Ekkari Ghosh from whom the appellant had purchased was recognised as a transferee and it is consequently urged that that recognition enures to the benefit of the present defendants. But as has been pointed out that recognition is merely a recognition personal to Ekkari and had nothing to do with the general question of recognition or the transferability of the holding.

For the reasons I have indicated the appeal fails and is dismissed with costs.

Cuming, J.—I agree.

Z. K.

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1372
OF 1922.

June 16, 1925.

Present:—Justice Sir John Bucknill, Kt.,
and Mr. Justice Macpherson.

Srimati PEARI DAI AND OTHERS—DEBTORS
—APPELLANTS
versus

NAIMISH CHANDRA MITRA AND OTHERS
—RESPONDENTS.

Registration Act (XVI of 1908), ss. 17, 49—Lease for period exceeding one year—Registration, absence of

—Possession delivered to lessee, effect of—Part performance, doctrine of, applicability of.

Plaintiffs were the owners of a certain *mahal*. Their agent addressed them a proposal in writing for granting a lease of the *mahal* on certain terms to certain persons who had approached him for such lease. Plaintiffs authorized their agent to grant the lease and to issue a *parwana* to the lessees. A *parwana* was eventually issued to the defendants purporting to grant them a lease of the *mahal* on the terms accepted by the plaintiffs for a period of five years and the defendants were put in possession of the *mahal*. Plaintiffs subsequently brought a suit to eject the defendants from the *mahal* on the allegation that the *parwana* being unregistered did not operate as a lease and that the defendants were consequently trespassers:

Held, that the doctrine of part performance applied to the case and that the plaintiffs were bound by the terms of the lease which they had authorized and could not eject the defendant from the *mahal*. [p. 825, col. 1.]

Appeal from a decision of the Subordinate Judge, Bhagalpur, dated the 15th July 1922, reversing that of the Munsif, Bhagalpur, dated the 22nd April 1921.

Mr. S. K. Mitter, for the Appellants.

Messrs. C. M. Agarwala and S. N. Sahay, for the Respondents.

JUDGMENT.

Bucknill, J.—This is a second appeal. The appellants were the plaintiffs in an action which they brought against a number of defendants for a declaration of their (the plaintiffs') right, title and interest to the extent of two-thirds share in a *mahal* called *aratghat*; they also applied for recovery of *khas* possession to the extent of their share and they asked for an adjudication that the defendants first party were trespassers and had acquired no title as lessees to the *ghat* by virtue of any valid settlement made to them on behalf of the plaintiffs. The facts in the case are extremely simple and the large majority of them are not even in issue. The plaintiffs were the owners of two-thirds share in this *mahal*; the principal value of this *mahal* appears to have laid in the fact that there was a ferry and that tolls were levied and collected at the *ghat*. It was the usual practice to let out the *ghat* to a lessee but it is said that sometimes the proprietors kept it in their own hands. Now, there is no doubt that the defendant second party was until some time in 1918 the *Naib* or manager of this property on behalf of the plaintiffs or some of them. In 1917 this *Naib* the defendant second party whilst in the plaintiff's employment made a proposal to the plaintiffs with regard to the future letting out of the *ghat*; a written applica-

tion or proposal appears to have been made by the *Naib* to the proprietors saying that he had the opportunity of effecting a lucrative lease with some persons whom he knew were anxious to acquire the rights in the *ghat*. The proposal contained the suggestion that these applicants would give Rs 200 annually (which was considerably more than what up to that time had been paid) and that the lease should be for five years. The *Naib* asked for instructions and orders. This seems to have taken place on the 15th July 1917. Now, on the 31st July of that year an order was passed by the proprietors in connection with this application; it was simply to the effect "*Naib* will do the needful". This was followed later by a formal letter from the proprietors to the *Naib* definitely accepting the offer and telling him to issue a *parwana* to the new lessee. On the 1st October 1917 it seems that the *Naib* did give a *hukamnama* or *parwana* to the new lessees.

The Munsif found all these circumstances as facts. He found definitely that all these transactions had taken place. He found that the lessees had actually been put into possession; he found that a quarrel had arisen between the plaintiffs and their *Naib* and that they had alleged that he had fraudulently granted this lease with their assent. This, however, he did not believe and he would undoubtedly have given judgment for the defendants had it not been that he was led to form an opinion upon a point of law which is the only point which has been seriously argued before this Court. This point was that the defendants relied upon the *parwana* to which I have already referred. It was urged before the Munsif that the lease or *parwana* must be registered as it purported to be a lease of immoveable property granted for five years and that, as it was not registered, it was impossible for it to be referred to or looked at by the Court and that in consequence the defendants were unable to prove that they had got any title. The Munsif remarking that he could not see his way to invoke any equity in favour of the defendants held that there could have been no valid settlement by lease and in consequence he decided in favour of the plaintiffs and ordered that their suit be decreed with costs.

Now, this decision of the Munsif of Bhagalpur which was dated the 22nd April 1921 was the subject of an appeal to the Subordinate Judge of that place who by

his judgment of the 15th July 1922 affirmed in every respect save one the decision to which the Munsif came. He, however, was of the opinion that it was not impossible to invoke equity in favour of the defendants and he came to the conclusion that it was necessary and proper to do so.

In consequence, as a matter of course, he had to reverse the judgment of the Munsif, he allowed the appeal and ordered that the plaintiff's suit be dismissed.

The point to which I have referred is the only point which is of any importance in this case. It has been argued very strenuously by the learned Counsel who has appeared for the appellants that it is impossible to invoke equity in favour of the defendant. He bases his argument upon s. 49 of the Indian Registration Act. This section reads;—

"No document required by s. 17 to be registered, shall—

(a) affect any immoveable property comprised therein, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered."

Now, it is admitted here that this lease for five years ought to have been registered. The learned Counsel has suggested that as under the provisions of s. 49, sub-s. (c) a document required to be registered shall not unless registered be received as evidence of any transaction affecting such property or conferring such power, this *hukum-nama* could not be looked at at all by the Court nor could any equity be utilised as arising from it in favour of the defendant. He refers in this connection to an instructive case *Sanjib Chandra Sanyal v. Santosh Kumar Lahiri* (1). The learned Judge (Mr. Justice Rankin) who decided that case held that he could not permit a document which was not registered but which ought to have been registered to be received in evidence as evidential of the title of a plaintiff who was seeking to enforce his rights under that unregistered document. On the other hand, however, a case of equal importance *Mahomed Musa v. Aghore Kumar Ganguli* (2) has been brought to our

notice. That was a decision of their Lordships of the Privy Council and there it was laid down very specifically that "when the actings and conduct of the parties are founded upon, as in the performance or part-performance of an agreement, the *locus penitentiae* which exists in a situation where the parties stand upon nothing but an engagement which is not final or complete is excluded. For equity will support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon". Now, it is, of course, difficult to say definitely that equity will override completely the specific provisions of ss. 17 and 49 of the Indian Registration Act and in the case of *Nilkanth Bhimaji v. Hanmant Eknath* (3), Mr. Justice Heaton in referring to the Privy Council case which I have just mentioned draws attention to the necessity of guarding oneself in stating definitely that the decision of their Lordships was intended to affect adversely the proper construction or maintenance of those sections of the Registration Act to which reference has been made. His Lordship says:—

"I feel quite certain that their Lordships of the Privy Council in giving judgment in *Mahomed Musa v. Aghore Kumar Ganguli* (2) did not intend either to modify or to limit that part of the enactment of the Indian Legislature which appears as ss. 17 and 49 of the Indian Registration Act, nor do I believe that the Privy Council ever have intended by their judgments to modify or limit that which has been enacted by the Legislature in India. So the effect of ss. 17 and 49 of the Indian Registration Act remains as totally unaffected as before, by anything that is said in the case of *Mohamed Musa v. Aghore Kumar Ganguli* (2)."

Now in this case before us it seems to me that it can be dealt with quite unhampered by any question of admissibility of this document. Personally I think that it is admissible and that equity can be invoked from it although it should have been registered and that we could draw an equity in favour of the defendant. But even if it was not admissible there was ample material upon which a Court may come to the same conclusion to which the Subordinate Judge has come, namely, that the equity here is clearly in favour of the defendant and must be given to him in relief. What have we

(1) 69 Ind. Cas. 877; 26 C. W. N. 329; 49 C. 507; (1922) A. I. R. (C.) 436.

(2) 28 Ind. Cas. 930; 42 C. 801; 17 Bom. L. R. 420; 21 C. L. J. 231; 28 M. L. J. 548; 19 C. W. N. 250; 13 A. L. J. 229; 17 M. L. T. 113; 2 L. W. 28; (1915) M. W. N. 621; 42 I. A. 1 (P. C.).

(3) 58 Ind. Cas. 415; 44 B. 881; 29 Bom. L. R. 992.

here in coming to the same conclusion from another point of view? We have findings of fact which show clearly that the Naib, that is to say, the manager of the plaintiffs asked for their consent to grant a lease for five years at Rs. 200 per annum to the lessees. He got this permission in a very definite form from the proprietors and he actually put the lessees into possession. The terms upon which the lease was to be granted appear clearly not only in what he offered in the application for instructions which the Naib made to the proprietors but in the proprietors' letter authorising him to grant the lease. How it can be seriously suggested after that that there was not a completed transaction not only on the face of the papers themselves but by a part performance, namely, the induction of the lessees into actual possession, I cannot understand. To allow the plaintiffs to succeed against their own nominees simply because the document which was given by the plaintiffs' agent to the new lessee did not comply with the provisions of s. 49 of the Registration Act, would appear to me most inequitable. In these circumstances I think that in this case the Subordinate Judge has taken the proper course. He has come to the conclusion that there was no ground for allowing the plaintiff to eject the defendants who were their own lessees. They could not take advantage of some flaw in a document, which has been produced by the defendants in order to show that their lease did not comply with the terms of the Registration Act nor could it be allowed that the lease which the defendants possessed against their own landlord should be defeated at his application.

I think, therefore, that this appeal should be dismissed with costs.

Macpherson, J.—I agree to the order proposed, this appeal should be dismissed with costs.

Z. K.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 64 OF 1924.

September 2, 1925.

Present:—Mr. Dalal, J. C.

DIRBIJOY SINGH AND OTHERS—
DEFENDANTS—APPELLANTS

versus

DRIGPAL SINGH AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Adverse possession—Possession of Hindu widow—Possession, when in her own right.

Where a Hindu widowed mother, who is not entitled to succeed to the property left by the widow of her deceased son, takes possession of the property on the death of such widow, she does so in her own right and the adverse possession enures in her and cannot be deemed to be referable to her son's estate. [p. 826, col. 2.]

Lajwanti v. Safa Chand, 80 Ind. Cas. 788; 51 I. A. 171; 22 A. L. J. 301; (1924) A. L. R. (P. C.) 121; 5 L. 192; (1924) M. W. N. 412; 20 L. W. 10; 2 Pat. L. R. 245; 28 C. W. N. 960; 26 Bom. L. R. 1117; 47 M. L. J. 935; 6 P. L. T. 1; L. R. 5 A. (P. C.) 94 (P. C.) and *Satgur Prasad v. Raj Kishore Lal*, 55 Ind. Cas. 486; 42 A. 152; 11 L. W. 384; (1920) M. W. N. 3; 24 C. W. N. 394; 38 M. L. J. 259; 18 A. L. J. 235; 2 U. P. L. R. (P. C.) 55; 22 Bom. L. R. 451; 46 I. A. 197; 27 M. L. T. 200 (P. C.), referred to.

First appeal against a decree of the Subordinate Judge, Hardoi, dated the 16th August 1924.

Messrs. *Ram Bharose Lal and Raj Narayan Shukla*, for the Appellants.

Mr. *Ishri Prasad*, for the Respondents.

JUDGMENT.—One Sheo Bakhsh left a son Ganga Singh and on the death of his son his mother Musammat Pohap Kuar succeeded to the estate of a separated Hindu as mother. This happened in 1897. Subsequently a childless widow of Sheo Bakhsh's brother Ranjit Singh died in 1906 and half the property held by her was taken possession of by Musammat Pohap Kuar. The defendants are the daughter's sons of Musammat Pohap Kuar.

On her death the plaintiffs who are the grandsons of another brother of Sheo Bakhsh by name Parwan Singh sued for possession of the property. Their suit as regards the property was decreed and hence the defendants have appealed.

There is some matter relating to two items of money taken by the defendants' father. That matter will be considered subsequently.

There can be no doubt that the plaintiffs are entitled to possession of the property, which Musammat Pohap Kuar held as mother of a separated Hindu. The defence of defendant No. 1 Drigbijai Singh was that he had been adopted by Ganga

Singh. Ganga Singh was young in 1897 when he died and had a young wife who survived him. There was no reason why he should adopt at the time. If there had been an adoption the defendant Drigbijai Singh would not have gone to the trouble of obtaining an admission of adoption from the plaintiffs' father Badri Singh (Ex. A-4). It appears that Badri Singh in a hurry to get half a loaf for fear the whole loaf may not come to him in his lifetime took half the property of the widow and made a declaration with respect to the other half that it belonged to Drigbijai Singh as adopted son of Ganga Singh. At the same time he professes to relinquish his rights. In reality he would have no rights to relinquish if Drigbijai Singh was really the adopted son of Ganga Singh. The adoption is merely a device.

Nor is the deed of gift by *Musammatt Pohap Kuar* binding on the plaintiff because of the admission of their father. The father had no interest in the property at the time and the plaintiffs claimed as reversioners in their own right and not through their father.

The question regarding one-sixth share of property, that is one-third of the property in suit, is of some difficulty. To make it clearer the property which *Musammatt Pohap Kuar* took possession of on the death of *Musammatt Talik Kaur* in 1906 was one-sixth of the various shares in villages noted in para. 12 of the written statement. This is admitted here by both parties. In deciding this issue I shall be dealing with that property and no other.

The case for the plaintiffs was that *Musammatt Pohap Kuar* took possession of one-sixth of this property under a family arrangement to remain in possession for the period of her life, the property then reverting to her son's reversioners. The defence was that she was in adverse possession. On this point the lower Court has decided in favour of the defendants that *Musammatt Pohap Kuar* was in adverse possession. On the evidence this was the only decision possible. There is no evidence of any family arrangement in 1906. *Musammatt Pohap Kuar* was entered as proprietor in the village records and she had no right to succeed to the property. The conclusion is that she held adversely to the father of the plaintiffs.

The second line of argument adopted on behalf of the plaintiffs was that even if

Musammatt Pohap Kuar was in adverse possession she held adversely for her son and that property also became the estate of her son. On her death, on this reasoning, the plaintiffs became the heirs of this property. The defence was that the adverse title was in herself and the defendants the daughter's sons of *Musammatt Pohap Kuar* were the rightful heirs.

I do not think that the interpretation put by the lower Court on the Privy Council case of *Lajwanti v. Safa Chand* (1) is correct. In that case though *Jawahar Mal* had a son *Jawahar Mal's* widows were put in possession of certain properties as widows of *Jawahar Mal*. Under a decree of the Chief Court of the Punjab the widows were put in possession in their right as widows of *Jawahar Mal* as against the next reversioners to the property of *Jawahar Mal*. Under these circumstances their Lordships held that their adverse possession was as widows and that these ladies had a widow's estate in their deceased husband's estate. At page 176* of the report they observe:—

"If possessing as widow she possesses adversely to any one as to certain parcels, she does not acquire the parcels as *stridhan*, but she makes them good to her husband's estate."

Here the succession did not raise any dispute on the death of *Musammatt Talik Kuar* which may be said to have been decided in favour of *Musammatt Pohap Kuar* as holding in right of her being a widow of *Sheo Bakhsh Singh* or mother of *Ganga Singh*. She took possession in her own right and the adverse possession enured in her and was not referable to her husband's or to her son's estate. The circumstances of the case of *Lajwanti* were different. Reference may be made to the previous Privy Council ruling in the case of *Sutgur Prasad v. Raj Kishore Lal* (2). There *Musammatt Dalla Kuar* was the widow of one *Bhawani Dayal* who predeceased his brother *Basant Lal*. On *Basant Lal's* death his two widows succeeded as life-holders

(1) 80 Ind. Cas. 788; 51 I. A. 171; 22 A. L. J. 304; (1924) A. I. R. (P. C.) 121; 5 L. 192; (1924) M. W. N. 442; 20 L. W. 10; 2 P. L. R. 245; 28 C. W. N. 960; 26 Bom. L. R. 1117; 47 M. L. J. 935; 6 P. L. T. 1; L. R. 5 A. (P. C.) 94 (P. C.).

(2) 55 Ind. Cas. 486; 42 A. 152; 11 L. W. 384; (1920) M. W. N. 3; 24 C. W. N. 394; 38 M. L. J. 259; 18 A. L. J. 235; 2 U. P. L. R. (P. C.) 55; 22 Bom. L. R. 451; 46 I. A. 197; 27 M. L. T. 200 (P. C.).

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and on their death Musammatt Dalla Kuar took possession, which possession was held to be adverse by their Lordships of the Privy Council. This adverse possession was held by their Lordships to render the suit by the next reversioners of her husband on her death to be time-barred and the suit of the next reversioners was dismissed. Under the circumstances of that case their Lordships did not hold that Musammatt Dalla Kuar held adversely as a Hindu widow in that she did not acquire the property as *istirdhan* but made it good to her husband's estate. If such had been the conclusion of their Lordships, the plaintiffs the next reversioners of Bhawani Dayal would have succeeded and not Satgur Prasad who had no interest as heir of Bhawani Dayal as he was the son of Bhawani Dayal's daughter's daughter. The appeal must succeed with respect to the property mentioned above.

As regards the amount of money made payable to the plaintiff by the defendants the findings of the lower Court are correct. A technical objection was raised that the money was taken by the defendants' father. This, however, does not appear to be the fact and even if it were the fact, there appears to be no doubt that the defendants have sufficient assets of their father in their hands to meet the claim.

I decree the appeal for one-sixth of the property mentioned in para. 12 of the written statement dated 13th March 1923. The property shall be detailed in the decree of this Court. Otherwise the appeal is dismissed. The appellant shall declare the relative valuation and in this Court parties shall receive and pay costs according to their success and failure. The lower Court's order as to costs of its Court is maintained.

S. D.

Appeal decreed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1295.
OF 1922.

March 3, 1925.

Present:—Mr. Justice Suhrawardy
and Mr. Justice Duval.

KUMUD CHARAN ROY—DEFENDANT—
APPELLANT

versus

SAMBHU CHANDRA GHOSH AND
OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s. 3, Sch. I, Art. 11-A—

Civil Procedure Code (Act V of 1908), O. XXI, rr. 100, 103—Execution of decree—Sale—Possession delivered to auction-purchaser—Application for restoration of possession, dismissal of—Suit for possession—Limitation—Appeal—Suit discovered to be barred by time—Appellate Court, duty of.

Defendant purchased certain property in execution of a rent-decree and took possession of it through Court. Plaintiff made an application under r. 100 of O. XXI of the C. P. C., for restoration of possession but the application was dismissed. More than a year after the date of the dismissal of the application plaintiff instituted a suit to recover possession of the property:

Held, that the suit was one under r. 103 of O. XXI of the C. P. C., and was barred by the operation of Art. 11-A of Sch. I to the Limitation Act. [p. 828, col. 1.]

An Appellate Court is bound to dismiss a suit if it finds that it is barred by limitation, even though limitation has not been set up in defence. [p. 828, col. 2.]

Appeal against a decree of the Subordinate Judge, First Court, Midnapore, dated the 2nd March 1922, reversing that of the Munsif, Ghatal, dated the 22nd December 1920.

Mr. Amarendra Nath Bose (with him Babu Arun Chandra Bose), for the Appellant.

Babus Rupendra Kumar Mitter and Hemendra Nath Chatterjee, for the Respondents.

JUDGMENT.

Suhrawardy, J.—In this appeal by the defendant two points have been taken: (1) that the plaintiff's suit is barred by limitation and (2) that the learned Subordinate Judge of the Court of Appeal below has not considered the question raised and decided by the Trial Court with regard to the identity of the land in suit with the *jama* alleged to have been purchased by the plaintiff.

With regard to the first point, the defendant in his written statement took the plea of limitation on the ground that the defendant had been in possession for more than 12 years and also on the ground that the suit was not brought within one year after the dismissal of the claim case. On these pleadings the 4th issue raised in the Trial Court was,—Is the suit barred by the law of estoppel. In deciding that issue the learned Munsif observed as follows: This suit has been brought within one year from the order under O. XXI, r. 100, C. P. C. He, however, dismissed the plaintiffs' suit upon other grounds one of which was that the plaintiff was out of possession for more than 12 years and also on the ground of special limitation of two years as the landlord had through other tenants kept

the plaintiff out of possession for more than that period. On appeal the learned Subordinate Judge considered the question of limitation only with reference to the finding of the lower Court of the plaintiff not being in possession within 12 years of the suit and having come to the conclusion that the plaintiff succeeded in proving his possession within the statutory period and also finding title in favour of the plaintiff decreed the plaintiff's suit. The question of limitation on the ground that the suit was brought more than one year after the decision of the claim case does not appear to have been raised in the Court of Appeal below. But it has been argued before us that we ought to consider this question as it is a pure question of law. We have accordingly gone through the papers and they no doubt show that the present suit is barred by limitation. According to the plaint filed in this case it appears that the defendant took possession through Court of the property in suit as purchaser of the *jama* in execution of a rent-decree against another person. He obtained delivery of possession through Court on the 3rd May 1918. The plaintiff, therefore, made an application under O. XXI, r. 100 which was registered as Miscellaneous Case No. 52 of 1918. That application was dismissed on the 23rd December 1918 and the present suit was instituted on the 2nd January 1920.

It is argued on behalf of the appellant that under Art. 11-A of the Limitation Act the suit ought to have been instituted within one year from the date of dismissal of the plaintiff's application under O. XXI, r. 100, namely, on or before the 23rd December 1919 and it not having been done so it is barred by limitation. I think this contention ought to prevail. Under Art. 11-A of the Limitation Act a suit has to be brought under O. XXI, r. 103 within one year from the date of the order upon an application by any person dispossessed of such property in the delivery of possession thereof to the decree-holder or purchaser to establish the right which he claims to the present possession of the property comprised in the order. By a year as we find in the General Clauses Act of 1897, is meant a year according to British Calendar. Under s. 12 of the Limitation Act in computing the period of limitation prescribed for any suit, the day from which such period shall be reckoned shall be excluded; so

that the date of the order, namely, the 23rd December 1918 should be excluded and time should be computed from the 24th December 1918. The calendar year commences from the 24th December 1918 as the first day of the year and will end on the 23rd December of the following year. The learned Vakil for the respondent, however, argues that as the year was completed on the midnight of the 23rd December, the following day, namely, the 24th December should be the last day for the institution of the suit and the Court being closed from that date till the 1st January, he was in time in filing the suit on the 2nd January 1920. This argument to my mind is groundless and no authority has been cited in support of it. It is clear that the order having been passed on the 23rd December 1918 a calendar year ended on the 23rd December 1919 on or before which date the suit should have been brought. The 23rd December 1919 was not a close day. It is, however, argued on behalf of the respondent that this point was not raised in any of the Courts below and, therefore, we should not entertain it. I have referred to the observation of the learned Munsif on this point; but as it is a question of limitation which we are bound to take cognizance of under s. 3 of the Limitation Act, I have gone into the facts of the case in determining this question. Section 3 says that every suit instituted after the period of limitation shall be dismissed, although limitation has not been set up as a defence. This suit, according to our judgment was instituted after the period of limitation and, therefore, we are bound to dismiss it.

It is next argued that this question involves some consideration of fact, namely, it is possible that the plaintiffs' application was dismissed for default or non-prosecution and, therefore, Art. 11-A should not apply. Without deciding whether or not Art. 11-A is applicable if the plaintiff's application under O. XXI, r. 100 was dismissed for default or not I find that the allegations in the plaint are quite explicit on this point. In para. 1 the plaintiff states that on the defendant taking unlawful possession of the property in execution of the decree, the plaintiff filed an application under O. XXI, r. 100 to recover back his possession which was registered as claim Case No. 52 of 1918, but owing to his misfortune that claim

case was rejected in a summary trial. That being so, there is no question of fact involved which may necessitate a remand to the lower Appellate Court. In this view I hold that the suit instituted by the plaintiff was barred by limitation. It is not necessary, therefore, to consider the other points raised in the appeal.

The result is that this appeal is allowed, the decree of the lower Appellate Court set aside and the plaintiff's suit dismissed with costs in all the Courts.

Duval, J.—I agree.

Z. K.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 324 OF 1923.

March 5, 1925.

Present:—Mr. Justice Kumaraswami Sastri and Mr. Justice Krishnan.

SALAKSHI AMMAL—PLAINTIFF—

APPELLANT

versus

DORAIMANIKA NADAN AND OTHERS

—DEFENDANTS—RESPONDENTS.

Hindu Law—Charitable trust created by Will—Undivided sons appointed trustees—Sons, whether take as joint tenants or tenants-in-common—Will, construction of.

When a Hindu father makes a gift of self-acquired property to his sons who are members of a joint family, unless a tenancy-in-common is inferred from the grant, the presumption is that the sons take as joint tenants with rights of survivorship. This principle applies with greater force to cases where the father creates a trust and appoints his sons as trustees with hereditary rights, since the presumption is that in cases of trust property, trustees are to be ordinarily treated as joint tenants. [p. 830, col. 1.]

Case-law considered.

A Hindu by his Will bequeathed certain properties to charity and appointed his two sons who were members of a joint family as trustees thereof. The Will provided that "the lands mentioned herein as relating to the said charities should not in any way be alienated by the above-mentioned two persons or their heirs by means of sale, etc., but they should enjoy them hereditarily and conduct the above-mentioned charities," etc. There was a partition by the brothers later by which the management of the trust properties was to continue as before :

Held, that on a construction of the Will, the sons took the trusteeship and the management of the trust properties as members of a joint family with rights of survivorship and not as tenants-in-common. [p. 830, col. 2.]

Appeal against a decree of the Court of the Subordinate Judge, Tanjore, in O. S. No. 78 of 1922.

Mr. T. M. Krishnaswami Iyer, for the Appellant.

Messrs. A. Krishnaswami Iyer and P. S. Chandrasekhara Iyer, for the Respondents.

JUDGMENT.

Kumaraswami Sastri, J.—This appeal arises out of a suit which relates to the trusteeship of a charity founded under the Will of one Sappanimuthu Nadar who died leaving two sons. The material portion of the Will so far as it relates to the trust properties runs as follows:—

"The lands mentioned herein as relating to the said charities should not in any way be alienated by the above-mentioned two persons or their heirs by means of sale, *otti*, hypothecation, security, partition, etc., but they should enjoy them hereditarily and conduct the above-mentioned charities."

After the death of the testator, his two sons were conducting the charities. One of the sons died leaving a minor son who died leaving the plaintiff, his mother as his heir. This suit is filed by the plaintiff who was the widow of one of the deceased sons and whose right is as mother of her son for a declaration that she is jointly entitled as trustee, to conduct the management of these properties.

The defence is that on the death of her son the first defendant who was the only male member of the undivided family was entitled to the office and that plaintiff has no right to succession.

The Subordinate Judge dismissed the suit on the preliminary ground that the plaintiff had no right as the office was a joint office and that the first defendant was entitled on the death of his brother and brother's son. After the testator's death there was a partition deed executed between the two sons which it is necessary to consider before dealing with the contentions raised. This deed refers to properties which they got under the Will and so far as the trust properties are concerned the only reference to them is in cl. 6 which runs as follows:—

"In respect of the properties mentioned in the D schedule we shall act in common as stated in the Will."

The question is, having regard to the terms of the Will, whether the two sons of the testator took the trusteeship and the management as members of a joint family or whether each of them took separate interests in it as tenants-in-common. So far as gifts by a father of self-acquired property

to his sons by Will are concerned, the decisions of this Court are to the effect that in the absence of a contrary intention expressed or implied from the terms of the Will, the sons must be presumed to take the property as joint tenants. The reason is that in the case of a grant to two persons who form members of a joint family the ordinary presumption is that the grant to them is as co-parceners. I may refer to *Nagalingam Pillai v. Ramachandra Tevar* (1), *Yethirajulu Naidu v. Mukuntha Naidu* (2), *Venkataramaiah Pantulu v. Subaramaniam Pillai* (3), *Indoji Jithaji v. Kothapalli Ram Charlu* (4) and *Rajarajeswara Dorai v. Sundarapandiyaswami Thevar* (5). There is no doubt a conflict of authority between the various High Courts on this question. The view taken in Allahabad and in Bombay is that, where property is given to persons without stating what interest they are, to take, they are to take as tenants-in-common. This question as to the presumption to be raised in cases of gifts by a father to his sons recently came before the Privy Council in the case of *Lal Ram Singh v. Deputy Commissioner of Partabgarh* (6) and their Lordships state the rulings of the various High Courts. As regards Madras authorities this is what their Lordships say: "In Madras upon the whole, the view seems to be that the father can determine whether the property which he has so bequeathed, shall be ancestral or self-acquired on the principle of *cujus est dare ejus est disponere* and that, unless there is expression of his wish that it should be deemed self-acquired, it is ancestral. The Privy Council summarised the Madras decision as stating that, where the father does not state that the sons shall take the property as if it was self-acquired property of the sons, it is to be deemed to be ancestral in their hands; or, in other words, that unless a tenancy-in-common can be inferred from the grant, the presumption is that they are joint tenants. I do not think that on this state of the authorities, I can go behind the decisions though my attention

has been drawn to a recent decision in O. S. A. No. 56 of 1922 where Mr. Justice Ramesam seems to doubt the correctness of *Nagalingam Pillai v. Ramachandra Tevar* (1). It was an *obiter dictum*, so far as the Original Side Appeal was concerned and I do not think that so far as Madras is concerned the question can be set at rest, except by a decision of the Privy Council. The question is how far the doctrine in these cases which relates to property bequeathed by a father to his sons would apply to cases where the father creates a trust and appoints his sons as trustees with hereditary rights. On principle I can see very little difference between the conferring of the office of trustee as regards a trust founded by the father by dedication of properties and the gift of properties to the sons. No authority has been cited which creates a difference merely by reason of the difference in the powers of the donees. In the case of properties given to them absolutely, of course, they will have full powers of alienation, in the case of a trust they would have such powers as the law gives the trustee. The nature of the estate taken either in property or in the trust must, in my opinion, be the same. And I may also say that in the case of a trust the leaning of English authorities is in favour of joint tenancy. Trustees are treated as joint tenants with rights of survivorship. This is the principle enunciated in the Trusts Act. So far as the present Will is concerned, reading the Will as a whole I find there is nothing to show that the testator intended his sons to take the office of trustee as tenants-in-common. On the contrary the words in the Will that they should not partition, or sell the properties but they should enjoy them hereditarily suggest that he wanted them to take them with all the incidents of joint family property.

As regards the partition it seems to me that the two brothers when they divided did not intend to divide the office; they expressly leave the office to be controlled by the Will and if they wanted to divide the office to the extent to which the law allows a division, they would certainly have fixed some turns of management, each brother managing it for a turn. The question as to what the rights and liabilities of the brothers or their heirs would have been, had there been such a division of management is not free from difficulty. But it is unnecessary for us to go into that

(1) 24 M. 429; 11 M. L. J. 210.

(2) 28 M. 363; 15 M. L. J. 299.

(3) 26 Ind. Cas. 393; 16 M. L. T. 489.

(4) 54 Ind. Cas. 146; 10 L. W. 498.

(5) 27 Ind. Cas. 283; 27 M. L. J. 694 at p. 716.

(6) 76 Ind. Cas. 922; 45 A. 596; (1923) M. W. N. 591; (1923) A. L. R. (P. C.) 160; 9 O. & A. L. R. 746; 21 A. L. J. 777; 26 O. C. 257; 33 M. L. T. 355; 10 O. L. J. 513; 51 I. A. 265; 47 M. L. J. 260; 29 O. W. N. 86 (P. C.).

question, because in the present case there has not been such a division and we are to look to the Will to see what their rights are. Returning to the Will, they take the right to management as joint tenants. There has been no partition between the brothers of this office nor is there any suggestion in the pleadings that after the death of one of the brothers there has been such a severance either by conduct or otherwise between the widow and the first defendant, the surviving brother. It is, therefore, unnecessary to go into the question whether *Meenakshi Achi v. Somasundaram Pillai* (7) which has been referred to by Mr. T. M. Krishnaswami Iyer rightly lays down the law if there was a partition. As there has been no partition of the office and as the first defendant is the sole surviving male member of the family, I think the plaintiff has no right to manage the property along with the first defendant. The right survives to him alone. In the view I take the learned Subordinate Judge was right in dismissing the suit. The appeal fails and is dismissed with costs.

Krishnan, J.—This appeal refers to a charitable trust founded by one Sappanimuthu Nadar. The trust has been created by a Will which has been filed in the case as Ex. A. Under that Will, he made his two sons who were the only other members of the joint family of himself and his sons the trustees of the trust. The words creating the trust are cited in the judgment of my learned brother just now delivered and I need not refer to them again. There is an express provision there that the properties are not to be alienated or even partitioned but that the two brothers were to take the properties jointly and enjoy them jointly and carry out the provisions of the trust which are set out. Subsequent to the death of Sappanimuthu Nadar there was a partition between the two brothers and that partition is evidenced by Ex. B which has also been filed in the case. One of the brothers Kandaswami Nadar died subsequently leaving a minor son called Rajappa Nadar. He also died and the plaintiff Salakshi Ammal who is his mother and the widow of Kandaswami Nadar succeeded to a woman's estate in the properties which had fallen to the share of Kandaswami; she has brought this suit to have it declared that she was entitled jointly with the first de-

fendant, the surviving brother, to manage this trust estate. The Subordinate Judge before whom the case came on for hearing has dismissed the suit without taking any evidence except the two documents already referred to, Exs. A and B. He has held that the first defendant is the sole surviving trustee now and that the plaintiff has no right to manage the trust. The plaintiff has appealed to us.

It has been argued before us very strenuously by Mr. T. M. Krishnaswami Iyer that this decision is erroneous, that the right of trusteeship was vested in the brothers as tenants-in-common and that on the death of one of the brothers his right passed to his heirs, first to his son and then to that son's mother, the plaintiff. It is that question we have to consider in this appeal.

The partition deed, Ex. B, which has been referred to has really no bearing on the case, because when partitioning the family properties between the two brothers by Ex. B, they expressly reserved the trust properties from the partition, for they say in para. 6 "in respect of the charity properties mentioned in the D schedule (that is the charity properties dealt with in the Will), we shall act in common as stated in the Will," so that, as far as the partition deed was concerned, the arrangement in the Will was left in tact although the parties divided their family estate otherwise. For the disposal of this case, therefore, we have only to look to the Will and see what arrangement has been made under the Will for the purpose of carrying on the trust after the death of one of the persons named in the trust. The question, therefore, whether *Minakshi Achi v. Somasundaram Pillai* (7) is rightly decided or not is not before us at all. It would have been before us if the two brothers had attempted by their partition deed to divide the trust office or made some arrangement regarding it between themselves. Such a thing not having been done, we need not consider the question as to whether a trust office is partible at all between the trustees. Turning now to the wording of the Will, it seems to me quite clear that on the words of the Will the two brothers were constituted trustees of this charity as joint tenants and not as tenants-in-common as argued by Mr. T. M. Krishnaswami Iyer. The ordinary presumption as regards trustees is that they are joint tenants, for, both under the Eng.

(7) 59 Ind. Cas. 464; 44 M. 205; 12 L. W. 232; (1920 M. W. N. 507; 39 M. L. J. 403,

lish Law and under s. 44 of the Indian Trusts Act, on the death of one trustee all the rights of the trustees rest in the surviving trustees. As pointed out by my learned brother, the cases that he has referred to show that in Madras the view is taken that, when a father makes a gift of or bequeathes self-acquired property of his to his children who are members of a joint family the ordinary presumption is that they take that property as joint tenants and not as tenants-in-common. It was suggested that this view was not a correct view but it has been followed in so many cases that until the Privy Council decide to the contrary I am inclined to think that we should follow that view. It is true that Mr. Justice Ramesam has expressed a doubt the correctness of the ruling in *Nagalingam Pillai v. Ramachandra Thevar* (1) in his judgment in O. S. A. No. 56 of 1922 but that is not a sufficient basis for us to refer the question to a Full Bench as after all that doubt is expressed as an *obiter dictum*. Assuming then that, in the case of a gift by a Hindu father, who has sons who are members of a joint family, the presumption will be that the property is taken by the sons jointly. The presumption will be all the greater in the case of trust property as trustees are ordinarily to be treated as joint tenants. Here in this Will it is clear that the author of the trust, the father, intended that the charity property should be kept in tact and be enjoyed jointly by the trustees and their heirs. In these circumstances there is no difficulty in holding that the rule of succession as regards joint property in a Hindu family must apply, and that when one trustee dies the members of the joint family will take the trusteeship according to the law of survivorship. That will exclude the claim put forward by the plaintiff who is only a female member of the joint family. I, therefore, agree with my learned brother in thinking that the Subordinate Judge was right in the view he has taken of this case and that the plaintiff's appeal fails and must be dismissed with costs.

V. N. V.

N. H.

*Appeal dismissed.***CALCUTTA HIGH COURT.**

LETTERS PATENT APPEALS NOS. 43 AND 44 OF 1923.

March 16, 1925.

Present:—Justice Sir Ewart Greaves, Kt., and Mr. Justice Cuming.CHANDRA KUMAR SHAHA CHOU-
DHURY AND OTHERS—DEFENDANTS—
APPELLANTS IN L. P. A. No. 43 AND
RESPONDENT IN No. 44*versus*Moulvi MAFIZAR RAHMAN CHOU-
DHURY AND OTHERS—PLAINTIFFS—
RESPONDENTS IN L. P. A. No. 43 AND APPEL-
LANTS IN No. 44.*Construction of document—Lease, duration of—
Covenant against assignment—Receipt of rent from
assignee—Estoppel.*

The owner of a *raiya* interest demised certain premises to certain persons on a *dar-raiya*. The lease provided for the lessees building a house for the purpose of a shop on the land and carrying on business therein and paying the rent therein named every year to the lessor. There was a further provision in the document that if the rent was not paid in any year the lessor would be entitled to recover *khas* possession of the land with arrears of rent and damages by suit. The document further provided that if the lessees did not carry on business on the land then they would give up the land to the lessor and that the lessees would not be entitled to give the land to any body else. The lessees failed to pay the rent stipulated in the lease and the lessor, instead of recovering possession of the premises, brought the property to sale in execution of his rent-decree and the property was purchased by the defendants first party. The interest of the lessor was purchased by the plaintiff. Defendants first party sub-let the premises to the defendants second party and the latter put up a permanent structure upon the land of which the plaintiff was aware. Plaintiff continued to receive rent from the defendants second party after the erection of the building. Sometime afterwards the plaintiff sued to recover *khas* possession of the premises on the allegation that the defendants first party had parted with their possession of the premises to the defendants second party in contravention of the terms of the original lease:

Held, (1) that the original lease was one for the lives of the lessees subject to its determination if they failed to pay the stipulated rent in any year or if they failed to carry on business on the land or if they transferred the lease to a third party; [p. 833, col. 1.]

(2) that by their purchase in execution of the rent decree the defendants second party had obtained a tenancy in the terms of the original demise, that is to say, during the lives of the original lessees determinable on the grounds mentioned in the lease; [p. 833, col. 2.]

(3) that the plaintiff being aware of the sub-lease in favour of the defendants second party and of the erection of the permanent structure by them and having received rent from them with such knowledge, could not eject the defendants on the ground that the defendants first party had parted with the possession of the premises to a third party in contravention of the terms of the original lease. [*ibid.*]

Letters Patent Appeals against the judgment of Mr. Justice Newbould, dated the

27th of June 1923, in Appeals from Appellate Decrees Nos. 1466 and 1467 of 1921.

Babu Narendra Kumar Das, for Appellants in Appeal No. 43 and Respondents in No. 44.

Babus Joges Chandra Roy and Mahomed Nurul Huq Choudhury, for the Respondents in Appeal No. 43 and Appellants in No. 44.

JUDGMENT.

Greaves, J.—This is an appeal under section 15 of the Letters Patent.

The question that arises for our decision arises on a *kabuliyat* dated the 15th Pous 1247. Thereby the owner of the *raiya* demised certain premises which are situated in the Town of Chittagong to the persons named in the *kabuliyat* in a *dar-raiyati*. The document provided for the lessees building a house for the purpose of a shop on the land and carrying on business and paying the rent therein named every year to the lessor. There was a further provision in the document that if the rent was not paid in any year the lessor would be entitled to recover *khas* possession of the land with arrears of rent and damages by suit. The document further provided that if the lessees did not carry on business on the land then they would give up the land to the lessor and that the lessees would not be entitled to give the land to any body else. The contentions before the Courts below and before Mr. Justice Newbould were on behalf of the plaintiff that this was a tenancy-at-will which could be determined by proper notice whereas the defendants contended that upon the true construction of the document it was a permanent lease. Mr. Justice Newbould held that the lease was not a permanent one and that it had been determined by six months' notice which had been given. It seems to us that upon the true construction of the document the lease was one for the lives of the lessees subject to its determination if they failed to pay rent in any year or if they failed to carry on business on the land. There was a further right of re-entry if the lessees transferred the lease to any one else. The plaintiff purchased the interest of the original lessor and defendants Nos. 1 to 8 purchased at an execution sale the interest of the original lessees. Defendants Nos. 9 to 14 are the sub-lessees of defendants Nos. 1 to 8. When the original lessees failed to pay rent the lessor undoubtedly could have recovered possession

under the provisions of the *kabuliyat*. Instead, however, of taking this obvious course in execution of the rent-decree which they obtained they brought the property to sale and what was sold was the right of the judgment-debtor. Therefore, it seems to us that the effect of the execution sale coupled with the receipt of rent by the lessor thereafter was to create in defendants Nos. 1 to 8 a tenancy in the terms of the original demise, that is to say, during the lives of the original lessees determinable on the grounds which I have indicated. In the year 1909 according to the defendants or in the year 1914 according to the plaintiff a permanent structure was erected by the defendant No. 9 upon the land. According to the finding both of the Munsif and of the lower Appellate Court this erection was made with the knowledge of the plaintiff and subsequent to this rent was received by the plaintiff from defendants Nos. 1 to 8. It seems to us, therefore, that the plaintiff must have known of the sub-lease which was executed so long ago as 1891 and subsequent thereto and to the erection of a *pucca* building on the land he received rent with the knowledge of the sub-lease and erection of the *pucca* building on the land. Accordingly, it seems to us that the plaintiff cannot now eject the defendants on the ground that they have parted with their possession of the property to somebody else and we think that the plaintiff's suit must fail for the reasons which we have indicated. If the original lessees are dead it may be that in a subsequent proceeding the plaintiff will be entitled to recover possession of the land; but that question has not been raised in the suit and cannot be gone into in this proceeding.

The result is that the judgment appealed from was in our view not correct and the plaintiff's suit must fail.

The appeal, accordingly, succeeds with costs.

With regard to Appeal No. 44 of 1923 for the reasons which I have indicated this must fail and must be dismissed with costs.

Cuming, J.—I agree.

Z. K.

Appeal dismissed.

PATNA HIGH COURT.APPEAL FROM APPELLATE DECREE No. 1321
OF 1922.

June 10, 1925.

Present:—Justice Sir John Bucknill, Kt.
Sheikh MOHAMMAD SADIQ—APPELLANT
*versus***BASGIT SAH AND OTHERS—RESPONDENTS***Commissions—Commissioner appointed to carry out demarcation—Report unsatisfactory—Procedure.*

The fact that a Commissioner who has been appointed to ascertain the proper demarcation and site of the property in dispute in a suit has made a muddle of his enquiry should not in any way prejudice any of the parties to the suit. If the Court finds that the Commissioner's work is unsatisfactory, the proper procedure is to appoint another Commissioner who should carry out his work in accordance with the instructions of the Court.

Appeal from an order of the Subordinate Judge, Motihari, dated the 19th September 1922.

Mr. Hareswar Prasad, for the Appellant.

JUDGMENT.—This is a second appeal. It is a very simple matter although it is unfortunate that owing to some apparent misunderstanding there have already been no less than three or four judgments written in connection with the matter. The appellant who was the plaintiff brought a suit for a declaration of his *raiya* title to a certain plot of land and for recovery of possession thereof. Now, apparently, when the case came before the Munsif in the first instance he decided in the plaintiff's favour. But on appeal to the Subordinate Judge, it would seem that, on the ground that the Commissioner who had been appointed to ascertain the proper demarcation and site of the property in question had not been cross-examined, the Munsif's judgment was set aside and that the matter was remanded to the Munsif in order that the Commissioner might be cross-examined. The matter went back to the Munsif and the Munsif, after having had the Commissioner cross-examined, on this occasion dismissed the plaintiff's case. The ground upon which he dismissed the case appears, so far as I can see, to have been that the Commissioner had made some mistakes in the way in which he had set about his work, and in consequence, the Munsif thought that the plaintiff had failed to prove his case; he, apparently, not relying upon any evidence other than that of the Commissioner. The Munsif then sent the matter back to the Appellate Court with his recommendation and the Subordinate Judge came to the conclusion

that the Munsif's finding was correct. Again so far as I can see, the ground for this decision was simply that the Commissioner had made a bungle of his investigation. Now, this application came up for admission in second appeal and on its admission it seems to have been pointed out that the fact that the Commissioner had made a muddle of his enquiry should not in any way have prejudiced the plaintiff's position in the case. I have no doubt that what the Munsif should have done, if he found that the Commissioner's work was unsatisfactory, was to have appointed another Commissioner who would carry out the work more satisfactorily or at any rate in a manner intelligible and suitable to the Munsif's understanding. In these circumstances I think it is clear that this appeal must be allowed with costs and that the case must again unfortunately go back to the Munsif to be re-tried; and, so far as I can see, it would be highly desirable that another Commissioner should be appointed to make such observations and demarcations as are necessary to show whether or not the plaintiff's claim is sustainable. The learned Vakil who at one time appeared for the respondents to this appeal has appeared in Court this morning and has informed me that he has no instructions with regard to this matter. The respondents, therefore, to this appeal have not been represented before me.

Z. K.

*Appeal allowed.***MADRAS HIGH COURT.**SECOND CIVIL APPEALS NOS. 1328 TO 1333
OF 1923.

February 26, 1925.

Present:—Mr. Justice Phillips.
KONDAGUNTA MRUTYANJAI AH
AND OTHERS—PLAINTIFFS—APPELLANTS
*versus***MALLE VENKATAPATHIGADU****AND ANOTHER—DEFENDANTS—RESPONDENTS.***Madras Estates Land Act (I of 1908), s. 77—Rent—Dry and garden lands, irrigation of, with landlord's tank water—Compensation, rate at which, payable—Cess payable to village servants, inclusion of, in patta.*

Under the Madras Estates Land Act, when dry and garden lands are irrigated by the *raiya* with tank water with the landlord's permission, there is no invariable rule that the wet rate is the proper rate to fix for such lands. The landlord is entitled to reasonable compensation for the use of his water. The question has to be determined in each case as to the reasonable amount of compensation and the proper method of fixing the rate chargeable.

Venkatachalam Chetty v. Ayyamperuman Tevan, 53 Ind. Cas. 33; 42 M. 702; 37 M. L. J. 248; (1919) M. W. N. 768, referred to.

A provision for payment of a certain cess, not to the landlord but to village servants, should not be inserted in a *patta* tendered to the *raiyat*.

Second appeals against a decree of the District Court, Nellore, in A. S. Nos. 74 and 80 to 89 of 1921 respectively, preferred against those of the Court of the Deputy Collector, Gudur Division, in S. S. Nos. 229, 231, 232, 234, 235, 236, 238 to 241 and 244 of 1919.

Mr. A. Krishnawami Iyer, for the Appellants.

Mr. B. Somayya, for the Respondents.

JUDGMENT.—The main point raised in these appeals is the rate to be charged when dry and garden lands are irrigated with tank water with the landlord's permission. The appellants claimed $2\frac{1}{2}$ tooms per quarter *cawnie*. Presumably they mean $2\frac{1}{2}$ tooms of paddy but this is not quite clear from the *patta* itself. The Deputy Collector found that Rs. 6 per acre was reasonable rate and fixed that amount. His finding is accepted by the District Judge, and it is now contended that this finding cannot be supported. Neither the first nor the lower Appellate Court has given definite reasons for considering this reasonable but the Deputy Collector who is a Revenue Officer must have been aware of the fact that the highest wet rate levied by Government in the Nellore District is Rs. 6 per acre, and it was open to him to act on that knowledge and come to the conclusion that he did. The tenants made an offer at this rate which he accepted. The Judge has merely agreed with him, but I do not see any reason for setting aside the finding. It is, however, argued that under the law, the wet rate is the proper rate to fix for such lands, and reliance is placed on a ruling in *Venkatachalam Chetty v. Ayyamperuman Tevan* (1) to which I was a party. In that case it was held that the landlord was entitled to reasonable compensation for the use of his water, a principle which has been acted upon consistently by this Court. In the circumstances of that particular case, it was held that the charge of *sarasari*, which is the wet rate, was not unreasonable in view of the fact that there had been an old custom in that *zemindari* to levy that rate; but this is not an authority for saying

that the reasonable amount of compensation must be the same in every village or district, i. e., wet rate. In the present case, both the Courts have found what is the reasonable amount of compensation, and what was the proper method of fixing the rate chargeable. I see no reason to interfere with that finding.

The second ground of appeal relates to the charge on garden lands liable to submersion. This ground was not taken in the appeal memorandum, and although additional grounds have been filed, no valuation of this claim has been given and no stamp duty paid. So I must decline to discuss it.

The third point is that the provision for payment to village servants of a certain cess should be inserted in the *patta*. The payment is not to be made to the landlord but to the village servants, and it is a question between them and the *pattadar*. The lower Courts were, therefore, right in ordering that this clause should be omitted. The appeal is accordingly dismissed with costs. Costs will only be payable in Second Appeal No. 1329 to 1332 and 1334, and Vakil's fee for all these appeals together is fixed at Rs. 100.

V. N. V.

S. D.

Appeals dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 2560 OF 1922.

April 22, 1925.

Present:—Mr. Justice Suhrawardy
and Mr. Justice Duval.

PRIA NATH CHATTERJEE AND ANOTHER
—DEFENDANTS—APPELLANTS

versus

LAKSHMI NARAYAN BHATTACHARJYA AND ANOTHER—PLAINTIFFS—
RESPONDENTS.

Trust—Estoppel—Trustee, whether can deny validity of trust—Trustee, whether can buy trust property—Partner of trustee, whether can buy—Purchase by two persons—Shares undefined—Presumption as to half share of each—Bona fide purchase by person jointly with trustee—Purchase, whether affected in respect of half share of bona fide purchaser—Rulings, interpretation of.

After a trustee has taken possession of properties as trustee and dealt with them in the capacity of a trustee, he is estopped from disputing the validity of the trust. [p. 836, col. 2.]

A trustee for sale cannot purchase. A trustee, even if he be not a trustee for sale, can buy only subject to certain limitations. [p. 837, col. 1.]

Manohar Mookerjee v. Peary Mohan Mookerjee, 54

(1) 53 Ind. Cas. 33; 32 M. 702; 37 M. L. J. 248; (1919) M. W. N. 768.

Ind. Cas. 6; 30 C. L. J. 177 and *Peary Mohan Mukerjee v. Monohar Mukerji*, 62 Ind. Cas. 76; 48 C. 1019; 34 C. L. J. 86; 41 M. L. J. 68; 14 L. W. 104; 23 Bom. L. R. 913; (1921) M. W. N. 554; 19 A. L. J. 773; 2 P. L. T. 725; 26 C. W. N. 133; 30 M. L. T. 24; (1922) A. I. R. (P. C.) 235; 48 I. A. 258 (P. C.), referred to.

When purchase is made through a trustee or in the name of a trustee, though for the benefit of a third person, it is as bad as the purchase by the trustee himself. [p. 838, col. 2.]

Dhonendra Chunder Mookerjee v. Mutty Lall Mookerjee, 2 I. A. 18; 23 W. R. 6; 14 B. L. R. 276; 3 Sar. P. C. J. 408; 3 Suth. P. C. J. 53 (P. C.), relied upon.

A partner of a trustee or any person from whom he may directly or indirectly derive benefit by reason of the purchase, cannot purchase a trust property from the trustee. [p. 839, col. 2.]

Ex parte Forder, (1881) W. N. 147 and *Farrar v. Farrar*, (1888) 40 Ch. D. 395; 58 L. J. Ch. 185; 60 L. T. 121; 37 W. R. 196, referred to.

If the shares of two purchasers of property are not defined, the presumption is that they have one-half share each. [p. 840, col. 2.]

If property is purchased by two persons, one of whom owing to some inherent incapacity in him or owing to his original relation with the property is incapable of acquiring any title to it, the title of the other purchaser is not affected by reason of the incapacity of his co-purchaser. Therefore, if a purchase is made by a *bona fide* purchaser jointly with a trustee, the purchase is invalid and inoperative only in respect of half share of the trustee. [p. 838, col. 2; p. 840, col. 2.]

A ruling should be construed on the facts on which it is based. [p. 838, col. 1.]

Appeal against the decree of the Fourth Additional District Judge, 24-Perganas, dated the 31st May 1922, affirming that of the Officiating Subordinate Judge, First Court, of that district, dated the 22nd December 1919.

Messrs. Mohendra Nath Roy and Sarat Chandra Mukerjee, for the Appellants.

Messrs. Gopal Chandra Chakraverti and Ram Chandra Majumdar (with him Babus Indu Bhusan Mukerjee and Rupendra Kumar Mitter), for the Respondents.

JUDGMENT.

Suhrawardy, J.—The facts upon which the present suit was brought by the plaintiffs-respondents are these: On the 18th September 1896 and 1st July 1899 one Sashi Bhusan Bhattacharjee husband and father of the plaintiffs borrowed certain sums on notes of hand from defendants Nos. 1 and 2. On the 5th December 1902 Sashi Bhusan Bhattacharjee and his co-sharers including defendant No. 2 executed a deed of trust in favour of two co-sharers one of whom was defendant No. 1 Priya Nath Chatterjee. Under the deed the trustees took upon themselves the charge of all necessary duties for the management and protection of the joint estate. In December 1903 Sashi Bhusan died leaving a

widow plaintiff No. 2 and two sons plaintiff No. 1 and one Haladhar. Haladhar subsequently died childless leaving his mother the 2nd plaintiff as heir. On the 3rd April 1904 the defendants Nos. 1 and 2 sued the two sons of Sashi Bhusan on the hand-notes and on the 23rd August obtained a decree against them as representing the estate of Sashi Bhusan for Rs. 4,348. This decree was subsequently executed and Sashi Bhusan's share in the property described in the Schedules *ka* and *kha* of the plaint were sold in auction and purchased by defendants Nos. 1 and 2 (appellants) for Rs. 1,200. On the 31st March 1905 an application made by plaintiff No. 1 and Haladhar under ss. 244 and 311 of the Code of 1882 was dismissed. The present suit was brought on the 12th September 1918 by the plaintiffs for setting aside the decree and the sale in execution thereof as fraudulently obtained and for recovery of, or in the alternative, for confirmation of possession of the property in suit. Both the Courts below have agreed in decreeing the plaintiff's suit and setting aside the decree and the execution sale held on the 18th of December 1904, not on the ground that the sale was bad under the C. P. C., but on the ground that defendant No. 1 being a trustee was not competent to purchase the property. The learned Additional District Judge on appeal found that defendant No. 2 never acted as trustee to the properties in question. But relying on a certain decision of their Lordships of the Privy Council the learned Judge held that the entire sale was bad and ought to be set aside.

The defendants Nos. 1 and 2 have appealed and on their behalf several points have been taken. It is first contended that the trust deed of 1902 did not create such a valid trust as to constitute defendant No. 1 a trustee in law and make the purchase by him invalid. This point was not taken in any of the Courts below and we do not think that we should allow the appellants to raise it for the first time in this Court. It is a violation of the fundamental principle of estoppel and equity to allow the trustee to raise it after he has taken possession of the properties as trustee and dealt with them in the capacity of a trustee.

The next point taken is that the purchase by defendant No. 1 is not necessarily illegal as he was charged with the management of the properties only and was not a trustee

for sale. The law on this point is hardly open to controversy due to the decisions of the English Courts and of the Privy Council. In the case of *Manohar Mookerjee v. Peary Mohan Mookerjee* (2), it is observed: "It is equally well-settled that a trustee for other purposes than for sale cannot purchase the property where the purchase would conflict with his duty respecting it, or his position in regard to it; but in this class of cases there is no absolute rule against his purchasing the trust property from his *cestui que trust*, although Courts of Equity always regard such transactions with the utmost jealousy and, will not hesitate to set them aside if their fairness is not conclusively established". This case of *Peary Mohan Mukerjee v. Manohar Mookerjee* (2) was taken to the Privy Council and their Lordships in affirming the judgment of this Court remarked thus: "A trustee for sale cannot purchase; he cannot purchase because the same person cannot be both vendor and purchaser, and he who acts for another cannot also act for himself. But even if he be not a trustee for sale, if in any capacity he is trustee of the estate, although his incapacity to buy is not absolute and is subject to different limitations it is equally well-settled". In the present case the finding of fact of the Courts below is that the property was purchased at a wholly inadequate price. In consideration of the fiduciary relation existing between the parties and of the fact that the properties were sold at such an inadequate price and the other circumstances I think that the decision of the Courts below with regard to the purchase by the defendant No. 1 is correct and must be upheld.

It is argued in the third place that assuming that the sale of the trust property was bad it did not affect property No. 4 of the plaint inasmuch as it was not included in the trust properties and covered by the trust deed of 1904. The learned Judge has found that property No. 4 described in schedule *kha* was taken possession of by defendant No. 1 as a trust property who dealt with it and managed it as such and had complete control over it for that

purpose. On this finding the defendant must be taken to be a trustee appointed by consent or conduct of the party or as a trustee *de son tort*. In any view his possession with regard to this property was not in any way different from that in respect of the other property.

It is next argued that if the sale is to be set aside and the properties restored to the plaintiffs such restoration must take place on terms on equitable grounds, namely, that the plaintiffs should be held bound to pay the defendants the full amount of the decree, now that the defendant's claim under the decree has been extinguished by lapse of time. On this point also the appellants should not succeed. It was not a transaction between parties one of whom was an honest party as a *bona fide* transferee for value without notice. The defendant No. 1 while holding the position of a trustee brought the property to sale and purchased it at an inadequate price. On these facts no equity can arise in favour of the defendant No. 1 and the principle that one who seeks equity must do equity does not apply. The Courts below have, however, decreed that the plaintiffs will pay to the defendants the amount for which the property was sold before they can recover possession of it.

The last question raised by the appellants requires more detailed consideration. It is maintained on behalf of defendant No. 2 that though the purchase of defendant No. 1 was bad in law the purchase by defendant No. 2 who was a joint decree-holder with defendant No. 1 should not be held illegal by the defect in the purchase by the other defendant and should not be set aside. The Courts below have taken the view that the entire sale ought to be set aside. The learned Judge on appeal observes as follows:—"The trustee whether he be a trustee for sale or for other purposes cannot purchase the trust property; and the purchase by him jointly with another person unconnected with the trust is liable to be set aside at the instance of the *cestui que trust*." For his reasoning he relied on the decision of the Judicial Committee in the case of *Dhonendra Chunder Mookerjee v. Mutty Lal Mookerjee* (3). If their Lordships of the Judicial Committee have laid down the law in that case as formulated by the learned Judge,

(3) 2 I. A. 18; 23 W. R. 6; 14 B. L. R. 276; 3 Sar. P. C. J. 408; 3 Suth. P. C. J. 53 (P. C.).

(1) 54 Ind. Cas. 6; 30 C. L. J. 177.

(2) 62 Ind. Cas. 76; 48 C. 1019; 34 C. L. J. 86; 41 M. L. J. 68; 14 L. W. 104; 23 Bom. L. R. 913; (1921) M. W. N. 554; 19 A. L. J. 773; 2 P. L. T. 725; 26 C. W. N. 133; 30 M. L. T. 24; (1922) A. I. R. (P. C.) 235; 48 I. A. 258 (P. C.).

his decision should be upheld. But on a close examination of the case it would appear that their Lordships did not intend to lay down any such broad proposition. It is hardly necessary to remark that a ruling should be construed on the facts on which it is founded. In the case of *Dhonendra Chandra Mookerjee v. Mutty Lal Mookerjee* (3), the facts were that one Sambhoo Chandra Mookerjee died leaving five sons as executors and residuary legatees. After his death a posthumous son was born of the name of Sreeman Chunder. One of the sons of Sambhoo Chunder, namely, Harish Chunder subsequently died leaving a Will under which he appointed his eldest brother Juggat Chunder and second brother Mohesh Chunder as his executors. Juggat did not join in obtaining Probate and subsequently renounced executorship and Mohesh remained the sole executor under Harish Chunder's Will. Juggat, the eldest son, as executor of his father's estate, brought a suit and obtained a decree against his father's brother for a sum of Rs. 1,70,000. Thereafter Mohesh as executor of Harish's estate sold to Juggat Chunder the one-sixth interest of Harish in the decretal amount for a sum of Rs. 5,000. The purchase was made in the name of Juggat but for the benefit of Juggat himself and Sreeman Chunder. On these facts their Lordships held that the purchase by Juggat, as he was a trustee of Sambhu's estate to which one-sixth share of Harish belonged, was illegal and should be set aside. But it was argued before their Lordships that as Sreeman Chunder was only a party to the purchase through Juggat the purchase by him was not affected by any defect in Juggat's title. In dealing with this question their Lordships made the following observations: "But if Juggat Chunder, holding the decree in a fiduciary position, could not purchase it for himself, could Sreeman Chunder employ Juggat Chunder, who held the decree in a fiduciary position, to purchase that decree for the benefit of himself and Sreeman Chunder jointly? It appears to their Lordships that the same objection would apply to Juggat Chunder's purchasing for himself and Sreeman jointly as there would be to his purchasing for himself alone. One of the reasons for setting aside transactions such as this is, that the purchaser is presumed from his position to have better means than the vendor

has of ascertaining the value of the property purchased. Well, then, if a person knowing that another holds a fiduciary position, and has a better knowledge of the value than the vendor, employs that person to purchase for him and the trustee purchases secretly in his own name for the benefit of that other, it appears to their Lordships that the sale is equally invalid against the person for whose benefit it is purchased by the trustee as it would be against the trustee himself; therefore, it was not necessary in this suit to file a bill to set aside the sale merely as to half the estate as against Juggat Chunder, and to allow it to stand as to the other half for the benefit of Sreeman Chunder." The ground upon which this pronouncement was made is that when purchase is made through a trustee or in the name of a trustee, though for the benefit of a third person, it is as bad as the purchase by the trustee himself, because the rule of law which makes the purchase by the trustee for himself bad applies with equal force to the purchase made by him for the benefit of another, as in both the cases the trustee takes advantage of his special knowledge and connection with the property. Upon this decision is based the statement of law laid down in Lewin's Law of Trusts (12th Edition, page 571): "As a trustee cannot buy on his own account, it follows that he cannot be permitted to buy as agent for a third person: the Court can with as little effect examine how far the trustee has made an undue use of information acquired by him in the course of his duty in one case as in the other". *Dhonendra Chunder Mookerjee's case* (3), therefore is an authority for the proposition that if a trust property is purchased by the trustee as agent or *benamidar* of a third person such a purchase cannot be upheld. It does not follow that where purchase is made by a *bona fide* purchaser jointly with the trustee, the entire transaction should be set aside on the ground that a part of it is invalid. The learned Advocate for the respondent has relied upon this case and several other cases to which reference will shortly be made for the broad proposition that where a purchase is made by a trustee jointly with another person the whole transaction should be set aside. He has relied in support of his contention also upon the case of *MacPherson v. Watt* (4). A cursory

(4) (1877) 3 A. C. 254.

glance at the judgment of that case may appear to lend some support to the contention of the respondent. But a close examination will show that it did not lay down any such proposition. There were four houses belonging to two ladies. To a Solicitor of the name of Mr. John Watt the ladies through their brother expressed their desire to sell the houses. The Solicitor advised them not to advertise the houses in question for sale promising that he would obtain a purchaser. A few days afterwards John Watt presented his brother Dr. Watt as a purchaser for a certain price. The purchase was found to have been nominally made by Dr. Watt but was really made by John Watt himself. The House of Lords held that the purchase was bad and could not be enforced. It was argued at the bar that there was an arrangement between John Watt and his brother that of the four houses two would go to John Watt and two would remain the property of Dr. Watt. It was, therefore, urged that so far as the two houses which were to remain the property of Dr. Watt were concerned, the sale should be maintained. Lord Cairns, L. C., in advising the House referred to the proposal made to Dr. Watt by his brother in these words: "There are four houses to be sold, if you will buy two I will buy the other two, and we will get them at such and such a price, so much for your two, and so much for my two." Then the Lord Chancellor proceeds to observe: "It seems to me that in principle the case is exactly the same, neither better nor worse than it would have been, if, in place of Dr. Watt being beneficially interested in two of the houses, he had not been interested in any one of them and the person really interested in the whole had been John Watt. The only further observation I have to make is, that even as to the two houses in which Dr. Watt is interested, it seems to me impossible that the sale can be supported, for the sale as between the vendor and purchaser was one complete and entire sale, and even if you were to separate it into two parts, and to look at it as a sale, first of two houses to John Watt and then of two to Dr. Watt, the principle upon which, as between John Watt and his brother, the price was arrived at was this, that John Watt should have his two houses at one-half of the total price, and every mischief, therefore, which would exist, and which would render it impossible that an agent or a person in John Watt's posi-

tion, should purchase for his own benefit, would apply to the mode in which the price was fixed for the houses of which Dr. Watt was the purchaser". What his Lordship meant to say is that there was a secret understanding between two persons thus to divide the property amongst themselves, and the advantage taken by the trustee of his special knowledge or connection with the trust property was not only for the benefit of the trustee but also for the benefit of the other person. If, therefore, the purchase is made by the trustee for himself and for another person in the name of the other the sale is not enforceable on the principle that the rule of law which declares a purchase by the trustee to be bad applies with equal, if not greater, force to such a case.

Reference in this connection has also been made to the case of *Ex parte Forder* (5). That case has no bearing on the present question and only re-iterates the principle that the purchase made by a trustee for himself and another in whom he is interested is as bad as if it was made for himself. There the purchase was made in the name of the trustee's son who was a minor and a nephew of the trustee's partner in business. On these facts the Court held that the case fell within the principle of the cases which have decided that an assignee in bankruptcy cannot sell the bankrupt's estate to his partner in business or his Solicitor. The sale would, therefore, be void as contrary to the principle of the law even independently of the fact that one of the purchasers was a minor and legally incapable of entering into a contract. From this case Lewin on his book on Trusts draws the following proposition: "That a partner of a trustee or any person from whom he may directly or indirectly derive benefit by reason of the purchase cannot purchase a trust property from the trustee". In the case of *Farrar v. Farrar* (6), property was sold by the mortgagee to a corporation of which he was a member. It was argued by the plaintiff that the sale was invalid as it was a sale by a mortgagee to himself under the guise of a limited Company. Lindley, L. J., in examining this argument observed thus: "A sale by a person to a corporation of which he is a member is not, either in form or in substance, a sale by

(5) (1881) W. N. 117.

(6) (1889) 40 Ch. D. 395; 58 L. J. Ch. 185; 60 L. T. 121; 37 W. R. 196.

a person to himself. There is no authority for saying so. To hold that it is, would be to ignore the principle which lies at the root of the legal idea of a corporate body, and that idea is that the corporate body is distinct from the persons composing it. A sale by a member of a corporation to the corporation itself is in every sense a sale valid in equity as well as at law. There is no authority for saying that such a sale is not warranted by an ordinary power of sale, and, in our opinion, such a sale is warranted by such a power and does not fall within the rule to which we have at present referred. But although this is true, it is obvious that a sale by a person to an incorporated Company of which he is a member may be invalid on various grounds, although it may not be reached by the rule which prevents a man from selling to himself or to a trustee for himself. Such a sale may, for example, be fraudulent and at an undervalue or it may be made under circumstances which throw upon the purchasing Company the burden of proving the validity of the transaction, and the Company may not be able to prove it. Fraud in the present case is not now alleged; it was alleged in the Court below, and was then clearly disproved. But for reasons which will appear presently, the circumstances attending the sale were such as, in our opinion, throw upon the Company the burden of sustaining the transaction". This decision, in my opinion, lends some support to the appellant's contention that the purchase from the trustee by another person does not necessarily invalidate the transaction, but there may be circumstances which will throw burden upon such other person to prove that he was a *bona fide* purchaser for value and it may be difficult for a Court of Equity to sustain the transaction.

No case has been cited which may have direct bearing upon the facts before us. In this case the debt was contracted before the trust was created. To recover that debt a suit was brought and a decree was regularly obtained. The property was brought to sale in execution of that decree and purchased by the defendant No. 2. With regard to the character of this purchase both the Courts agree in finding that the decree and the sale were not vitiated by fraud and were regular in all respects. That being so, the purchase by defendant No. 2 can only be set aside if it can be established in law that a purchase

jointly with the trustee at an auction in execution of a decree is bad in law. It is not a case in which the trustee was the seller. It is a case in which the property was sold through the intervention of the Court in public auction, although the trustee was one of the parties to the execution. So far as defendant No. 2 is concerned he is not affected by the infirmity in the title of his co-purchaser. He had a decree in his favour which he was entitled to execute. His co-decree-holder joined with him in executing the decree. There was no duty cast upon him either in law or in equity to see that the co-judgment-creditor did not purchase the property. If the property is purchased by two persons one of whom owing to some inherent incapacity in him or owing to his original relation with the property is incapable of acquiring any title to it there is no reason why the title of the other purchaser should be affected by reason of the incapacity of the co-purchaser.

It is also argued in this connection that the sale should not be partially set aside but if it is set aside so far as defendant No. 1 is concerned, the entire sale ought to stand cancelled. This argument, I suppose, is based on the use of the words *setting aside* in connection with this case. The Courts below have also loosely used the same expression and they held that the purchase by defendant is liable to be set aside. The expression 'set aside' in this connection is not to be understood in the sense in which it is used in O. XXI, C. P. C. The effect of the decision so far as the defendant No. 1 is concerned is that the sale of the property to him is inoperative, ineffectual and unenforceable against the plaintiffs to the extent of his share. As the shares of the purchaser in respect of the property purchased are not defined it may be presumed that they have one-half share each. The sale so far as the half share of defendant No. 1 is concerned must, therefore, be held to be inoperative against the plaintiffs and the purchase by defendant No. 2 should prevail.

In the above view the appeal should be allowed in part, the decree of the Court below be set aside so far as it affects the interest of defendant No. 2 to the eight-annas of the properties in suit. The suit of the plaintiff as against defendant No. 2 to the extent of eight-annas of the properties in suit will stand dismissed. The decree

of the lower Appellate Court will be varied in the manner following: The plaintiffs will pay to defendant No. 1 Rs. 600 and the plaintiffs should recover possession of a half share of the properties in suit jointly with defendant No. 2. The defendant No. 1 will pay half of the costs of the suit in all the Courts to the plaintiffs and defendant No. 2 will recover half costs from the plaintiffs in all the Courts.

Duval, J.—The two chief points in this appeal appear to me to be these: (1) whether defendant No. 1's purchase will stand and (2) whether defendant No. 2's purchase will stand. Now, the finding of fact is that defendants Nos. 1 and 2 jointly lent money to the predecessor of the plaintiffs, obtained a decree after his death and purchased the property for the sum of Rs. 1,200, admittedly a most inadequate price for the property purchased. Another finding is that undoubtedly at the time of his purchase defendant No. 1 was the trustee of the estate, and that defendant No. 2 was not the trustee at all. It is also found, as a matter of fact, that there was no irregularity in obtaining the decree or in the conduct of the sale so as to justify the sale being set aside on ordinary grounds. The question then arises whether in view of the fiduciary relations existing between plaintiffs and defendant No. 1 the sale be declared void as regards him. As to that, the law appears to me to be perfectly clear. The trustee is not absolutely debarred from buying his *cestui que trust* property but the Court will look on such sale with the greatest suspicion and if there is the slightest doubt about its genuineness, it will set it aside. The finding of fact here is that the property was sold at a grossly inadequate price. That to my mind is sufficient to make the purchase of defendant No. 1 a nullity. As to defendant No. 2, he was not a trustee. In fact he was co-*cestui que trust* with the plaintiffs and there is nothing to show that he used defendant No. 1 who was the trustee, for the purpose of purchasing the property. A large number of cases have been cited before us but they do not cover the present case. In the present case the defendant No. 2 is a perfectly independent person though he undoubtedly joined with defendant No. 1 in the purchases at auction; he was, however, neither an assignee nor a *benamdar* of defendant No. 1 and he purchased as an ordinary member of the public

in the ordinary course of business. In this view I do not see how the sale so far as he was concerned can in the circumstances of this case be set aside. None of the cases cited goes so far as to say that merely because the purchase is joint therefore it should be set aside in so far as a purchaser such as he is found to be is concerned. In this view I agree with the judgment just delivered by my learned brother.

S. D.

Appeal allowed in part.

PATNA HIGH COURT.

SECOND CIVIL APPEAL NO. 1329 OF 1922.

June 11, 1925.

Present:—Sir Dawson Miller, Kt.,
Chief Justice, and Mr. Justice
Macpherson.

Shaikh MUSI KAZIM AND OTHERS
—DEFENDANTS—APPELLANTS

versus

Shaikh HAJI MUTASADDI AND OTHERS
—PLAINTIFFS AND Shaikh MUZAFFAR
MEDHI AND OTHERS—DEFENDANTS
—RESPONDENTS.

Evidence Act (I of 1872), s. 92—Registered deed—Evidence that property comprised in deed is different from that mentioned in deed, whether admissible.

Where a mortgage is effected by means of a registered deed the parties are precluded by the provisions of s. 92 of the Evidence Act from giving evidence that the property comprised in the deed is different from that which on the face of the deed appears to have been mortgaged. [p. 842, col. 2.]

Second appeal from a decision of the Additional Subordinate Judge, Saran, dated the 18th August 1922, reversing that of the Munsif, Siwan, dated the 19th August 1921.

Messrs. L. N. Singh and R. N. Prasad,
for the Appellants.

Messrs. A. B. Mukherji and B. B. Mukharji,
for the Respondents.

JUDGMENT.

Miller, C. J.—In the year 1866 Shaikh Farukh Hussain executed a deed of gift of *Mauza Hassanpurwa* in favour of his four sons Shaikh Azhar Hussain, Shaikh Mazhar Hussain, Shaikh Athar Hussain and Shaikh Asgar Hussain. There were at that time certain charges upon the property under two *zarpeshgis* and a simple mortgage bond executed by the donor. In 1870 the two elder brothers Azhar and Mazhar discharged the existing mortgages and

granted a fresh mortgage to the successors of the original mortgagees to cover the same debt and a further sum of Rs. 932 which was advanced to discharge another debt for costs in a suit which has been brought against their father the original donor. It is quite clear from the mortgage executed in 1870 that although the original mortgages which extended to an 8-annas share in the whole property were discharged the new mortgage was charged upon the 8-annas share of the two elder brothers only each of whom held a 4-annas share in the property and that the 8-annas share of the two younger brothers who were then minors was expressly excluded from the operation of the new mortgage. What rights the two elder brothers might have had against the two younger brothers to be re-imbursed for their share of the mortgage debt discharged by the transaction of 1870 it is unnecessary in this suit to consider. It appears that the interest of Shaikh Mazhar Hussain the second brother was sold in the year 1906 and purchased by one Saiyid Mazhar and from him the plaintiffs in the present suit purchased by two different *kabalas* in 1913 and 1916 the whole of that 4-annas share. The present suit is brought by the plaintiffs against the representatives of the other three brothers and the mortgagees, the *zarpeshgidars*, claiming a declaration that 2-annas out of the 4-annas share purchased by the plaintiffs which as I have said originally belonged to Shaikh Mazhar is free from the *zarpeshgi* incumbrance and that a 2-annas share of the interest held originally by the two younger brothers Athar and Asgar is charged with the *zarpeshgi* incumbrance. In other words the plaintiffs contend that a 2-annas share in the interests of each of the four brothers is subject to the mortgage and a 2-annas interest only in each of those shares. As I have already stated there is not the slightest doubt that the only property which was hypothecated by the mortgage of 1870 was the shares of the two elder brothers including the share purchased by the plaintiffs and, therefore, it is at first sight very difficult to see why the plaintiffs should be entitled to the relief which they claimed in this suit.

The revisional Record of Rights finally published in 1919 shows that it is the shares of the two elder brothers only that are subject to the incumbrance and that the shares of the two younger brothers now in the

hands of their descendants or transferees are free from incumbrance. The same thing appears in Register D in the Collectorate rolls. It was contended, however on behalf of the plaintiffs that the Record of Rights finally published in the year 1898 did show that the mortgagees were in actual possession of a 2-annas share of each of the four brothers or those who then represented them and, therefore, that it must be taken that at some time or other there had been a mutual arrangement between all the parties whereby the interest of the *zarpeshgidars* was taken as being an interest in a 2-annas share of each of the four brothers and not an interest in the 4-annas share of each of the two elder brothers. That entry in the Record of Rights is supported by certain other evidence which was relied upon by the learned Subordinate Judge such as a road, cess, return and certain rent decrees obtained by the *zarpeshgidars*. There was also some evidence to show that in recent years at all events the *zarpeshgidars* had paid the revenue in respect to a 2-annas share in the shares of the two younger brothers. Although there was a great deal of evidence the other way to show that no such arrangement had ever been come to or acted upon the learned Subordinate Judge accepted this evidence as proving that some private arrangement between the parties had been arrived at at some date or other which was left undetermined whereby the interest claimed by the *zarpeshgidars* under the mortgage was treated as an interest in other property than that which was actually mortgaged. He, therefore, passed a decree in favour of the plaintiffs granting the declaration which they asked.

In my opinion he was not entitled upon the facts in this case to do so. Nor was it permissible, in my opinion, for the plaintiffs to adduce any evidence which would go to show that there had been a variation of the terms of the written mortgage. I think that under s. 92 of the Evidence Act they were precluded even from giving evidence which would have the effect of showing that there had been a variation in the terms of a written agreement. The agreement was one which was required to be reduced to writing and registered. It was one which was in fact reduced to writing and registered and, therefore, even under the proviso No. 4 to s. 92 no evidence would be admissible to show any modification in the original agreement. The case of *Haridas*

Ranchordas v. Mercantile Bank of India (1) was relied upon by the plaintiffs in support of their contention. That, however, was a case in which the agreement sought to be modified was one which was not required by law to be in writing and which had certainly not been registered. Therefore under proviso No. 4 to s. 92 the evidence in that case was properly admitted. It follows, therefore, in my opinion, that the learned Subordinate Judge was wrong in granting the plaintiffs the declaration asked for in this case and his decision must be set aside and that of the learned Munsif restored.

I merely wish to say that as I have already intimated this suit is not concerned with what may be the rights of the plaintiffs against the shares of the two younger brothers or against the persons who now represent them.

That is a matter which, if any action is still permissible, must be the subject of another proceeding. It is certainly not possible in the present case upon the evidence before us to decide what the rights may be between the plaintiffs in this case who represent one of the elder brothers and those who now represent the younger brothers.

The appellants are entitled to their costs here and in the Court below.

Macpherson, J.—I agree.

Z. K. *Decree set aside.*

(1) 55 Ind. Cas. 522; 44 B. 474; 38 M. L. J. 387; 18 A. L. J. 359; (1920) M. W. N. 312; 22 Bom. L. R. 545; 2 U. P. L. R. (P. C.) 78; 12 L. W. 356; 47 I. A. 17; 27 M. L. T. 255 (P. C.).

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 604 OF 1923.

March 28, 1924.

Present:—Mr. Justice Odgers.

PRATHIPATI SURYANARYANA

—PLAINTIFF—PETITIONER

versus

PRATHIPATI SESHAYYA AND OTHERS—

DEFENDANTS—RESPONDENTS.

Court Fees Act (VII of 1870), Sch. II, Art. 17 (b)—Hindu joint family—Division in status—Partition by metes and bounds, suit for—Relief, whether can be valued—Court-fee payable.

The correct method of regarding the relief claimed in a suit for partition by metes and bounds by one

member of a Hindu joint family which has already become divided in status against the other members is that it is merely a prayer to change the form of enjoyment and can only be valued by deducting from the value of the plaintiff's share as ascertained in the partition the value of his beneficial enjoyment as co-parcener before partition. In such a case it is impossible to estimate the money value of the suit and the suit is governed by Art. 17 (b) of Sch. II to the Court Fees Act. [p. 844, col. 1.]

Kirity Churn Mitter v. Ananth Nath Deb, 8 C. 757; 11 C. L. R. 95; 4 Ind. Dec. (N. S.) 488, and *Rangiah Chetty v. Subramania Chetty*, 8 Ind. Cas. 512; 21 M. L. J. 21; (1910) M. W. N. 755; 9 M. L. T. 3, relied on.

Petition, under s. 115 of Act V of 1908, praying the High Court to revise an order of the Court of the Additional District Munsif, Guntur, dated the 23rd July 1923, in O.S. No. 205 of 1923.

Mr. B. Somayya, for the Petitioner.

ORDER.—This is a revision petition presented against the decision of the Additional District Munsif of Guntur in which he held that the plaintiff's suit had not been properly valued. He held that *ad valorem* Court-fee on the value of the property claimed must be paid.

Now the value of the suit is to be ascertained from the plaint and the plaint sets out that the suit is one for partition. It is brought by the plaintiff the younger brother of the 1st defendant. The 3rd defendant is the undivided son of the 1st and the 4th and 5th defendants, the sons of the 2nd defendant. According to the plaint, in the year 1912 it was arranged that a division should take place and certain vessels and working utensils were divided out into three equal shares. The 1st defendant had been the manager of the joint family and he was apparently unwilling to divide the rest of the property moveables and immoveables. The plaintiff has admittedly collected and applied to his own use certain rents from the family land, and it is alleged that the 1st defendant has done the same thing with regard to granting cowles of other portions of the family land which the plaintiff says the 1st defendant is liable to account for. The said lands are in the management of the 1st defendant and in the constructive possession of this plaintiff. The learned Additional District Munsif says that

"Having regard to the claim for rendition of accounts and for the recovery of past profits, it cannot be said that the plaintiff is in joint possession and enjoyment of the suit properties."

This I am unable to follow. The allega-

tion is clearly that the lands and some of the moveables have remained undivided and that the plaintiff, with regard to the land that has been leased by the 1st defendant, is in constructive possession thereof, which can only mean to my mind that he is in possession as a tenant-in-common the division in *status* of the joint family having, as stated, taken place in 1912.

Under the state of things the question is, under which provision of the Court Fees Act the matter falls? In the Full Bench case reported as *Rangiah Chetty v. Subramania Chetty* (1), a suit for partition by a member of a joint Hindu family—it was held by White, C. J., and Krishnaswami Aiyar, J., the majority of the Court that the suit was governed by s. 7, cl. 4 (b). Now partition having taken place, the question is whether the matter is not governed by the present Art. 17 (b) in Sch. II which would entail a Court-fee of Rs. 15. As stated by Krishnaswami Aiyar, J., the question “is really the value of the convenience of changing the form of the enjoyment of the plaintiff’s share.....It is not possible to estimate this difference in value or this convenience in the form of the enjoyment at a money value.” True he was there speaking of joint possession, but I do not think that that affects the applicability of those remarks to the present case. Ayling, J., who dissented from the majority of the Full Bench in that he held that the matter fell under Art. 17 (b) as amended also concurred in the opinion expressed in *Kirty Churn Mitter v. Aunath Nath Deb* (2) that the correct method of regarding the relief claimed in suits for partition was that it was merely a prayer to change the form of enjoyment and could only be valued by deducting from the value of his share as ascertained in the partition the value of his beneficial enjoyment as co-parcener before partition. That learned Judge also was of opinion that in such a case it was impossible to estimate the money value of the suit. I have not had the advantage of an argument on the other side but Mr. Somayya has put before me the facts fully and clearly so far as I am able to understand and I am of opinion that the decision of the learned Additional District Munsif is wrong. I think on the authority of the Full Bench case above quoted, the

proper valuation will be that which seems to have occurred to the learned District Munsif in one place in the course of his judgment, namely, Rs. 15.

The civil revision petition will be accordingly allowed. The Court-fee will be paid within ten days after the records are received in the lower Court.

V. N. V.

Petition allowed.

Z. K.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 37 OF 1923.

March 26, 1925.

Present:—Justice Sir Ewart Greaves, Kt., and Mr. Justice Cuming.

SUDHANYA KUMAR DAS AND OTHERS—
—PLAINTIFFS—APPELLANTS

versus

Shaik ISMAIL AND OTHERS—DEFENDANTS
—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 26, 183—Occupancy right acquired by under-raiyat, whether heritable—Custom, proof of.

The right of occupancy acquired by an under-raiyat is a right acquired by custom or usage and not by Statute, and before such right can be said to be heritable it must be proved by evidence that by custom or usage heritability is an incident of such right. The question is one of fact and not of law. [p. 815, cols. 1 & 2.]

Per Cuming, J.—Ordinarily the interest of an under-raiyat holding on an annual holding is not heritable. All that his heirs get is the right to remain on the holding until the end of the agricultural year. If he holds under a lease his heirs are entitled to succeed him in the tenancy and can be ejected without notice at the expiry of the lease. [p. 816, col. 1.]

It is inaccurate to speak of an occupancy holding. The right of occupancy is a right peculiar to a particular person not to a particular parcel of land or holding, and is a personal right. [p. 816, col. 2; p. 847, col. 1.]

Whatever may be the origin of a right of occupancy, heritability of such a right is a creature of the Statute created by s. 26 of the Bengal Tenancy Act, and outside the Statute there is no heritability of such a right. To determine if the occupancy right of an under-raiyat is heritable the Court must look to the Act itself. Such a right has been deliberately excluded from the operation of s. 26, but it is open to the under-raiyat to prove that by custom or usage the right is heritable. [p. 847, cols. 1 & 2.]

Letters Patent Appeal against the decree of Mr. Justice B. B. Ghose, in S. A. No. 2866 of 1920, dated the 11th April 1923,

(1) 8 Ind. Cas. 512; 21 M. L. J. 21; (1910) M. W. N. 755; 9 M. L. T. 3.

(2) 8 C. 751 11 C. L. R. 95; 4 Ind. Dec. (N, S. 488

reversing a judgment and decree, dated the 17th September 1920, of the First Subordinate Judge, Faridpur, confirming those of the Munsif, First Court, Bhanga, dated the 6th April 1920.

Babu Satindra Nath Roy Chowdhury, for the Appellants.

Babu Surendra Nath Das Gupta, II, for the Respondents.

JUDGMENT.

Greaves, J.—This is an appeal under s. 15 of the Letters Patent from a decision of Mr. Justice Bipin Behary Ghose, dated the 11th April 1922.

The question which arises for our decision is whether the learned Judge was right in holding that a right of occupancy acquired by an under-raiyat by custom descends to his heirs.

The point so far as I can ascertain has never been decided.

By s. 26 of the Bengal Tenancy Act if a raiyat dies intestate in respect of a right of occupancy the right descends like other immoveable property subject to any custom to the contrary and the learned Judge considers that once an under-raiyat proves that he has acquired a right of occupancy he is clothed with all the rights which have been described as the incidents of occupancy right under Ch. V of the Bengal Tenancy Act in the absence of any custom to the contrary and he thinks that to hold otherwise would be to give an under-raiyat an occupancy right which would be barren of any results. Chapter V deals with occupancy raiyats and nowhere in the Chapter is an under-raiyat mentioned or referred to except in s. 113 (1) where reference is made to an under-raiyat with rights of occupancy and it is not until s. 183 of the Act is reached that there is any reference to the occupancy rights of an under-raiyat acquired by custom or usage which are expressly saved by that section and I find it difficult to see on what ground the provisions of Ch. V should regulate or govern these rights.

Such rights are acquired by custom or usage and, in my opinion, before such right can be said to be heritable it must be proved by evidence in the usual way that by custom or usage heritability is an incident of such right and I think the case must go back to the Munsif for a decision upon evidence of the question whether by the custom or usage prevailing in that

part of the country where the land is situated upon the death of an under-raiyat who has by custom or usage acquired occupancy rights in his holding such right upon his death descends to his heirs. The Munsif will record his finding and return it to this Court as soon as possible. The parties will be at liberty to adduce fresh evidence if they so desire. Before I leave this appeal I should say that, in my opinion, the question is one of fact and not of law and I think that no useful purpose will be served by referring to the numerous cases which were cited before us.

The right of occupancy acquired by an under-raiyat is a right acquired by custom or usage and not by Statute and in order to determine whether heritability is an incident of the custom or usage you have to ascertain by evidence the nature and extent of the custom or usage.

I have not been able to satisfy myself that apart from Statute heritability is an invariable incident of occupancy right as was urged before us, it may have been so in the case of *khod khasht raiyats* who seem by custom to have acquired by long tenancy an hereditary right of occupancy: See Phillip's Law of Land Tenures, Bengal, p. 14 and I think from the terms of s. 6 of Act X of 1859, re-enacted by Act VIII of 1869 s. 6, that the right of occupancy thereby conferred on raiyats who had cultivated for more than 12 years was a heritable right, at least it would seem so from the wording of the section which refers to the holding of the father or other person from whom a raiyat inherits, although Sir Burns Peacock in *Ajoodhya Pershad v. Imam Bandi Begum* (1) doubts whether a right of occupancy was heritable and in other cases it has been held to be merely a personal right: see *Narendro Narain Roy v. Ishan Chandra Sen* (2) and *Bibi Suhodra v. Smith* (3).

Cuming, J.—This is an appeal against the order of Mr. Justice Bipin Behary Ghose reversing the order of the learned First Subordinate Judge of Faridpur who had reversed the order of the First Munsif of Bhanga. The learned Judge by his order dismissed the plaintiff's suit.

The plaintiff has appealed under cl. 15 of Letters Patent.

(1) B. L. R. Sup. Vol. 725; 7 W. R. 528.

(2) 13 B. L. R. 274; 22 W. R. 22.

(3) 20 W. R. 139 at p. 140; 12 B. L. R. 82.

The facts found are briefly these. The plaintiffs are *raiyat* and one Gedu was their under-*raiyat* with a right of occupancy. He died.

The plaintiffs now seek to eject his heirs on the ground that the occupancy right of an under-*raiyat* is not heritable and does not descend to his heirs. The learned Judge has held that such a right is heritable and hence this appeal. The sole point to be determined in this appeal is

Is the occupancy right of an under-*raiyat* heritable?

The argument of the plaintiffs-appellants is this. Occupancy rights are made heritable by Statute by s. 26 of the Bengal Tenancy Act. This section applies only to *raiyats* and not to under-*raiyats* and, therefore, the occupancy right of an under-*raiyat* is not heritable. The respondent argues that an occupancy right is immoveable property and so descends like any other immoveable property, that before 1859 the right of all cultivators whether *raiyats* or under-*raiyats* were recognised as heritable and the present Act has made no difference, that the heritability of an under-*raiyat* is part of the Customary Law of this country and not a creature of Statute.

Now ordinarily the interests of an under-*raiyat* holding on an annual holding is not heritable [See the cases of *Meher Ali v. Kalarkhalasshi* (4), *Arip Mandal v. Ram Ratan Mandal* (5) and *Jamini Sundari Dassi v. Rajendra Nath Chuckrabutty* (6)].

All that the heirs get is the right to remain on the holding until the end of the agricultural year.

If he holds under a lease his heirs are entitled to succeed him in the tenancy and can be ejected without notice at the expiry of the lease [*Alejan Bibi v. Raham Ali* (7)].

Are his heirs in any different position if he held a right of occupancy in the land or in other words the occupancy right of the under-*raiyat* is heritable?

The respondent has contended strenuously that a right of occupancy is not a personal right but is immoveable property and he relies on certain observations in the case

of *Chandra Binode Kundu v. Ala Bux* (8), where Mukerji, J., remarks: "The right of occupancy it will be observed, is for the purpose of descent, thus placed on the same footing as other immoveable property. This is hardly consistent with the theory that the right of occupancy is a merely personal right." And further on (page 250*) the same learned Judge remarks: "the occupancy *raiyat* enjoys under the Bengal Tenancy Act substantial rights in the land and his interest cannot be appropriately described as a merely personal right or personal privilege".

Unfortunately the learned Judge does not go on to state how such a right of occupancy can be appropriately described. I think myself that considerable confusion has arisen from the use of the expression "occupancy holding" an expression which is constantly found in the law report and is used in the decision which I have just referred to. As far as I can see with great respect to the learned Judges who have used the expression it is inaccurate. In the Bengal Tenancy Act a holding means a parcel of land held by a *raiyat* and forming the subject of a separate tenancy. So an occupancy holding is an occupancy parcel of land held by a *raiyat*. I confess I can attach no meaning to this expression. The expression "occupancy holding" is found occasionally in the Act itself, e. g., s. 113. Possibly it is used as a short way of referring to a holding when held by a *raiyat* with a right of occupancy. But as a general rule the Act speaks of a *raiyat* with a right of occupancy. The view which I have always taken is that it is inaccurate to speak of an occupancy holding. To illustrate my meaning take a certain parcel of land in a village. It is let out to A who is a settled *raiyat* of the village. He has a right of occupancy in the land. But suppose it is let out to B a person who is a complete stranger and without any right of occupancy. His interest in the land is entirely different from A and he has no right of occupancy. So the incident of the tenancy depends not on the particular piece of land but the person who holds it and it is difficult to see how a right of occupation is anything but a personal right peculiar to the person who holds the land and not to the land itself. As was pointed out

(4) 29 Ind. Cas. 461; 27 C. L. J. 579; 19 C. W. N. 1129.

(5) 31 C. 757; 8 C. W. N. 479.

(6) 11 C. W. N. 519.

(7) 31 Ind. Cas. 26; 22 C. L. J. 232; 22 C. W. N. 756.

(8) 58 Ind. Cas. 353; 48 C. 184 at p. 249; 31 C. L. J. 510; 24 C. W. N. 818.

*Page of 48 C.—[Ed.]

in the case of the *Midnapore Zemindari Co. v. Hrishikesh Ghosh* (9), s. 26 deals with the devolution of the right of occupancy and not of a holding pure and simple and as the right of occupancy is a creature of the Statute and a doubt had been expressed as to the heritability of a right of occupancy under Act X of 1859, there was a good reason for making other provision in relation to a right of occupancy which would not apply to the ordinary holding of a *raiyat*. A consideration of ss. 19, 20, 21, 22, 23 and 26 make it clear that the right of occupancy is a right peculiar to a particular person and not to a particular parcel of land or holding. The conclusion to which I come is that an occupancy right is a personal right. The use of the expression "as other immoveable property" in s. 26 has helped to add to the confusion it being argued that as the word "other" is used it must mean that an occupancy right is immoveable property. If, however, this was the meaning the section would be clearly superfluous. I may now deal with an argument which was put forward that before the passing of the Tenancy Act of 1885 an under-*raiyat* or sub-tenant was a *raiyat*. Mukherji, J., dealt with the question in the case of *Kamini Sundari Dasi v. Prasanna Kumar Sil* (10), and it is unnecessary for me to discuss it for I entirely agree with the conclusion to which the learned Judge came (see page 689*). It has been argued that if the occupancy right of an under-*raiyat* is not heritable what advantage does he get from it? The simple answer to this is that he enjoys all the rights of an occupancy *raiyat*. His heirs do not enjoy the right of inheritance that the heirs of the occupancy *raiyat* would have. It is perhaps unnecessary to re-capitulate what these rights are. The conclusion to which I have come is that whatever may be the origin of a right of occupancy heritability of such a right is a creature of the Statute created by s. 26 and that outside the Statute there is no right of heritability in such a right and to determine if the occupancy right of an under-*raiyat* is heritable we must look to the Act itself. Section 26 specifically makes the occupancy right of a *raiyat* heritable. But the section makes no reference to under-*raiyat* nor is there any

(9) 25 Ind. Cas. 562; 18 C. W. N. 828; 19 C. L. J. 505; 41 C. 1108.

(10) 58 Ind. Cas. 692; 24 C. W. N. 685.

*Page of 24 C. W. N.—[Ed.]

section which directly refers to the heritability of an occupancy right held by an under-*raiyat*. The expression *raiyat* does not include an under-*raiyat*. See s. 4 of the Act where tenants are divided into tenure holders, *raiya*s and under-*raiya*s. Each of these classes of tenants is defined and they are kept distinct throughout the Act. Section 5 (3) makes the distinction between *raiyat* and under-*raiyat* quite clear.

The framers of the Act had in their mind the possibility of an under-*raiyat* having a right of occupancy [see s. 113 (1) where under-*raiya*s with a right of occupancy are referred to]. The conclusion is, therefore, inevitable that they deliberately excluded under-*raiyat* with a right of occupancy from the operation of s. 26. It might, no doubt, be open to the under-*raiyat* to prove that by custom or usage the occupancy right was heritable (s. 183, Bengal Tenancy Act). This he has not attempted to do nor apparently was it ever his case. My learned brother is, however, of opinion that he should be given an opportunity to prove this if he can and so I agree with the order of remand he proposes.

Z. K.

Appeal allowed ;
Case remanded.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 188 OF 1924.
July 24, 1925.

Present:—Justice Sir B. K. Mullick, Acting Chief Justice, and Mr. Justice Kulwant Sahay.

JOGENDRA PRASAD NARAYAN SINHA
—DEFENDANT—APPELLANT

versus

MANGAL PRASAD SAHU—PLAINTIFF—
RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 82 (5), (6)
—Civil Procedure Code (Act V of 1908), O. XXI, rr. 11, 12, 13, 14, 22—Execution of decree—Application for execution made by one of several joint decree-holders, whether in accordance with law—Notice under r. 22 of O. XXI, issue of, whether extends limitation.

An execution application is one made in accordance with the law within the meaning of Art. 182 (5) of Sch. I to the Limitation Act if the particulars required by rr. 11 to 14 of O. XXI of the O. P. C. are mentioned in the application. The mere fact that the application is made by one of several joint decree-holders does not take it out of the purview of cl. (5) of Art. 182. [p. 848, col. 2.]

Even where an application for execution is not one in accordance with the law a notice issued under r. 22 of O. XXI of the O. P. C. upon such application

would be a step which would give a fresh start for limitation under cl. (6) of Art. 182 of Sch. I to the Limitation Act. [p. 849, col. 1.]

Miscellaneous appeal from an order of the Subordinate Judge, Muzafferpur, dated the 2nd August 1924.

Messrs. *Janak Kishore* and *A. P. Upadhyaya*, for the Appellant.

Mr. *K. P. Jayaswal*, Babus *C. J. Bannerji*, *S. M. Gupta*, *S. K. Mitra* and *M. C. Dutt*, for the Respondent.

JUDGMENT.

Kulwant Sahay, J.—This is an appeal by the judgment-debtors against an order of the Subordinate Judge of Muzafferpur dismissing their objection to the execution of a decree on the ground of limitation.

The decree which was a mortgage-decree was passed on the 25th January 1918 in favour of two brothers Gauri Prasad and Mangal Prasad and on the 25th January 1921 an application was made for execution of the decree by Mangal Prasad alone on the allegation that by a partition between the two brothers Mangal Prasad was entitled to the entire amount covered by the decree. Notice of this application was given to the judgment-debtors who filed an objection on the ground that Mangal Prasad alone was not entitled to execute the whole decree.

The learned Subordinate Judge it appears ultimately allowed the objection. He held that under a private partition between the parties Mangal Prasad was entitled to only one-third of the amount covered by the decree and that the remaining two thirds had been allotted to his minor sons who were living under the guardianship of their mother.

This objection was allowed by the Subordinate Judge on the 5th September 1923. On the 10th September 1923 Mangal Prasad applied to the Executing Court to strike off the execution case saying that he would file a fresh application in continuation of the first application and the execution case was struck off on the 20th September 1923.

The present application was then filed on the 21st September 1923 by Mangal Prasad and his two minor sons. Objection has been taken to this application by the judgment-debtors on the ground that the present application cannot be treated as a continuation of the first application and if it be treated as a fresh application then it is barred by limitation.

The learned Subordinate Judge has disallowed this objection holding that the present application must be treated as one in continuation of the first application. He has also held that the first application was an application in accordance with law and that, therefore, the present application which was filed within three years from the first application was also within time. He further found that limitation was saved by reason of the explanation to Art. 182 of the Limitation Act inasmuch as an application by any one of joint decree-holders shall take effect in favour of all of them. He accordingly disallowed the objection of the judgment debtors and they have come up in appeal to this Court.

In my opinion, the decision of the learned Subordinate Judge appears to be correct. The first application which was filed on the 25th January 1921 must be treated as an application in accordance with law. It fulfils all the requirements of O. XXI, rr. 11 to 14 of the C. P. C. It has been contended on behalf of the judgment debtors that this application was dismissed on the ground that it was not an application upon which any relief could be granted to the decree-holders and that, therefore, it could not be treated as an application in accordance with law but an application may be in accordance with law and yet the applicant may not be entitled to any relief on account of circumstances other than there being any defect in the application itself. It has been held in *Bhagwat Prashad Singh v. Dwarka Prasad Singh* (1) that under Art. 182, cl. (5) of the Limitation Act, an application is one made in accordance with law if the particulars required by O. XXI, rr. 11 to 14 of the C. P. C. are supplied. In the present case, we find that all the particulars required to be stated in an application for execution by rr. 11 to 14 of O. XXI had been given in the first application. The application of the 25th January 1921 must, therefore, be treated as an application made in accordance with law.

The present application which was filed on the 21st September 1923 was admittedly within three years of the first application and was, therefore, within time. Furthermore, it appears that on the first application an order had been made for issue of notice under O. XXI, r. 22. Under cl. (6) of

(1) 74 Ind. Cas. 174; 4 P. L. T. 513; (1923) Pat. 229; 2 Pat. 809; 1 Pat. L. R. 453; (1924) A. I. R. (Pat) 28.

[96 I. C. 1925]

Art. 182 a fresh period of limitation began to run from date of the issue of that notice. That notice was issued on the 23rd May 1921 and, therefore, the issue of the notice also saves the present application from limitation.

Even if it be contended that the first application was not in accordance with law the issue of the notice would give a fresh start for limitation. In *Gopal Chunder Manna v. Gosain Das Kalay* (2), a Full Bench of the Calcutta High Court held that even if the application for execution be not one in accordance with law a notice issued under O. XXI, r. 22 upon that application would be a step which would give a fresh start for limitation. The same view was taken by a Full Bench of the Allahabad High Court in *Dhonkal Singh v. Phakkar Singh* (3). In this view of the case it is not necessary to consider whether the present application can be taken to be one in continuation of the first application. Mr. Jayaswal, who appears for the respondent has not laid any stress upon this point and it is not necessary to consider it.

In my opinion, there is no substance in the appeal and it must be dismissed with costs.

Mullick, Actg. C. J.—I agree.

Z. K.

Appeal dismissed.

(2) 25 C. 594; 2 C. W. N. 556; 13 Ind. Dec. (N. S.) 392.

(3) 15 A. 84; A. W. N. (1893) 36; 7 Ind. Dec. (N. S.) 770.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1635 OF 1923.

February 17, 1925.

Present :—Mr. Justice Phillips.

KIDANGU KETTIYA RAMDUPURAYIL

KUNHAHOMED—DEFENDANT No. 4—

APPELLANT

versus

PAYOTH RAMDUPURAYIL SARA

UMMA AND OTHERS—PLAINTIFFS NOS. 1

TO 7—RESPONDENTS.

Malabar Law—Maintenance karar—Allotment of properties in lieu of maintenance to members of tarazhi, existing and future—Subsequent suit for enhanced maintenance—Parties necessary—Frame of suit.

An arrangement for maintenance made by a karnavan cannot be set aside by his successor except for good cause. [p. 850, col. 2.]

Ramaswami Pattar v. Gopalan, 37 Ind. Cas. 659; 32 M. L. J. 97, relied on.

Where a karnavan of a Malabar tarwad entered into a karar with some members of his tarwad by which certain properties were allotted to them and their families for their maintenance and it appeared that the document was intended to enure for the benefit not only of the members then in existence but also of persons subsequently born, a suit for enhanced maintenance against a succeeding karnavan by the members of the tarazhi is not maintainable without the remaining members of the tarwad or at least the other members of the tarazhi who are in possession of tarwad properties in lieu of maintenance being impleaded as parties. [p. 850, col. 2.]

If the members of a tarazhi think that the circumstances of their family warrant claim to enhanced maintenance it is not open to them to have the benefit of an allotment for maintenance to their tarazhi already made and also seek to add to it a separate allotment for each individual ignoring the benefits which they are already receiving. [*ibid.*]

Kelu Achan v. Lakshmi Nethyar Ammal, 18 Ind. Cas. 231; (1913) M.W.N. 379 and *Pattu Neithiar Amma v. Thazhatha Meladath Dharman Achan*, 21 Ind. Cas. 755, distinguished.

Second appeal against a decree of the Court of the Subordinate Judge, Tellicherry, in A. S. No. 170 of 1922, preferred against that of the Court of the Additional District Munsif, Tellicherry, in O. S. No. 346 of 1920.

Mr. T. S. Viswanatha Iyer, for the Appellant.

Mr. B. Pocker, for the Respondents.

JUDGMENT.—In this suit the plaintiffs claim maintenance from the karnavan of their tarwad. Both the lower Courts found in their favour and have given a decree for maintenance. The fourth defendant who claims to be the present karnavan of the tarwad has filed this appeal, and it is contended on his behalf that the plaintiffs are not entitled to bring this suit without impleading the other members of the tarwad, or at any rate the other members of their tarazhi, because in 1886 the then karnavan, Kunhi Thoopan, entered into karars with his six sisters, under which certain properties were allotted to them and their families for maintenance. The karar which refers to the tarazhi of plaintiffs' ancestress is filed as Ex. I. It is executed by the karnavan's sister Kanjathumma and her nine children and also the children of these children. There are in all 33 executants who apparently comprise all the adult members of that tarwad. The minor children are not in terms parties to the karar and their parents do not purport to act as their guardians in the execution but the recitals in the document show clearly that it was an allotment for the maintenance of this lady, Kanjathumma, and her

descendants. Both the lower Courts have found that the *karar* was merely an allotment for the maintenance of the members of the *tavazhi* who were alive at its date. This would be a rather curious position in a Malabar *tavazhi* of this size because a large number of the members are adult women and it may be ordinarily expected that children would be born shortly after the date of the *karar* and it is unreasonable to conclude that after born children are intended to be deprived of the benefits of this *karar* unless it is so stated. It must be remembered that at the time this *karar* was entered into there had been disputes and litigation in the *tarwad* and the allotments for the maintenance were made in settlement of those disputes, and, therefore, it is unlikely that the intention of those parties was that this settlement should be subject to modification immediately other members were born. Here, we have recitals in the document which show clearly that the allotment was made to the *tavazhi* as such which would include not only the members then alive but also members born thereafter. In para. 2 which recites "the properties set apart for ourselves and our children, etc., altogether 69 in number now and others" the force of the word "now" seems to be that it contemplates a different number being in existence hereafter and that the words "and others" can only refer to children coming into existence thereafter. It obviously does not refer to strangers and it cannot refer to people in existence for they are said to be only 69 in number. I think it perfectly clear from the recital and from the various references to "*tavazhis*" that the allotment was one made to the *tavazhi*, including future members. The clause relied on by the lower Courts is a statement in para. 5 that the stipulations according to this *karar* shall hold good until your death but there is a subsequent provision that after the *karnavan's* death, it was open to the *tavazhis* to demand increased maintenance if circumstances justified it, and it would be open to all the parties to these *karars* to take advantage of that condition and apply for enhanced maintenance if it was justifiable, although possibly they would have that right even without a special stipulation. The lower Appellate Court has held that the *karar* was to be good only during the lifetime of Kunhi Thoopan and relies on a so-called admission

of the deceased first defendant who was *karnavan* that the *karar* was not binding on the *karnavans* who are to succeed Kunhi Thoopan. It appears that first defendant is a member of the plaintiff's *tavazhi* and this statement of his is not one against his interest but it is one in his favour. I do not think in view of the written statement that he has filed which directly contradicts this admission, that much importance can be attached to it. It is not denied that after Kunhi Thoopan's death, the members of the plaintiff's *tavazhi* have remained in possession of the properties allotted to them in 1886, and we see from the judgment Ex. VIII that the *karars* entered into at the time of Ex. I continued in force after Kunhi Thoopan's death. It has been held in this Court that an arrangement for maintenance made by a *karnavan* cannot be set aside by his successor except for good cause [see *Ramaswami Pattar v. Gopalan* (1)] and it is not suggested here that this maintenance allotment was not proper one; consequently it would be binding on Kunhi Thoopen's successors until set aside by a fresh arrangement. I have already found that the document is intended to enure for the benefit not only of the members then in existence but also of persons born subsequently and consequently, plaintiffs as members of the *tavazhi* are entitled to the benefits of the allotment and it appears from the District Munsif's finding on issue No. II that plaintiffs have been obtaining that benefit, at any rate, until shortly before suit. That being so, if plaintiffs want to set aside the arrangement they must implead the other members of the *tarwad*, or at least, the other members of their *tavazhi* who are in possession of *tarwad* properties in lieu of maintenance and claim enhanced maintenance if they think that the circumstances of their family warrant the claim but it is not open to them to have the benefit of an allotment for maintenance to their *tavazhi* and seek to add to it a separate allotment for each individual ignoring the benefits which they are already receiving. The cases relied on by the plaintiffs are *Kelu Achan v. Lakshmi Nethyar Amma* (2) and *Pattu Neithiar Amma v. Thazhatha Meladath Dharmam Achan* (3). In the former case it was held that a certain

(1) 37 Ind. Cas. 659; 32 M. L. J. 97.

(2) 18 Ind. Cas. 234; (1913) M. W. N. 379.

(3) 21 Ind. Cas. 755.

maintenance allotment which had not been fully acted upon was liable to alteration in view of altered circumstances. In the latter case, there was an allotment made to a *tarazhi* consisting of a certain number of persons and the maintenance was fixed at so much per head; it was there held, that this was an allotment solely to the members then in existence and had no reference whatever to members who would be subsequently born. This was clear from the terms of the *karar*, and consequently, it was held that other members of the *tarazhi* were entitled to separate maintenance. The facts of those cases are not identical in any way with the present case, and I hold that the plaintiffs are not entitled to bring this suit in this present form. They may be entitled to enhanced maintenance but in order to obtain it, they must bring a suit in proper form impleading all the necessary parties and put the *tarwad* property in their hands at the disposal of the *karnavan* with a view to a re-allotment for maintenance. The suit accordingly fails and is dismissed. Plaintiffs will pay appellant's costs of this appeal. Each party to bear his own costs in the lower Courts.

V. M. V.
Z. K.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 25
OF 1923.

March 23, 1925.

Present:—Justice Sir Hugh Walmsley, Kt.,
and Mr. Justice Mukerji.

THE EASTERN MORTGAGE AND
AGENCY Co., LTD. AND OTHERS—
DEFENDANTS—APPELLANTS

versus

Moulvi MOHAMMAD FAZLUL KARIM
—PLAINTIFF AND ANOTHER—DEFENDANT—
RESPONDENTS.

*Transfer of Property Act (IV of 1882), s. 55—
Contract Act (IX of 1872), s. 69—Vendor and purchaser—Covenant against encumbrances, operation of—
Suit based on breach of covenant, when maintainable—
Rent due for period prior to sale—Purchaser, whether liable—Payment made by purchaser—Suit to recover the amount paid, whether maintainable—Receiver, position of—Payment made by Receiver, whether payment by owner.*

In order to justify a suit based on the breach of a covenant against encumbrances contained in a conveyance it is requisite that an actual interruption,

claim or demand be made on the purchaser: some hindrance or prevention of enjoyment proved: for, the chance of his being disturbed, and his liability to satisfy claimants, or, in other words, the mere existence of outstanding encumbrances, unless they prevent entry and enjoyment, will not constitute an immediate breach of the covenant. [p. 853, col. 1.]

Under s. 55 of the Transfer of Property Act, a purchaser of immoveable property is not liable for rent due to the landlord for a period prior to the date of the sale. [p. 857, col. 1.]

Per Mukerji, J.—Where a purchaser discovers defects in the property before conveyance, he can either rescind the contract or successfully oppose a suit for specific performance; but if he discovers material defects after the conveyance he must make out a case of fraud in order to set aside the sale. [p. 855, col. 2.]

The mere existence of an encumbrance on the property conveyed does not give the purchaser a right to sue as on a breach of the covenant against encumbrances. In a suit of this description the plaintiff must allege the facts constituting the disturbance and that the disturbance was lawful, with sufficient particularity to show the breach of the covenant. [p. 856, cols. 1 & 2.]

Where in order to save the property purchased from being proceeded against for the recovery of rents due to the landlord in respect of a period prior to the date of the sale, the rents are paid out of the estate of the purchaser and the purchaser subsequently brings a suit against the vendor to recover the amount of the payment, the suit is not one based on a breach of the covenant against encumbrances contained in the sale-deed but is one under s. 69 of the Contract Act. [p. 855, col. 2.]

In a suit under s. 69 of the Contract Act it is essential that there should be, first, a person who is bound by law to make a certain payment, secondly, another person who is interested in such payment being made, and thirdly, a payment by such last mentioned person. If these circumstances exist, the fiction of an implied request from the defendant to the plaintiff to make the payment may be properly imported into the case so as to bring it within the section. [p. 856, col. 2.]

The words "interest in the payment of money which another is bound by law to pay" in s. 69 of the Contract Act include the apprehension of any kind of loss or inconvenience or of any detriment capable of being assessed in money. Arrears of rent which form the first charge on an estate under s. 65 of the Bengal Tenancy Act and for which the estate is liable to be sold, if not paid, reasonably create such an apprehension. It makes no difference that a decree has not yet been obtained, for a suit may be instituted at any moment and the loss and the inconvenience consequent on the institution of a suit are manifest. [p. 857, col. 1.]

The nature of the office of a Receiver is simply this, that he is an impartial person appointed by the Court to collect and receive pending the proceedings the rents, issues and profits of land or personal estate or other things in question which it does not seem reasonable to the Court that either party should collect or receive. The object sought by the appointment of a Receiver is the safeguarding of property for the benefit of those entitled to it. His possession is on behalf and for the benefit of all the parties to the suit in which he is appointed, and is the possession of all the said parties according to their titles. The property in his hands is in *custodia legis* for the

person who can make a title to it. The title of the real owner is in no way affected either in theory or principle by his appointment. He collects and receives the rents, issues and profits not upon his own title but upon the title of some persons, parties to the action. One of the main incidents of his duties is to preserve and protect the property which is put into his possession and from this it necessarily follows that where a Receiver is appointed in respect of lease-holds, upon him devolves the performance of the obligations imposed by the possession of land and consequently he must out of the sub-rents discharge the head rents payable in respect of the lease-holds. [p. 857, col. 2.]

A payment made by the Receiver of an estate of the rents justly due, out of the funds in his hands, is equivalent in law to a payment made by the owner himself. [p. 859, col. 2.]

Case-law referred to.

Appeal against a decree of the Subordinate Judge, First Court, Bakergunj, dated the 30th November 1922.

Mr. Pugh (with him Babus Ambicapada Chaudhury and Suresh Chandra Bose), for the Appellants.

Babus Suresh Chandra Talukdar, Mohendra Kumar Ghose, Jatindra Nath Lahiri and Probodh Chandra Chatterjee, for the Respondents.

JUDGMENT.

Walmsley, J.—This appeal is preferred by the second and fourth defendants, that is the Eastern Mortgage and Agency Company Limited, (1902) the new Company and Mr. Tweedie. The other defendants were the old Company and its Liquidator: against them, the suit was dismissed, and they are not parties to the appeal. There was a fifth defendant, Mr. A. M. Parukh added *pro forma* on account of a financial arrangement between him and the plaintiff.

The plaintiff is Moulvi Muhammad Fazlul Karim: he bought from the defendant Company on December 1919 the Company's interest in an estate called Haturia. The purchase price was Rs. 3,20,000. It was also agreed that a sum of Rs. 30,000, should be paid to Mr. Tweedie, the Company's Manager as brokerage. There is no dispute about the payment of these sums. It is also agreed that a further sum of Rs. 10,000 was paid, but the parties differ as to the reason for this payment. The defendants assert that the back rents were not included in the transaction, and that as the result of a discussion and an account it was arranged that for a further payment of Rs. 10,000 the plaintiff was to have an assignment of the back rents coupled with an obligation to pay rents due to the superior landlord. The plaintiff, on the other hand, maintains that this sum of Rs. 10,000

was exacted by Mr. Tweedie as additional brokerage, and that so far from there being such an arrangement as the defendants describe it was always intended that his purchase should include the back rents, and it was never suggested that he should accept liability for rent due to the head landlord.

Mr. Tweedie was not only Manager of the Company, but he was also Receiver of the Haturia Estate. He was appointed Receiver in a mortgage suit of 1911, instituted by the Company, it was in the subsequent execution sale that the Company acquired its interest in Haturia. Before that suit was disposed of a partition suit was instituted and Mr. Tweedie was continued as Receiver in that suit, and his possession as Receiver went on until May 1922 that is until long after the institution of the present suit. In his capacity as Receiver he paid the rents due on account of the whole estate to the superior landlord for the period prior to sale and he entered those payments in his Receivership accounts. The substance of the plaintiff's case is that rents due to the superior landlord up to the date of the conveyance should have been paid by the defendant Company, to the extent of their interest, and that by including the whole of the payments in the Receivership accounts, the Receiver has reduced the profits of the plaintiff. Stated in this form the plaintiff's grievance is intelligible, and it at once occurs to the mind that he may be entitled to recover under the provisions of s. 69 of the Contract Act.

The plaint, however, does not proceed upon such simple lines. The main plank is that there was fraudulent misrepresentation on the part of Mr. Tweedie, the fraudulent misrepresentation consisting of a representation that "the properties were free of encumbrances, and that rents and cess due to superior landlords for the properties sold up to the date of the deed of sale were fully paid up." It was only in a secondary manner that the plaint referred to the aspect which I have just mentioned. No emphasis was laid upon it, with the result that no issue was raised dealing specifically with the applicability of s. 69 of the Contract Act, and the learned Judge was not asked to find that the provisions of that section are applicable.

In the trial the plea of fraudulent misrepresentation was pressed, and a second argument was advanced based on the words

of the conveyance, "and that free from all encumbrances whatsoever."

It was urged that rents due to the superior landlords for the period before sale were encumbrances, and that, therefore, by the terms of the conveyance the Company ought to have paid them. Incidentally much time was spent on investigating the reasons for the further payment of Rs. 10,000.

The learned Judge rejected the plea of fraudulent misrepresentation, but he accepted the other argument, and found that Mr. Tweedie ought to have paid the back rents due to the superior landlord out of the money he held as Manager of the Company and not out of the money he held as a Receiver. On this finding he directed a commission to issue for examining the accounts submitted by Mr. Tweedie as Receiver, and determining how much had been paid out of the plaintiff's share in the estate on account of rent and cess due to the superior landlord at the date of sale.

For the appellant it is contended that the suit is not maintainable. In view of the Judge's finding, with which I agree, that there was no evidence to show that Mr. Tweedie represented that rents to the head landlord had been paid in full, I need not say anything about that part of the matter. The learned Judge thinks that there could be an action on the covenant, and this view is based on the words "and that free from all encumbrances whatsoever." There I think he is wrong: these words come in the clause that provides for peaceful enjoyment: they are words of art, occurring in an English conveyance expressed in English and they have a well defined meaning. In Platt's Law of Covenants, there is a passage referred to with approval in the case of *Nottidge v. Dering* (1). It ends with these words:—

"In order to justify legal proceedings on this covenant against encumbrances it is requisite that an actual interruption, claim or demand be made on the purchaser: some hindrance or prevention of enjoyment proved: for, the chance alone of his being disturbed, and his liability to satisfy claimants, or in other words the mere existence of outstanding encumbrances, unless they prevent entry and enjoyment as in the case of a prior unexpired lease, will not constitute an immediate breach".

(1) (1909) 2 Ch. 647 at p. 656; 101 L. T. 491.

In my opinion, therefore, the plaintiff cannot succeed on the ground that there has been a breach of covenant.

There remains the question whether the suit can proceed as a suit based on the provisions of s. 69 of the Contract Act. The words of that section are: "A person who is interested in the payment of money which another is bound by law to pay and who, therefore, pays it, is entitled to be re-imbursed by the other." It appears to me that the ninth paragraph of the plaint refers to this section. It employs the very terms used in the section and states facts which suggest that the equitable principle underlying the section is applicable. Stated in simple language the plaintiff's contention is this: That Mr. Tweedie as Receiver used his money to pay the Company's debts and, therefore, he ought to be allowed to recover that money from the Company. The justice of his claim seems obvious, and I think that all the requirements of the section are proved, that is to say if plaintiff's version of the facts is correct. It is said that the proper place to press this claim was in the suit in which Mr. Tweedie was appointed Receiver. It seems doubtful, however, whether in that suit the Court would have been able to deal with the matter. In any event, I do not think the existence of an alternative method of relief is any bar to this suit.

I think, therefore, that the suit can proceed as based on the provisions of s. 69 of the Contract Act, but that will be against the Company only. As against Mr. Tweedie there is no cause of action even if a suit could be brought against him without the leave of the Court.

The question of fact that is left for consideration is whether the plaintiff accepted liability for rents due to the head landlords. In spite of an elaborate conveyance prepared after much discussion in the offices of the Solicitors for the parties, the Court plunged into a mass of oral evidence as to the terms of the contract. In my opinion the evidence was inadmissible. On the terms of the deed read with the provisions of the Transfer of Property Act it is clear that the plaintiff was not liable for rent prior to the date of sale.

Assuming, however, that the evidence was properly admitted, I do not think that it leads to a different result. The changes made in the drafts and the correspondence make it clear that the plaintiff did not

accept liability. It is idle to discuss the oral evidence, for the defendant's own Solicitor says that the property was to be sold free of liabilities. He is a most unsatisfactory witness and the share he took in the transaction creates suspicion but he must have known what he meant by that answer. I find, therefore, that it was for the Company to pay the rents to the head landlord for the period prior to sale. As a matter of fact they were paid by the Receiver. There must, therefore, be a commission issued as directed by the learned Judge.

Accordingly I would dismiss the appeal so far as the Company is concerned, and allow it so far as Mr. Tweedie is concerned. The Company must pay the costs of the respondents in this appeal. Mr. Tweedie will bear his own costs in both Courts.

Mukerji, J.—The action out of which this appeal arises was commenced by the respondent Moulvi Fazlul Karim for the recovery of money. His case shortly stated was this:—The defendant No. 1 the Eastern Mortgage and Agency Company Limited were mortgagees of 12-annas share of the Haturia Estate and they instituted a suit for enforcement of their mortgage. During the continuance of that suit, a partition suit was instituted in respect of the 16-annas of the estate. The defendant No. 4 Mr. T. C. Tweedie was appointed Receiver in the mortgage suit in respect of the 12-annas of the estate involved therein and thereafter also in the partition suit in respect of the entire estate. In the mortgage suit the mortgaged properties were purchased by the decree-holder, namely, the Eastern Mortgage and Agency Company Limited. The said Company then went into liquidation, and its assets and liabilities were taken over by the defendant No. 2 the Eastern Mortgage and Agency Company (1902) Limited. The defendant No. 3 Mr. Anchincloss was appointed Liquidator. The defendant No. 4 Mr. T. C. Tweedie was also the constituted Attorney of the old Company, the new Company and the Liquidator. By a conveyance dated the 12th December 1919 executed by the defendant No. 4 on behalf of the old Company, the new Company, the Liquidator and the Receiver "the right, title and interest of the old Company and of the new Company" in the said purchased properties, "however acquired and all arrears of rent due from tenants, and all moneys due from

tenants and other persons having dealing with the old Company in connection with the said properties on decrees, bonds, *khatas* balance of accounts or otherwise" and also the decree in the mortgage suit together with the securities therefor and the benefits thereof, were purchased by the appellant for a consideration of Rs. 3, 20,000. On the same day the plaintiff sold a half-share of the aforesaid properties to the defendant No. 5 Mr. A. M. Paruk. The plaintiff's allegation in the plaint was that the defendants Nos. 1 to 4 by their constituted Attorney the defendant No. 4 represented to the plaintiff that the properties were free of encumbrances and that the rents and cesses due to the superior landlords for the properties sold up to the date of sale were fully paid up, and on the faith of that representation he was induced to purchase the properties for the consideration stated above. He stated in the plaint that the said representation was false, and he subsequently came to know that at the date of the sale a sum of Rs. 9,900 was due to the superior landlords as arrears of rent and that the said sum was subsequently paid out of the funds of the estate of the plaintiff and the defendant No. 5. He stated further that the defendants Nos. 1 to 4 were bound to pay the said amounts out of their own funds. The plaintiff, therefore, prayed to be re-imbursed in respect of the said amount of Rs. 9,900 or so much of it or such further amount, as might be found to have been so paid. The cause of action was laid at Barisal as being the place where the defendant No. 4 worked for gain and where the said money was paid on various dates between the 12th December 1919 and September 1920.

The defendants Nos. 2 and 4 contended, *inter alia*, that the suit was not maintainable in the form in which it was instituted; that there was no cause of action; that the defendants or any of them were not liable to the plaintiff for his claim or any part of it; that the defendant No. 4 did not represent to the plaintiff that all rents and cesses of the properties conveyed which were due to the superior landlords had been fully paid up; and that the plaintiff purchased the properties with full knowledge of the liabilities for arrears of rent due to the superior landlords.

The defendant No. 5 contended that he had purchased a half of the properties from the plaintiff and the latter had mortgaged the other half to him under an English

mortgage end that he was entitled to the whole amount of claim.

The learned Subordinate Judge has passed a preliminary decree for accounts in favour of the plaintiff and has ordered that a commission do issue to examine the accounts of the Receiver, the defendant No. 4 (who has been removed but not discharged from Receivership) and determine the amount due to the superior landlords on account of arrears of rent and cesses at the date of the sale and which had been paid from the plaintiff's share of the estate purchased by him and that the plaintiff would get a decree for the said amount together with interest at 6 per cent. per annum, and further that as regards the decretal amount, which would be realized, the plaintiff would get a half and the remaining half would remain in deposit for the benefit of the defendant No. 5.

The defendant No. 2, namely, the new Company and the defendant No. 4 Mr. T. C. Tweedie have preferred this appeal. The contentions put forward on behalf of the appellants substantially are the following:—Firstly, that the suit was not maintainable as it had not been established that there was a breach of any of the covenants embodied in the contract between the parties and that if the defendant No. 4 in his capacity as Receiver made the payments the proper course for the plaintiff was to object to his accounts in the suit in which he had been appointed Receiver or to sue him as Receiver with the requisite permission of the Court and not to sue him either as the constituted Attorney of the Company or of the Liquidator or in his personal capacity as has been done in the present suit. Secondly, that upon the finding of the learned Subordinate Judge to the effect that the plaintiff had failed to prove that the defendant No. 4 had made any false representation such as was alleged in the plaint the suit should have been altogether dismissed or at any rate should have been dismissed as against the defendant No. 4. Thirdly, that the plaintiff by his purchase took over the liability to pay off the arrears of rent due to the superior landlords and, therefore, the plaintiff is not entitled to recover. And lastly, that the plaintiff has failed to establish his claim as against the defendant No. 2, the new Company.

As regards the first of the aforesaid contentions, namely, that relating to the main-

tainability of the suit in the form in which it has been brought, the question must be dealt with on the footing of the case as presented by the plaintiff and on the assumption that the allegations are correct.

Now, the law is well-settled that where the purchaser discovers defects in the property before conveyance he can either rescind the contract or successfully oppose a suit for specific performance [*Recre v. Berridge* (2) and *Caballero v. Henty* (3)] but if the purchaser discovers material defects after the conveyance he must make out a case of fraud in order to set aside a sale [*Brownlie v. Campbell* (4)]. The present suit is one commenced after the execution of the conveyance and is not one for cancellation of the sale. Is it a suit for recovery of damages for breach of covenant? The appellant's contention is that it is a suit of that nature, and that as there has been no breach, it is not maintainable, regard being had to the principle laid down in the case of *Joliffe v. Baker* (5). It is true that the heading of the plaint describes the suit as a "suit for recovery of money against a fraudulent seller of immoveable properties". The allegations made in the plaint are that there was a misrepresentation, that no arrears of rent were due to the superior landlords, that the plaintiff subsequently came to know that there were such arrears and that the said arrears were paid out of the income of the properties, that is to say out of the moneys which were in the hands of the defendant No. 4, the Receiver; and inasmuch as the Company was bound to pay, the plaintiff sought to be re-imbursed for the payments made. The suit, in my opinion, is not one for damages consequent on a breach of any covenant. Learned Counsel for the appellants has been at great pains to show us that it is such a suit, and he has urged that the covenant as to encumbrance which is the only relevant covenant in this connection has not in fact been broken, for there has been no disturbance or interruption of the plaintiff's quiet possession or enjoyment of the properties. The covenant in question runs in these words: "To have and to hold the said zemindaries, lands, hereditaments, and pre-

(2) (1888) 20 Q. B. D. 523; 57 L. J. Q. B. 265; 58 L. T. 836; 36 W. R. 517; 52 J. P. 549.

(3) (1874) 9 Ch. 447; 43 L. J. Ch. 635; 30 L. T. 314; 22 W. R. 446.

(4) (1880) 5 A. C. 925 at p. 949.

(5) (1883) 11 Q. B. D. 255; 52 L. J. Q. B. 609; 48 L. T. 966; 32 W. R. 59; 47 J. P. 678.

mises hereby granted expressed so to be unto and to the use of the said purchaser his heirs and assigns for ever and the old Company and the new Company do and each of them doth hereby for themselves itself their and its assigns and representatives covenant with the said purchaser, his heirs, executors, administrators, representatives and assigns that notwithstanding any act, deed or thing by the old Company or the new Company or their agents done or executed or knowingly suffered to the contrary the old Company and new Company are lawfully and absolutely seized and possessed of or otherwise well and sufficiently entitled to the *zemindaries*, lands, hereditaments and premises hereby granted or expressed so to be and every part thereof for a perfect and indefeasible estate and that notwithstanding any such act, deed or thing whatsoever as aforesaid the old Company and the new Company have good right to grant the said *zemindaries*, lands, hereditaments and premises hereby granted or expressed so to be unto and to the use of the said purchaser his heirs and assigns in manner aforesaid and the said purchaser his heirs and assigns shall and may at all times hereafter peaceably and quietly possess and enjoy the said *zemindaries*, lands, hereditaments and premises and receive the rents and profits thereof without any lawful eviction, interruption, claim or demand whatsoever from or by the old Company or new Company or any person or persons lawfully or equitably claiming from under or in trust for them and that free from all encumbrances whatsoever made or suffered by the old Company or the new Company or any person or persons lawfully or equitably claiming as aforesaid". It is quite clear that the covenant against encumbrances is not an independent covenant, but is prefaced by the words "and that" and follows the covenant, for quiet enjoyment. I am unable to agree in the view propounded on behalf of the plaintiff that the word "that" which precedes the expression "free from encumbrances" relates to the word "estate" and that the covenant means to guarantee that the estate was free from encumbrances. The mere existence of an encumbrance does not give a right to sue under this covenant [*Nottidge v. Derring* (1), also *Nottidge v. Derring* (6) and *In re Martin, Ex parte*

(6) (1910) 1 Ch. 297; 79 L. J. Ch. 439; 102 L. T. 145.

Dixon (7).] In an action on a covenant of this description the plaintiff must allege the facts constituting the disturbance and that the disturbance was lawful, with sufficient particularity to show the breach of covenant [*Foster v. Pierson* (8)]. In the present case no such disturbance was alleged; and, in fact, so far as can be made out from the evidence the payments were made without even a claim or demand made by or on behalf of the superior landlords. Were it possible to hold that the present suit was one for damages for breach of the covenant I would have unhesitatingly held that it did not lie; but I do not find any indication in the pleadings that it is a suit of that character.

The precise character of the suit, notwithstanding the inartistic form of the plaint, to my mind, is essentially that of a suit to recover money under s. 69 of the Indian Contract Act. The plaint says in so many words that it is a suit for recovery of money and it can very well be gathered from the plaint taken as a whole and also from the statement therein of the cause of action that the claim is not one for damages but for money actually paid. Section 69 of the Indian Contract Act runs thus: "A person who is interested in the payment of money which another is bound by law to pay, and who, therefore, pays it, is entitled to be re-imbursed by the other". In a suit under this section it is essential that there should be, firstly, a person who is bound by law to make a certain payment, secondly, another person who is interested in such payment being made, and thirdly, a payment by such last mentioned person. If these circumstances exist, the fiction of an implied request from the defendant to the plaintiff to make the payment may be properly imported into the case so as to bring it within the section and thus the right to re-imbursement is created. A debt for money paid arises where a person has paid money for another under circumstances and upon occasions which make it just and equitable that it should be re-paid, a debt or promise to pay is then implied in law, without any actual agreement to that effect. Sir Frederick Pollock in his book on the Indian Contract Act expressed an opinion that s. 69 of the Act lays down in one respect a wider rule than appears to be supported by any English authority, and that the words

(7) (1912) 106 L. T. 381.

(8) (1792) 4 T. R. 617; 100 E. R. 1207.

"interested in the payment of money which another is bound by law to pay" might include the apprehension of any kind of loss or inconvenience or at any rate of any detriment capable of being assessed in money, while that was not enough in the common law, to found a claim to re-imbursement by the person interested if he makes the payment himself. This view has been judicially adopted by Stanley, C. J., in the case of *Tulsha Kumar v. Jogeshwar Prasad* (9) and by the Madras High Court in case of *Subramania Iyer v. Vengappa Reddi* (10) and by this Court in the case of *Pankhabati Chaudhurani v. Nonihal Singh* (11). It can hardly be disputed that arrears of rent which form the first charge on an estate under s. 65 of the Bengal Tenancy Act and for which the estate is liable to be sold, if not paid, reasonably creates such an apprehension. It makes no difference that a decree has not yet been obtained for a suit may be instituted at any moment and the loss, and inconvenience consequent on the institution of a suit are manifest. In paras. 8 and 9 of the plaint the fact of such payments and the circumstances thereof were specifically alleged and the wording of the latter paragraph closely follows the language of s. 69 of the Indian Contract Act. The defendants in their written statement did not state that the payments were made otherwise than in the ordinary course. If the plaintiff's allegation is true and, as I have said before, we must proceed for the purposes of this question on the assumption that it is true—then the Company was bound in the absence of a contract to the contrary to pay the rent accrued due in respect of the property upto the date of sale. Under s. 55 of the Transfer of Property Act the liability to pay the arrears was with the Company. There can, therefore, be no doubt whatsoever that the first two out of the three conditions enumerated above are present in the case. I am not at all pressed by the authority of the decision in the case of *Dost Muhammad v. Sanjad Ahmed* (12) upon which reliance was placed on behalf of the appellants as the judgment gives no reason beyond stating that no relations existed between the vendor and the vendee from which

any obligation of the character mentioned in ss. 69 and 70 of the Act could be implied as attaching to the vendor, and also because the Transfer of Property Act evidently had not come into operation on the date of the suit in that case. In fact the Allahabad High Court has held in a later case, namely, that of *Kishan Lal v. Megh Singh* (13) that after the passing of the Transfer of Property Act, that decision cannot be regarded as good. The other condition, as I have stated, is that the payment should have been made by the plaintiff. Here in the present case the defendant No. 4 as Receiver paid the monies out of the funds of the plaintiff's estate in his hands. It is not disputed that such payments were made, and it is not alleged on behalf of the defendants that they were made otherwise than in the ordinary course, but it is urged that the payments were made by the Receiver and not the plaintiff himself and, therefore, the plaintiff cannot claim to be reimbursed.

The nature of the office of a Receiver is simply this, that he is an impartial person appointed by the Court to collect and receive pending the proceedings the rents, issues and profits of land or personal estate or other things in question which it does not seem reasonable to the Court that either party should collect or receive. The object sought by the appointment of a Receiver is the safeguarding of property for the benefit of those entitled to it. His possession is on behalf and for the benefit of all the parties to the suit in which he is appointed, and is the possession of all the said parties according to their titles. The property in his hands is in *custodia legis* for the person who can make a title to it. The title of the real owner is in no way affected either in theory or principle by his appointment. He collects and receives the rents, issues and profits not upon his own title but upon the title of some persons, parties to the action. One of the main incidents of his duties is to preserve and protect the property which is put into his possession and from this it necessarily follows that where a Receiver is appointed in respect of lease-holds, upon him devolves the performance of the obligations imposed by the possession of land and consequently he must out of the sub-rents discharge the head rents payable in respect of the lease-holds.

(13) A. W. N. (1901) 37.

(9) 28 A. 563; A. W. N. (1906) 114; 3 A. L. J. 372.

(10) 4 Ind. Cas. 1033; 33 M. 232; 19 M. L. J. 750.

(11) 21 Ind. Cas. 207; 18 C. W. N. 778; 19 C. L. J. 72.

(12) 6 A. 67; A. W. N. (1883) 210; 3 Ind. Dec. (N. S.) 640.

It is contended, however, that Mr. Tweedie when he made the payment was an officer of the Court and was not an agent of the plaintiff and that, therefore, the plaintiff cannot claim to be re-imbursed in respect of payments made by Mr. Tweedie. It is urged that Receiver is aptly described as the hand of the Court and is not the representative or agent of the party or parties but of the Court. This proposition is certainly correct in the sense that he acts in the interest of neither plaintiff nor defendant but for the common benefit of all parties interested. It is also correct in the sense that as the representative of the Court he is subject to its orders and accountable to such persons and in such manner as the Court may direct. It is not, however, a proposition which can be accepted as universally correct under all circumstances; its correctness or otherwise would depend upon the nature of the cause in which and the party on whose behalf he is appointed and also on the nature of the transaction which he enters into.

In the case of *Premalall Mullick v. Sumbhoo-nath Roy* (14) which is one of the cases relied upon by the appellant on this point, this Court relying upon the observations of the Master of the Rolls in *Bertrand v. Davies* (15) observed that where a Receiver or Manager is appointed by Court in a suit properly constituted he should be considered as appointed on behalf of all persons interested in the property, and he is entitled to his ordinary commission and allowance, and also to a lien on the estate, as against all persons interested in it for the balance, whatever it may be, that shall be found to be due on taking his accounts. In the case of *Administrator-General of Bengal v. Prem Lall Mullick* (16), where a Receiver had been appointed to hold and administer the estate of a testator, it was held that he was merely the officer of the Court, and the estate must for all legal purposes be considered as being in *manibus curiæ*. In the case of *Orr v. Muthia Chetti* (17), where a Receiver was appointed at the instance of an attaching creditor in respect of the properties of a judgment-debtor and misappropriated monies that came to his hands, and the

question arose as to whether the payment by the judgment-debtor to the Receiver operated as a valid discharge of the judgment-debtor Muttusami Ayyar, J., held that the Receiver was an officer or representative of the Court and subject to its orders, and could not be considered as the judgment-creditor's agent. In an appeal preferred against the aforesaid decision *Muthia Chetti v. Orr* (18). Shephard, J., held that a Receiver appointed to collect monies is not an agent of either party, he is an officer of the Court deputed to collect and hold monies in accordance with the order of the Court. In the case of *Harihar Mukherjee v. Jahar-uddin Mandal* (19), the owners of an estate had instituted a suit for accounts against a *Tehsildar* appointed by a Receiver who had been in charge of the estate under an order of the Court but had since been discharged, it was held that such a suit can only be sustained on proof of a fiduciary relation between the parties and the Receiver is not a representative of the parties but an officer of the Court. In the case of *Bolhm v. Goodall* (20), the position of the Receiver and Manager of a partnership business in an action brought by one partner against his co-partner for the dissolution of the partnership and winding up of partnership affairs was considered with reference to his right to be indemnified by the party who put the Court in motion for his appointment and it was held that he was not an agent for that party. In the case of *In re Flowers & Co.* (21), it was held that service of notice on such a Receiver was not service on the partners as he was not the agent of the partners. In the case of *Burt, Boulton & Hayward v. Bull* (22) which was debenture-holders' action, it was held that the Receiver appointed therein is not the agent of the Company. On the other hand in books on Receivers there are cases cited to show as to how far a Receiver is an agent for the Court or for the party or parties entitled to the estate where he is treated as an agent for the Company or debenture-holders in an action for winding up, or for the mortgagor or the mortgagee or in other cases. In

(14) 22 C. 960; 11 Ind. Dec. (N. S.) 637.

(15) (1862) 31 Beav. 429; 54 E. R. 1204; 32 L. J. Ch. 41; 9 Jur. (N. S.) 34; 7 L. T. 372; 11 W. R. 48; 135 R. R. 504.

(16) 22 C. 1011; 2 I. A. 203; 5 M. L. J. 157; 6 Sar. P. C. J. 660; 11 Ind. Dec. (N. S.) 672 (P. C.).

(17) 17 M. 501; 6 Ind. Dec. (N. S.) 347.

(18) 20 M. 224; 7 Ind. Dec. (N. S.) 160.

(19) 62 Ind. Cas. 768; 26 C. W. N. 992.

(20) (1911) 1 Ch. 155; 80 L. J. Ch. 86; 103 L. T. 717; 55 S. J. 108; 27 T. L. R. 106.

(21) (1897) 1 Q. B. 14; 65 L. J. Q. B. 679; 75 L. T. 306; 45 W. R. 118.

(22) (1895) 1 Q. B. 276.

the case of *Wilkinson v. Gangadhar Sirkar* (23) which is the leading case on Receivers in this country, Phear, J., explained the true position of a Receiver appointed by the Court in these words: "The Receiver in a suit is nothing more than the hand of the Court for the purpose of holding the property of the litigants whenever it is necessary that it should be kept in the grasp of the Court, in order to preserve the subject-matter of the suit *pendenti lite* and the possession of the Receiver is simply the possession of the Court. He has no personal rights in the property, nor can he take any steps with regard to it, without the sanction of the Court. If it is necessary for him to take action of any sort, he should be put in motion by the Court on the application of the parties to the suit; and whatever he rightly does with regard to the property, he does simply as agent of the owners of the property." That was a case in which a Receiver had entered into a contract to sell some property. In the case of *Poresh Nath Mookerjee v. Omerto Nauth Mitter* (24) in which case a Receiver appointed in a partition suit had created a charge on the estate for the purpose of raising money on the security of the entire estate for paying the rents due on the estate and a suit was instituted for a declaration that the indenture executed by the Receiver under the authority of the Court's order created a valid charge, two questions arose first whether the parties were bound by the indenture so executed by the Receiver and second, whether an application should not have been made in the suit in which the Receiver had been appointed instead of a separate suit being instituted. Trevelyan, J., whose judgment is reported at pages 615* and 616* quoted with approval the *dictum* of Phear, J., cited above and held that the principle applied just as much with regard to the parties to the suit who opposed the Receiver's appointment or who objected to his receiving particular powers as it did to the parties at whose instance he was appointed or set in motion and that being so the ordinary law of principal and agent applied. It was also held that the fact that the plaintiff may have a remedy in the suit in which the Receiver was appointed did not exclude his remedy in the suit separately instituted. This decision

was affirmed on appeal and it was pointed by the Court of Appeal that having regard to the conditions under which the estates are held in this country, one of which is that they are liable to be sold if the rents and revenue due upon them are not paid, it was apparent that the power to take the estate out of the hands of the owners and to place it in the hands of a Receiver with powers to do what is necessary for its protection must include a power to raise money to pay rent or revenue whenever it is necessary to do so. Applying these principles to the present case it follows as a matter of course that the payment by the Receiver of the rents justly due out of the funds in his hands is equivalent in law to a payment made by the owner himself.

In my opinion, then, all the conditions requisite to bring the suit within the provisions of s. 69 of the Indian Contract Act are present and the suit is accordingly maintainable. It is not a suit instituted against the defendant No. 4 asking for any relief as against him in his capacity as a Receiver and, therefore, no sanction of the Court is necessary for its institution. It cannot be doubted that a person who is prejudiced by the conduct of a Receiver appointed in an action ought not, without the leave of the Court, to commence an action against him for adequate reliefs; more ordinarily would his remedy lie in an application to the Court in the course of the action itself. But, if an application had been made in the partition suit by the present plaintiff to hold the Receiver accountable for the monies paid by him as alleged, the Court would in all probability have found itself unable to decide the question of his accountability in such a proceeding, inasmuch as it involved a determination of the rights and liabilities between the Companies on the one hand and the plaintiff on the other—a matter entirely outside the scope of the suit in which the Receiver had been appointed. Where the accountability of a Receiver depends upon debatable questions not easy to be dealt with at the passing of the Receiver's accounts the Court often declines to go into the matter in such proceedings. As an instance of this class of cases may be quoted the case of *Coomar Sattya Sankar Ghosal v. Rance Golapmonee Bebee* (25). The Court dealing with the suit for partition would have passed the accounts on the

(23) 6 B. L. R. 486.

(24) 17 C. 614; 8 Ind. Dec. (N. S.) 940.

*Pages of 17 C.—[Ed.]

(25) 5 C. W. N. 223.

view that the arrears were justly due by the estate and the Receiver was justified in paying them off out of the monies in his hands. This objection, therefore, in my opinion, is not well-founded and the suit as framed was clearly maintainable.

The appellants' next objection relates to the maintainability of the suit as against all the defendants, and particularly as against the defendant No. 4 upon the finding of the Subordinate Judge that the misrepresentation charged in the plaint had not been substantiated. On the other hand it has been contended on behalf of the plaintiff that it should have been held that the allegation of misrepresentation was established upon the evidence adduced in the case. Reference was made on his behalf in this connection to the evidence of the plaintiff himself and his own affidavit which is an annexure to the written statement of the defendant No. 5. The evidence on this point is not at all convincing and I must hold agreeing with the learned Subordinate Judge that there is no reliable evidence to prove that the defendant No. 4 made any such representation. The suit, however, does not seem to me to be based on such misrepresentation. The heading merely describes the alleged character of the sellers and the allegation of misrepresentation is a statement of an alleged fact on which the cause of action does not rest. From this finding it legitimately follows that if the present suit is treated as one under s. 69 of the Indian Contract Act, there is no cause of action as against Mr. Tweedie, the defendant No. 4 and whatever may be liabilities of the defendant No. 2, the new Company, there can be no decree against the defendant No. 4 in the present suit.

The next contention on behalf of the appellants is to the effect that the liability to pay the arrears of rent was taken over by the plaintiff by his purchase. I have already observed that the plaintiff's case put forward in his plaint was that there was a representation made to him by the defendant No. 4 that there were no arrears due has not been established; it is also clear upon the circumstances of the case, the plaintiff's wife being one of the co-sharers in the superior interest that it is not very likely that the plaintiff would not know that there were arrears. These findings, however, are not sufficient to dispose of the question. It must be decided upon the terms of the document, and

perhaps also upon the evidence that there is on the record as to the circumstances connected with the transaction and as to the intention of the contracting parties,—I say perhaps, as I am very doubtful if in the face of the document Ex. 1, embodying the terms of the contract between the parties any evidence is at all admissible for the purpose of proving the agreement that is set up on behalf of the defendants. Such evidence may, if at all, be admissible under the second proviso to s. 92 of the Indian Evidence Act; and in view of the highly formal nature of the document which evidences the transaction—a document which was executed after a good deal of correspondence between two firms of Solicitors who were acting for the parties, in the course of which the terms were threshed out in all their details and which was drawn up after the drafts were several times corrected and finally approved—I should not be prepared to hold that the evidence is admissible in the present case. Learned Counsel appearing for the appellants concedes that it is difficult to say that it is admissible and his only justification for relying upon the evidence, as he says, is that the plaintiff also has sought to travel beyond the covenants embodied in the document. He contends on the authority of the case of *Joliffe v. Baker* (5) that if a purchaser after completion of the contract and execution of the conveyance seeks to recover compensation from the vendor, for false representation made by the latter, such compensation cannot be recovered unless there was fraud or the breach of some contract or warranty contained in the conveyance. In my opinion, the principle is not applicable to the present suit, which is not a suit for compensation based upon breach of a covenant, but as I have already said, a suit for recovery of money actually paid on behalf of the plaintiff and out of the plaintiff's estate, which, it is alleged the respondents were bound to pay. The plaintiff, therefore, in my judgment, is not seeking to go beyond the covenants in any view of the matter. I am, therefore, of opinion that as there is no dispute that the conveyance does not purport to deal with the liability to pay the arrears, the ordinary law applies and the vendors were liable to pay them up to the date of the sale.

I should not, however, rest my judgment on this ground alone, as extrinsic evidence

has been adduced on both sides, and evidently without any objection. A good deal of dust has arisen over the controversy as to why it was that the consideration-money was increased from 3 lacs 20 thousand to 3 lacs 30 thousand and yet ultimately the former sum was mentioned in the document and not the latter or in other words as to what did this extra amount of 10 thousand represent and to whom did it go. On plaintiff's behalf it is urged that it was paid so that the back rents due from tenants might be assigned over to the purchaser. On behalf of the defendants it was contended that it represented the rents due from tenants less the amounts of arrears due to the landlords and so the liability to pay the latter was taken over by the purchaser. A most unsavoury part of the evidence was that given by the Solicitor Mr. Watkins and that afforded by the entries in his books. There is a want of candour running through the evidence of this gentleman and the explanation offered by him, if it is any explanation at all, of the entries in his books which purport to ear-mark this extra amount of 10 thousand as brokerage, is, to say the least unworthy of his position as an officer of the Court, which he is and in which capacity he acted. I propose to say nothing further in this matter as, in my opinion, it has very little bearing on the question that we have got to determine. Suffice it to say that I am unable to accept the story of Mr. Tweedie and his witness Abinash Chandra Mittra that the extra 10 thousand represented the difference between the arrears due from tenants and the arrears of rent due to the landlords. The correspondence especially the letters Ex. 10 and Ex. 16 and the evidence of the Solicitor Mr. J. N. Basu which is perfectly clear and fair leave no doubt in my mind that no liabilities were taken over by the purchaser and the purchase was made on a bare contract of sale and that the conveyance was executed on the terms mentioned in the conveyance itself and there was no arrangement or agreement entered into between the parties varying the ordinary incidents of law relating to the rights and liabilities as between a vendor and a purchaser. I am also fortified in this conclusion by the circumstance that in one of the drafts Messrs. Watkins & Co., expressly put in a clause as to the taking over of the liability by the purchaser, but it was

not embodied in the document in the form that it ultimately took. There is some evidence that the vendors had been negotiating in the past for the sale of the properties on the footing of the liabilities in respect of the arrears of rent being taken over by the purchaser as for instance the evidence of D. W. No. 1, Babu Ramesh Chandra Sarkar, and some documentary evidence as well in the shape of correspondence. This evidence, however, does not go far enough to show that the plaintiff's purchase was on that footing. The positive evidence given by Mr. Tweedie and of D. W. No. 2, Abinash, as to a statement showing arrears of rent due from the tenants of the estate and the arrears due to the landlords having been given to the plaintiff about six months before the sale may or may not be true; but that does not, in the face of the matters to which I have already referred, lead to the conclusion that the liability did in fact pass to the plaintiff by the sale.

The last argument is that the plaintiff has failed to prove that the defendant No. 2 the new Company took over the liabilities of the old Company in the matter of the payment of the arrears. This objection in the form in which it is urged before us does not appear to have been taken in the written statement. In the written statement there is only a general statement that the new Company is not legally liable for the amount claimed or for any amount whatever. It would seem that they never disputed the position that whatever rights and liabilities attached to the old Company passed to the new Company and consequently no issues were raised on this point. In the conveyance to which, as I have already stated, the new Company was a party executant, it was declared that the new Company was incorporated with a view to take over the assets and liabilities of the old Company, and that both the Companies were lawfully and absolutely seised and possessed of or otherwise well and sufficiently entitled to the *zemindaries*, lands, hereditaments and premises. The whole case has been fought out in the Court below on the footing that the rights and liabilities of the two Companies were identical. If that was not the fact it was for the new Company to plead the same or at any rate to prove the same as it was a matter within their special knowledge. In none of the forty-four grounds taken

by the appellants in their memorandum of appeal has this objection been indicated, and it would be unreasonable to require the plaintiff to produce evidence of a fact which was to all intents and purposes one of the admitted features of the case.

I am accordingly of opinion that the appeal fails except in so far as it is on behalf of the defendant No. 4. I, therefore, agree with my learned brother in holding that the decree passed by the Court below as against the said defendant should be set aside, and the suit in so far as it is against him must be dismissed. The appeal in so far as it is on behalf of the defendant No. 2 should be dismissed with costs. The defendant No. 4 must bear his own costs in both Courts.

Z. K.

Appeal dismissed.

PATNA HIGH COURT.

APPEALS FROM APPELLATE DECREES
Nos. 915, 963 TO 976, 1454 TO 1471
OF 1924.

July 22, 1925.

Present:—Justice Sir B. K. Mullick,
Kt., Acting Chief Justice and Mr. Justice
Kulwant Sahay.

SIB SAHAI LAL AND OTHERS—
APPELLANTS

versus

HON'BLE SIR BIJAI CHAND MAHTAB—
RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 52—Landlord and tenant—Kabuliyat granted on the basis of area—Additional rent, whether can be claimed—Jamabandi prepared by landlord, whether admissible in evidence.

Where a contract of tenancy is made not with reference to any boundaries or a specific block otherwise identifiable but for a certain area at a certain rental the area is of the essence of the contract and any subsequent excess found upon measurement renders the *raiyat* liable to pay additional rent under s. 52 of the Bengal Tenancy Act. [p. 864, col. 1.]

For the purposes of s. 52 of the Bengal Tenancy Act it is not always necessary to ascertain the area of the original grant and the rent thereby reserved. All that the landlord has to show is that the present area is greater than the area for which the rent was last paid. The onus is then shifted on the tenant to show that the excess land used previously to belong to the holding and was lost by diluvion or otherwise. [p. 864, col. 2.]

A *jamabandi* prepared by the landlord though not binding upon the tenant is admissible in evidence to show that since the creation of the tenancy rent has been assessed and that such assessment was on the basis of a certain area. [p. 865, col. 2.]

Appeals from a decision of the Additional Subordinate Judge, Bhagalpur, dated the 26th April 1924, affirming that of the Munsif, Madhipura, dated the 4th June 1923.

Messrs. S. M. Mullick and S. N. Palit, for the Appellant.

Messrs. Sultan Ahmad and S. C. Mazumdar, for the Respondents.

JUDGMENT.

Mullick, Actg. C. J.—The plaintiff brought 47 suits against different tenants for arrears of rent for the years 1327, 1328 and 1329 *Faslis*. He also at the same time claimed additional rent for excess area under s. 52 of the Bengal Tenancy Act alleging that by a measurement made in the course of partition proceedings in 1910 and 1911 it was found that the area in the possession of the tenants was in excess of the area for which rent had been previously paid. He also claimed an enhancement under s. 30 (b) on the ground that there had been a rise in the average local prices of staple food crops. He also claimed enhancement under s. 30 (d) on the ground that the lands had been improved by the fluvial action of the river Kosi.

Three suits were compromised and one was decreed *ex parte*. In the remaining 43 cases the Munsif disallowed the prayer for enhancement under s. 30 (d) but he allowed in a modified form the prayer for enhancement under s. 30 (b). He also allowed the claim under s. 52. He made decrees against the tenants in accordance with these findings.

Thereupon the tenants in 35 cases appealed to the District Judge. The appeals were heard by the Subordinate Judge whose decision was as follows:—

(a) The learned Subordinate Judge affirmed the Munsif's decree for enhancement on the ground of a rise in the price of food grains.

(b) He affirmed the Munsif's finding that the quality of the land had not been shown to have improved and his decree dismissing the claim under s. 30 (d), Bengal Tenancy Act.

(c) He affirmed the Munsif's finding that the standard of measurement was a *lugga* of $6\frac{1}{2}$ cubits.

(d) Disagreeing with the Munsif he found that the tenancies which, according to the evidence, have existed for a period of 70 years were not created after measurement and he modified the Munsif's decree and

allowed an enhancement under s. 52 only in some of the cases.

As the learned Subordinate Judge's judgment seems somewhat obscure at first sight it is necessary to examine it with reference to the pleadings and the judgment of the Trial Court. Now in the plaint the plaintiff distinctly makes the case that the *mouzas* from time immemorial have been settled with tenants after proper measurement with a *lugga* of 6½ cubits and that the measurements were entered in the rent roll kept by the *zemindar* and in the receipts granted to the *raiyats* and that in accordance with the said practice the defendants used to take settlement of specified areas at specified rates per *bigha*. The plaintiff then alleges that from about 1305 to 1313 *Faslis* the lands were inundated by the river Kosi and that in 1314 the defendants encroached upon the *khas* lands of the plaintiff and that in 1316 a Cadastral Survey was made and it was found that the defendants were holding lands in excess of the area originally settled with them. At the trial the plaintiff produced the *jamabandis* for the years 1314, 1315 and 1316, also some *karchas* and counterfoil rent receipts. From the Munsif's judgment it would appear that the *jamabandis* show the area, the rate per *bigha* and the total rental. The *karchas* show the area and the rental. The counterfoil rent receipts contain the same particulars and on the back of them appear the thumb impressions of the *raiyats*.

At the trial one of the Issues (No. 14) was "Is there any system of measurement prevalent in the village where the plaint lands are situate?" This was answered by the Munsif in the affirmative. The Munsif appears to have held not only that the standard of measurement was 6½ cubits but also that there was a practice of measurement in the *mouza* such as is referred to in cl. (6) of s. 52 of the Bengal Tenancy Act. That clause provides that if such a practice is established then the Court may presume that the area specified in a *patta*, *kabuliyat* or rent roll has been entered in such *patta*, *kabuliyat* or rent roll after measurement and the Munsif gave effect to this presumption and found that the areas shown in the *jamabandis* and the other papers were entered after measurement.

The Subordinate Judge accepts the Munsif's finding as to the length of the

standard of measurement but does not find that there was any measurement before entering the areas in the papers.

But in the course of the trial the plaintiff appears to have made an alternative case. He contended that even if his allegation of measurement was not accepted and it was held that the *jamabandi* and other papers referred to an assumed area, still he was entitled to additional rent upon the difference between the present area and such assumed area.

The learned Munsif accepted this alternative contention although it did not arise upon his findings.

The Subordinate Judge took a middle course and he held that the areas entered in the papers were in fact assumed areas and where the difference between the present area and the assumed area was small he declined to decree enhancement. He thought that it was quite possible that in these cases the area was underestimated and that the area of the holding at the time of its origin was the same as that fixed by the partition proceedings. He appears to have found his decision upon the principle of mutual mistake.

But where the difference was large the Subordinate Judge held that the *raiyat* must have encroached upon the *zemindar's* land. The learned Judge found that the encroachment took place not upon the *zemindar's khas* lands of which he had none in the neighbourhood but upon the lands of other *raiyats* paying rent to him. But as the law is that encroachments, whether upon the landlord's *khas* lands or upon those of third parties must always enure to the benefit of the landlord, the learned Subordinate Judge held that in these cases the difference between the present area and that shown in the landlord's papers constituted an excess upon which the *raiyat* was liable to pay additional rent.

The Subordinate Judge accordingly dismissed 17 of the appeals.

In the remaining 18 appeals he disallowed the prayer for enhancement under s. 52 while maintaining the enhancement under s. 30 (b).

We have now before us 33 second appeals.

In 18 the landlord appeals against the Subordinate Judge's decrees disallowing enhancement under s. 52.

In 15 appeals the tenants appeal against

the Subordinate Judge's decrees allowing enhancement under s. 52.

It is urged that the Subordinate Judge's finding is that as the plaintiff has failed to show what was the area of the holdings at the time of their origin he is not entitled now to claim rent on any excess area and that the operative part of the judgment is inconsistent with the findings.

In my opinion the findings, when properly understood justify the decree and it is desirable first to consider the scope of s. 52. Now excess area may be acquired by a tenant; (a) by encroachment on waste or unoccupied land of the same estate belonging to his landlord; (b) by alluvion or (c) by encroachment on the lands of a third person. The tenancy may be created by reference to boundaries. In such a case the operative part of the contract lies in the enumeration of the boundaries and any reference to area is merely descriptive and does not affect the identity of the subject-matter of the grant.

Next a tenancy may be created by the grant of a block of land described otherwise than by reference to boundaries. Here again any incorrect assertion as to the area will be merely false description and will not affect the liability for the rent reserved. In either of these two cases the rental may be either a lump sum without reference to rates or a lump sum based upon a rate or rates per unit of measurement.

The third case arises when a tenant squats upon the land of the *zemindar* and there is an implied contract of tenancy to pay fair and equitable rent upon all the lands in his possession at any time. Strictly speaking, s. 52 is not necessary to fix liability for excess area under such a contract. The liability for excess area arises upon the contract itself.

The fourth case arises when the contract is made not with reference to any boundaries or a specific block otherwise identifiable but for a certain area at a certain rental. In such a case the area is of the essence of the contract and any subsequent excess found upon measurement renders the *raiya*t liable to pay additional rent. In determining the area demised the parties may either resort to measurement or they may agree to accept an assumed figure. In either case s. 52 operates. In the cases before us there is no finding that the original grant was for land within any specified boundaries or comprised in a specified block. The Sub-

ordinate Judge finds that there was no measurement before the grant and I think he intends to find that the settlement was for an assumed area. He does find that there was no rate per *bigha*; but that question is not material. The sole question is whether the rent reserved in 1314 was for an area less than the present area.

For the purposes of s. 52 it is not always necessary to ascertain the area of the original grant and the rent thereby reserved. All that the landlord has to show is that the present area is greater than the area for which rent was last paid. The onus is then shifted on the tenant to show that the excess land used previously to belong to the holding and was lost by diluvion or otherwise. As I read the learned Subordinate Judge's findings I think he holds that the landlord's papers show that in 1314 and subsequent years the tenants were paying the rents noted against their names for areas assumed by both parties to be correct and that they would be liable to pay additional rent: (1) if the *jamabandis* of 1314 recorded a new contract; or (2) if the assumed areas were in accord with the state of affairs at the origin of the tenancies.

As the case of neither party was that there was a new contract of tenancy the only question for decision that remained was what was the area at the origin? For this purpose the learned Judge accepted the *jamabandi* papers as evidence but he declined to give that weight to them that the Munsif gave and he held that in some of the cases they were inaccurate. The Munsif held that as there was a practice of measurement in the *mouza* the *jamabandis* must be taken to be accurate and conclusive as to the area of the holdings at their origin. The Subordinate Judge declined to accept the oral evidence upon this point and he drew attention to the fact that the papers previous to 1314 had not been produced and he thought that the areas shown in the *jamabandi* of 1314 might well be the area of the holdings at the time of their origin in those cases where the excess discovered in 1316 was only slight. On this point the learned Government Advocate on behalf of the landlord attacks the learned Judge's finding on the ground that he did not consider the whole evidence in the case. It is pointed out that no reference is made to the fact that the tenants placed their thumb impression upon the counterfoil rent

receipts and that there is no discussion of the evidence of some of the witnesses who prove the measurements. As the Subordinate Judge had the whole evidence before him his finding in favour of the tenants with reference to these cases is, I think, conclusive.

Therefore, the Second Appeals Nos. 1454 to 1471 of 1924 preferred by the landlord must be dismissed with costs. I do not think there is any ground for the suggestion that the learned Judge was labouring under the impression that landlord must prove measurement in 1314. It is clear that he did not consider that necessary. And as to the onus which rested upon the tenants to show that the present area is not in excess of the original area, though it is not quite clear whether the Subordinate Judge has correctly placed the burden, the learned Judge has come to a finding on the evidence on both sides and the question of the burden of proof becomes academical.

In regard to the cases in which the difference is large, the learned Subordinate Judge takes the view that the *jamabandi* of 1914 is approximately correct and the large difference shows that the excess is real. The position taken by the learned Subordinate Judge is perhaps not very logical but he was entitled to find in which cases the *jamabandi* area was not the original area and his finding is conclusive.

Therefore, Second Appeals Nos. 915 and 963 to 976 which have been preferred by the tenants are dismissed with costs.

Before concluding it is necessary to refer to *Manindra Chandra Nandi v. Kaulat Shaik* (1). In this case the landlord produced *jamabandis* and rent receipts showing the area in certain years and he claimed additional rent on excess area found in the possession of the *raiyat* in a subsequent year. Their Lordships of the Calcutta High Court held that the claim could not be allowed, but in affirming the decision of the lower Appellate Court, which was conclusive as a finding of fact, their Lordships reviewed the previous law on the subject in Bengal and made certain observations upon which, though *obiter*, considerable stress has been laid by the learned *Vakil* for the tenant appellants before us. The material passage of the leading Judgment runs as follows:—

"I take it to be the settled rule of this

Court that when a letting upon the basis of a measurement is proved the tenant has *prima facie* to show that the rent was a consolidated rent for all the land within specific boundaries, but that in the absence of such proof the mere production of such *dakhilas* as those now in evidence does not suffice to throw any onus on the tenant. The position then is simply that the landlord has failed to establish the fact of excess area because he has failed to show with sufficient certainty what the area in fact was for which the rent was originally reserved. There is no reason whatever forbidding a landlord from proving, if he can, a contract of the nature indicated in *Dhrupad Chandra's case* (2), but entries of area and rate in *dakhilas* or *jamabandis* do not suffice to prove this by themselves in the absence of further material throwing light upon the original conditions of a holding whose origin is beyond the reach of direct evidence."

The learned Judges appear to have been disinclined to accept the view taken in this Court in *Kesha Prasad Singh v. Tribhuvan* (3), where it was held that statements of area in the landlord's papers whether after measurement or not were evidence for the purpose of ascertaining what the area was for which the rent shown in *jamabandi* was being paid. It would seem that the learned Judges were of the opinion that unless the *jamabandis* were prepared after measurement no claim for enhancement could be founded upon them. In their view the settled rule of the Calcutta High Court was that an assumed area could never be a foundation for such a claim. It does not appear, however, that the case of *Durga Priya Choudhury v. Hazra Gain* (4) was considered by the learned Judges. There Mookerjee, C. J., observed that a *jamabandi* prepared by the landlord though not binding upon the tenant was admissible as evidence that since the creation of the tenancy rent has been assessed and that such assessment was on the basis of a certain area; and in remanding the case the learned Chief Justice gave the following directions: "The District Judge will first consider whether since the date of the last assessment of rent, land has been added to the holding by encroachment, accretion or in like manner.

(1) 79 Ind. Cas. 852; 28 O. W. N. 264; 50 O. 957; (1924) A. I. R. (O.) 374.

(2) 45 Ind. Cas. 660; 22 C. W. N. 826; 27 C. L. J. 563.

(3) 39 Ind. Cas. 611; 2 P. L. J. 276; 1 P. L. W. 409.

(4) 62 Ind. Cas. 453; 25 C. W. N. 204.

If this is answered in the negative, he will consider whether the rent was assessed at a consolidated sum for the entire tract in the possession of the tenant, whatever its area might turn out to be, or whether the rent was assessed on an area fixed by estimate or determined by measurement. If the rent was not fixed as a consolidated sum the plaintiff is entitled to additional rent." This view of the law is in accord with that which had been taken in this Court in 1917 in *Kesho Prasad Singh's case* (3). It was subsequently affirmed in *Sheo Kumar Lal v. Ramphal Das* (5) and, in our opinion, the learned Subordinate Judge was right in taking the landlord's papers into consideration in ascertaining whether the excess in the cases before him was real or fictitious.

The result is that all the appeals before us are dismissed with costs.

Kulwant Sahay, J.—I agree.

Z. K. *Appeals dismissed.*

(5) 58 Ind. Cas. 959.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1253
AND 1347 OF 1922.

March 19, 1925.

Present:—Mr. Justice Suhrawardy and
Mr. Justice Duval.

Hazi Munshi FAZULUDDIN
MAHAMMAD—DEFENDANT—APPELLANT
versus

KHETRA GHORAI AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 95—Decree obtained by fraud, whether void or voidable—Sale held in execution of fraudulent decree—Suit to set aside decree and sale—Limitation.

A transaction tainted with fraud is voidable and not void. A decree obtained by fraud, collusion or any other unlawful means, is a pronouncement of a Court of Justice and cannot be treated as waste paper. The only objection that can be made to a decree as being void or a nullity must be on the ground that it was passed without jurisdiction. Where a decree is passed by a Court which had jurisdiction over the subject-matter of the suit, a plaintiff will not succeed in obtaining any relief in respect of it unless he gets it vacated. [p. 867; cols. 1 & 2.]

A sale held in execution of a fraudulent decree is not a void but a voidable sale; till vacated by an appropriate proceeding, the rights created thereby are effective. Consequently where the right to have a decree set aside as fraudulent has become barred

by limitation, no decree can be passed setting aside the sale only as made in execution of a fraudulent decree. [p. 867, col. 2.]

A suit for a declaration that a decree and an auction sale thereunder are not binding on the plaintiff, is not a mere declaratory suit but in substance a suit to set aside the decree on the ground of fraud and is governed by Art. 95 of Sch. I to the Limitation Act. [p. 868, col. 1.]

Appeals against the decrees of the Officiating Subordinate Judge, Third Court, Midnapore, dated the 28th February 1922, modifying those of the Munsif, First Court at Contai, dated the 28th February 1921.

Mr. J. C. Hazra (with him Babus Charu Chandra Ganguly and Apurba Charan Mukerji), for the Appellant.

Babu Santosh K. Pal, for the Respondents.

JUDGMENT.

Suhrawardy, J.—The facts of this case are that defendant No. 3 brought a suit (being Mortgage Suit No. 79 of 1914) against the plaintiffs and obtained an *ex parte* decree against them in execution of which the properties in suit were sold and purchased by defendant No. 1 who obtained symbolical possession of the properties on the 20th February 1916. The present suit was brought on the 28th February 1920 in which the plaintiffs prayed "to have their possession confirmed after declaration of their alleged title to the lands in suit or in the alternative for recovery of possession of the disputed lands, after declaration that the decree in the mortgage Suit No. 79 of 1914 and the auction-sale in execution thereof were fraudulent and void, and if necessary, after setting aside the decree." One of the pleas raised by the defendants was that of limitation and that is the only point pressed before us on behalf of the defendants-appellants. The plaintiff in his plaint alleged that he came to know of this decree on the 10th December 1918. The First Court accepted that statement and finding that the decree and sale were fraudulent gave the plaintiffs a decree for all the properties in suit which were described in two schedules being schedules (ka) and (kha). The defendant No. 3 appealed and the learned Subordinate Judge found that in the mortgage-bond the property described in schedule (ka) was fraudulently interpolated, and, therefore, the decree obtained by the defendant on the strength of the bond so far as it related to that property was void as also the sale held under that decree. Regarding the properties described in sche-

dule *kha* he found that the properties were mortgaged to the defendant under the bond and, therefore, so far as the properties of that schedule were concerned the suit should be dismissed.

As regards schedule *kha* the learned Subordinate Judge observes that the auction-purchaser is a third party and he was not a party to the fraud by which the decree was obtained nor did he collude with the other defendants; so the plaintiffs cannot recover possession of the land described in schedule *kha* unless he gets the sale and the decree set aside; and he thought that Art. 95 of the Limitation Act applied to the case. After making these observations the learned Judge raises the issues—So the question is if the plaintiffs are within three years of the date of their knowledge of the fraud, i. e., the forgery in the bond: On this issue he records his finding in these words: "In fact I am convinced that they (the plaintiffs) knew of the same (the decree and the sale) on the 20th February 1916 when the symbolical possession was delivered and the defendants wanted them to vacate the *bastu*. This suit is brought on 28th February 1920. Therefore, the suit is evidently after three years from the date when the plaintiffs knew of that fraud." As to schedule *ka* the learned Subordinate Judge is, of opinion, that as the land described in that schedule was interpolated in the mortgage-bond after its execution the decree and sale have not affected the lands of schedule *ka*. The learned Judge seems to think that different legal considerations should apply to different portions of the decree obtained by the appellant. If this is the view taken by the learned Judge it must be held to be wrong. A transaction tainted with fraud is voidable and not void. A decree obtained by fraud, collusion or any other unlawful means is a pronouncement of a Court of Justice and it cannot be treated as a waste paper. The only objection that can be made to a decree as being void or a nullity must be on the ground that it was passed without jurisdiction or that the Court which passed it had no territorial or pecuniary jurisdiction over the subject-matter of the suit. It is conceded that the Court which passed the mortgage-decree had jurisdiction over the properties in suit and was pecuniarily competent to try it. That decree, therefore, is a decree which is binding upon all the parties to the suit unless set

aside in a properly constituted proceeding. The view that a decree passed with jurisdiction, however tainted it may be with fraud, is not void, hardly needs any support from authorities: for it has been repeatedly held that a plaintiff will not succeed in obtaining any relief before he, if the decree passed against him was by a competent Court, gets it vacated. Reference may be made to the case of *Ramsona Choudhurani v. Nabakumar Sinha* (1), where it is observed "that a judgment rendered by a Court having jurisdiction over the parties and the subject-matter, unless reversed and annulled in some appropriate proceeding, is not open to contradiction or impeachment in respect of its validity, verity, or binding effect, by parties or privies in any collateral action or proceeding. The position is different when a judgment shows on its face that it is void for want of jurisdiction either of the person or the subject-matter; such a judgment is treated as a nullity, collaterally impeachable by any person interested, whenever it is brought in question". The same view has been expressed in the case of *Raj Kumar Sarkel v. Raj Kumar Mali* (2), where it was held that a sale in execution of a fraudulent decree is not a void but a voidable sale; till vacated by an appropriate proceeding, the rights created thereby are effective. In that case which covers a greater part of the points raised in this case, the sale was sought to be set aside on failure to set aside the decree; and the learned Judges held "that it was essential that the plaintiffs should seek, as they did in their plaint, to have the decree set aside on the ground of fraud before they could have the sale vacated. Consequently where the right to have the decree set aside as fraudulent has become barred by limitation, no decree can be made setting aside the sale only as made in execution of a fraudulent decree, and as the plaintiffs have lost their right to attack the decree, they cannot consequently attack the sale". This view has been adopted in many rulings one of which may be referred to, viz., the case of *Bijoy Chand Mahatap v. Asutosh Chakrabarty* (3). The result of all these authorities is that the plaintiffs cannot get the relief which they seek to obtain in this case before they get rid of the decree

(1) 10 Ind. Cas. 90; 13 C. L. J. 404; 16 O. W. N. 895.

(2) 33 Ind. Cas. 767; 20 O. W. N. 659.

(3) 62 Ind. Cas. 73; 48 C. 454; 25 O. W. N. 42.

which stands in the way. According to the findings of the learned Judge the plaintiffs came to know of the existence of the decree and the sale more than three years before the date of the institution of the suit which is a suit to all interests and purposes a suit for setting aside the decree and the sale. The decree and the sale being only voidable, they must be avoided within the period of limitation fixed by Statute. But it is argued on behalf of the respondent that the suit was only one for a declaration that the decree and the sale were not binding on the plaintiffs and, therefore, it may be treated as a declaratory suit. This is an attempt to evade the clear provisions of law. To hold that the plaintiffs are entitled to have a declaration that a certain decree is not binding against them though they were parties to such proceedings would be to make nugatory such provisions of the law which makes it obligatory on a party to set aside the decree and the sale in order to remove an impediment which stands in the way of his obtaining the relief he seeks. For instance the plaintiff, to avoid Arts. 91 or 92 of the Limitation Act, may not seek to have the instrument which purports to have been executed by him cancelled or set aside but may merely sue for a declaration and possession of property or other ancillary reliefs. This he cannot be allowed to do. It cannot be said that the plaintiff is entitled to regard the transaction to which he is said to be a party a nullity.

I am conscious of the view taken in some cases that there are cases where the plaintiff may not be required to remove an apparent obstruction to his right before he seeks possession of the property from which he has been dispossessed. But the view taken in such cases is based upon a different ground. In the present case the plaintiffs were parties to the transaction or proceeding; but in a case in which the plaintiff is not such a party he may not be bound to have the transaction set aside; he may ask for a declaration that it is not binding on him. But where there is a judgment of Court against him he cannot succeed unless he gets the hindrance removed. In the view I take of this case, the decree and the sale were not absolutely void but were voidable and the plaintiffs not having sought the proper remedy within three years from the date of their knowledge, i. e., 20th February 1916, the present suit

for setting aside the decree and the sale thereunder is barred and, therefore, the plaintiffs have lost their right.

The result of the above consideration is that these appeals succeed, the decrees of the Courts below are set aside and the plaintiff's suit dismissed. In S. A. No. 1253 of 1922 the appellant will get his costs in all the Courts but in S. A. No. 1347 of 1922 the appellant will not get her costs in any Court.

Duval, J.—I agree that these appeals must be allowed. The facts shortly are as follows. The respondents are the mortgagors and the appellant in S. A. No. 1347 of 1922 is the mortgagee. The latter brought a suit in 1916, obtained an *ex parte* decree on her mortgage, and put the properties to sale which were purchased by the appellant in S. A. No. 1253 of 1922. Thereafter this latter appellant as auction-purchaser took symbolical possession on the 20th February 1916 and the present suit was brought on the 28th February 1920. The plaintiffs-respondents' case was that as a matter of fact one of the items in the schedule of the mortgage-deed was fraudulently interpolated after the mortgage was executed. They brought the suit on the 28th February 1920 alleging before the Munsif that they only came to know of the decree and the sale on the 10th December 1918, i. e., within three years of the date of the suit. It is clear, therefore, that the suit as framed recognizes that Art. 95 is the appropriate Article. The learned lower Appellate Court, however, has found that as a matter of fact they were aware of the fraudulent decree more than three years before the suit was instituted. The lower Appellate Court also found (disagreeing with the first Court) that the appellant in S. A. No. 1253 of 1922 (the auction-purchaser) neither had any previous knowledge of any fraud in the decree nor acted in collusion with the appellant in S. A. No. 1347 of 1922. The only argument addressed to us on behalf of the appellant is that as Art. 95 is the Article applicable and as the learned lower Appellate Court has found that the plaintiffs had knowledge of the decree more than three years before he brought the suit, the suit is barred under that Article. In this Court a defence is set up on behalf of the respondent that as a matter of fact Art. 95 is not applicable but another Article, namely, the residuary Article, i. e., Art. 120 applies, and

the learned Vakil for the respondent has argued that this is not a suit to set aside the decree but a suit for declaration that the decree and the sale under it are not binding on them. It is only a declaratory suit and the plaintiff is still in possession. The only point, therefore, that appears to me to be arguable is whether, on the form of the suit as framed, this suit is one to set aside a decree. My learned brother has dealt with that point and I agree with him in his finding that it is a suit to set aside the decree passed in Suit No. 79 of 1914 and that the plaintiffs cannot get over the limitation of three years by arguing that it is a suit for a mere declaration or that it is a case for declaration with certain reliefs. I, therefore, agree with my learned brother that both the appeals must be allowed.

Z. K.

Appeals allowed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER

No. 37 OF 1923.

February 7, 1925.

Present:—Mr. Justice Madhavan Nair.

AYISA BOVI AMMAL—DEFENDANT

—APPELLANT

versus

SOKARA BOOI—PLAINTIFF—

RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 47, 73—Partnership decree—Question in execution between decree-holders—Section 47, application of—Decree transferred at instance of one decree-holder to another Court—Realization of assets—Rateable distribution—Orders under s. 73, whether appealable.

A question raised in execution between parties to a partition suit, in whose favour the decree has been passed, is a question raised between the parties to the suit within s. 47, C. P. C., notwithstanding that all the parties are in the position of decree-holders. [p. 870, col. 2.]

Varada Ramaswami v. Vumma Venkataratnam, 67 Ind. Cas. 546; 42 M. L. J. 473; 30 M. L. T. 178; 15 L. W. 421; (1922) M. W. N. 184; (1922) A. I. R. (M.) 99, *Raja of Karvetnagar v. Venkata Reddi*, 29 Ind. Cas. 231; 39 M. 570; 29 M. L. J. 96; (1912) M. W. N. 334; 17 M. L. T. 457 and *Venkatakrishna Pattar v. Venkatakrishna Pattar*, 37 Ind. Cas. 900; 31 M. L. J. 820; 20 M. L. T. 238; 2 L. W. 324, distinguished.

All orders passed under s. 73 of the C. P. C., if passed between parties to a suit, fall under s. 47 of the Code and are appealable. [*ibid.*]

Where in a partition suit, a decree is passed for payment of certain amounts by one of the partners or the others, and one of the latter realizes a certain

amount on having the decree transferred to another Court, the other decree-holders are not entitled to claim rateable distribution, without the decree having been transferred at their instance to the said Court. [*ibid.*]

Appeal against an order of the District Court, East Tanjore at Negapatam, dated the 8th November 1922, in A. S. No. 360 of 1921, preferred against that of the Court of the District Munsif, Negapatam, dated the 14th October 1921, in E. A. No. 422 of 1922, in O. S. No. 32 of 1918, on the file of the Court of the Additional District Munsif of Tiruvalur.

Mr. M. Subbaraya Iyer, for the Appellant.

Mr. K. V. Krishnaswami Iyer, for the Respondent.

JUDGMENT.—This Civil Miscellaneous Second Appeal is against an order of the District Judge of East Tanjore at Negapatam affirming an order of the District Munsif dismissing a petition for rateable distribution under s. 73 of the C. P. C. The appellant is the 2nd defendant and the respondent is the plaintiff-decree-holder in O. S. No. 32 of 1918 on the file of the Court of the Additional District Munsif of Tiruvalur. In that suit a decree for partition was passed to the effect that the 1st defendant in the suit was to pay the plaintiff a certain sum of money and he was also directed to pay to the present appellant another sum of money. The relevant portion of the decree is as follows:—"This Court doth order and decree that the 1st defendant do pay to the plaintiff (for her share) the sum of Rs. 2,999-8-0 with interest thereon at the rate of 6 per cent. per annum from this date to the date of realization of the said sum and do also pay to the plaintiff the sum of Rs. 352-3-2 for her costs of this suit with interest thereon at the rate of 6 per cent. per annum from this date to the date of realization. And this Court doth further order and decree that on payment by the 2nd defendant of the necessary Court-fees amounting to Rs. 175 due to Government, 1st defendant do pay to the 2nd defendant (for her share) the sum of Rs. 2,999-8-0 with interest thereon at the rate of 6 per cent. per annum from this date to the date of realization of the said sum." This decree was passed by the Additional District Munsif of Tiruvalur. After the passing of the decree the respondent here, viz., the plaintiff got it transferred to the Nagapatam Court and in execution of the decree a certain amount has been realized,

The present appellant filed an application under s. 73 of the C. P. C., claiming a share by way of rateable distribution and his petition has been dismissed by both the lower Courts. The learned District Judge held that the appellant "is not entitled to execution in the Negapatam Court without the decree having been transferred at her instance to the said Court."

Mr. Krishnaswami Iyer on behalf of the respondent has taken a preliminary objection that no second appeal lies in this case inasmuch as the contest here is between two rival decree-holders in which the judgment-debtor has no interest and the order appealed against does not, therefore, come under s. 47 of the C. P. C. In support of his contention he has relied upon three decisions, namely, *Varada Ramaswami v. Vumma Venkataratnam* (1), *Rajah of Karvetnagar v. Venkata Reddi* (2) and *Venkatakrishna Pattar v. Venkatakrishna Pattar* (3). I think these cases are clearly distinguishable. In the case reported as *Varada Ramaswami v. Vumma Venkataratnam* (1), the respondent "obtained a decree against a certain judgment-debtor Mothivala Usman in O. S. No. 776 of 1916 on the file of the Ellore District Munsif. In execution he attached certain monies belonging to the judgment-debtor. Various other decree-holders who are appellants now before us applied for and obtained rateable distribution under s. 73 of the C. P. C. The money was distributed. On appeal the order for rateable distribution was set aside by the Court. The respondent then applied for the return of the money which had been paid to the other decree-holders." One of the questions for decision in the case was whether the order for rateable distribution can be considered to be an order under s. 47 of the C. P. C. The learned Judges held that the order did not fall within s. 47 of the C. P. C. since it was passed on contest between rival decree-holders and no objection to the rateable distribution was raised by the judgment-debtor and it was not suggested that his interests were directly or indirectly affected. The facts of the case show that the contest was not be-

tween parties to the suit in O. S. No. 776 of 1917 but between the decree-holder in that suit and various other decree-holders. Clearly, therefore, the order did not fall within s. 47 as it did not settle any question arising between the parties to the suit in which the decree was passed. In *Rajah of Karvetnagar v. Venkata Reddi* (2) referred to in *Varada Ramaswami v. Vumma Venkataratnam* (1), their Lordships, Seshagiri Iyer and Kumaraswami Sastri, JJ., observed that orders passed under s. 73 of the C. P. C. are appealable if they affect parties to the suit. The same view is also expressed in *Venkatakrishna Pattar v. Venkatakrishna Pattar* (3). If the parties to the proceedings in question are not parties to any common suit, then the orders passed in such proceedings cannot obviously fall under s. 47 of the C. P. C. In the present case the question arising for decision is raised in execution between parties to the suit though the 2nd defendant—the decree being one passed in a partition suit—is also in the position of a decree-holder like the plaintiff. I, therefore, overrule the preliminary objection.

As regards the merits of the case, I am inclined to agree with the view of the learned District Judge. It has been argued that a transfer of the decree at the instance of the appellant is not necessary in this case as the decree had already been transferred to the Negapatam Court at the instance of the plaintiff-respondent. No authority directly bearing on the question has been cited before me by either side. The argument advanced on behalf of the appellant overlooks the fact that the decree in question is not in the nature of a joint decree. In the partition suit the plaintiff has obtained a money-decree and the 2nd defendant has also been given such a decree. The plaintiff's decree can be executed without any reference to the decree given in favour of the 2nd defendant. The only decree for execution now before the Negapatam Court is the decree obtained by the respondent which has been transferred to it for execution under the provisions of the C. P. C. In my opinion the 2nd defendant-appellant is not entitled to execute the decree made in her favour without getting it transferred at her instance to the said Court. Till such a transfer is effected the Negapatam Court has no jurisdiction to pass orders in connection with the decree at the in-

(1) 67 Ind. Cas. 546; 42 M. L. J. 473; 30 M. L. T. 178; 15 L. W. 421; (1922) M. W. N. 184; (1922) A. I. R. (M) 99.

(2) 29 Ind. Cas. 231; 39 M. 570; 29 M. L. J. 96; (1915) M. W. N. 334; 17 M. L. T. 427.

(3) 37 Ind. Cas. 900; 31 M. L. J. 820; 20 M. L. T. 538; 5 L. W. 354.

stance of the appellant. This C. M. S. A. fails and is dismissed with costs.

V. N. V.

Appeal dismissed.

N. H.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1070 OF 1922.

June 18, 1925.

Present:—Sir Dawson Miller, Kt.,
Chief Justice, and Mr. Justice Macpherson.

Musammât Bibi WAJIHUNISSA

BEGAM—PLAINTIFF—APPELLANT

versus

BABU LAL MAHTON AND OTHERS—

DEPENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 46 (7), 61, Sch. III, Art. 2 (a)—Landlord and tenant—Non-occupancy tenant—Enhancement of rent—Agreement by tenant to pay rent determined by Court—Liability to pay, when commences—Deposit of rent by tenant, what amounts to—Suit to recover rent—Limitation.

Where under sub-s. (7) of s. 46 of the Bengal Tenancy Act a non-occupancy tenant agrees to pay the rent determined by the Court, his liability to pay rent at the rate so determined commences from the date on which he agrees to pay the rent so determined. [p. 873, col. 1.]

The limitation provided by Art. 2 (a) of Sch. III to the Bengal Tenancy Act applies only to cases where a deposit was made in accordance with the provisions of s. 61 of the Act and if no deposit was made within the meaning of that section the period of limitation provided in the Article does not apply. Where, however, there has been a *bona fide* deposit in respect of the whole amount due at the date of the deposit, and not merely in respect of a portion thereof, the deposit is validly made under s. 61, even though it should turn out that the whole amount due had not been deposited. The section provides for the case of a *bona fide* deposit of what the tenant considers to be the full amount of the rent due at the time of the deposit. The deposit, however, must be in respect of the whole rent due and not in respect of a portion only. [p. 874, cols. 1 & 2.]

Appeal from a decision of the Subordinate Judge, Patna, dated the 12th June 1922, modifying that of the Munsif, Patna, dated the 31st January 1922.

Messrs. S. Ahmad, G. Das, A. L. Das Gupta, A. H. Fukhruddin, K. Hasnain and N. Hussain, for the Appellant.

Messrs. P. C. Manuk and A. N. Das, for the Respondents.

JUDGMENT.

Miller, C. J.—The suit out of which this appeal arises was instituted by the plaintiff on the 4th May 1921, claiming rent from the defendants in respect of a holding of 7 *bighas* 5 *cottahs* of land in Patna

for the years 1325 to 1327 *Faslis* and for the *Pous* and *Chait kists* of 1328 *Fasli* together with damages at 25 per cent. per annum. The rent was claimed at the rate of Rs. 252-13-0 per annum.

The main defences to the action were (1) that the amount of rent recoverable was Rs. 102 per annum and that for the years 1325 to 1327 *Faslis*, the rent at that rate had been deposited in Court under the provisions of s. 61 of the Bengal Tenancy Act and a receipt obtained under the provisions of s. 62, sub-s. (2) and that the rent claimed for 1328 *Fasli* was not payable until *Bhado* in that year corresponding to September 1921, which date had not arrived when the suit was instituted, and (2) that the suit was barred by limitation under the provisions of Sch. III, Art. 2 (a) of the Bengal Tenancy Act, having been brought more than six months after the date of service of notice of the deposit.

It appears that in 1917 the plaintiff attempted to eject the defendants as trespassers, but it was decided by the High Court in April of that year that the status of the defendants was that of non-occupancy *raiyyats*. The rent then payable was Rs. 102 per annum. On the 13th July 1917, the plaintiff filed in Court an agreement under the provisions of s. 46 of the Bengal Tenancy Act, for the payment of an enhanced rent at the rate of Rs. 379 per annum and on the 18th July 1917 (9th *Sawan* 1324) the agreement was duly served on the defendants. The defendants refused to execute the agreement and on the 5th November 1917, the plaintiff instituted a suit before the Munsif of Patna for ejectment of the defendants under s. 46 (6) of the Act. Under the provisions of s. 46, sub-ss. (6) to (10) if the *raiyyat* refuses to execute an agreement tendered to him under the earlier provisions of the section and the landlord thereupon institutes a suit to eject him, the Court shall determine what rent is fair and equitable for the holding. If the *raiyyat* agrees to pay the rent so determined he shall be entitled to remain in occupation of his holding at that rent for a term of five years from the date of the agreement, but on the expiration of that term shall be liable to ejectment unless he has acquired a right of occupancy. But if the *raiyyat* does not agree to pay the rent so determined, the Court shall pass a decree for ejectment and a decree for ejectment so passed shall take effect from the end of the agricultural

year in which it is passed. The suit for ejectment was not decided by the Munsif until the 4th February 1920, when he found that a fair and equitable rent for the holding was Rs. 252-13-0. On the 12th February 1920, a notice was served on the defendants to accept and pay the rent found to be fair and equitable, but they do not appear to have agreed to pay the rent at the rate found by the Munsif. The Munsif's judgment has not been produced before us but it may be assumed that he passed a decree for ejectment in accordance with the provisions of s. 46 (8) of the Act. No steps, however, were taken to eject the tenants and they remained in possession without any agreement to pay the rent determined by the Court. I think the plaintiff was entitled to put them to their election but she failed to do so, and no agreement was come to by the tenants to accept the new rent determined by the Court until a year later as will presently appear.

The defendants appealed from the Munsif's decision to the Subordinate Judge. On the 19th September 1920 the appeal was dismissed. The defendants then preferred a second appeal to the High Court and applied for a stay of execution of the decree for ejectment. They were in this difficulty that if they refused to agree to pay the rent found equitable, they would be liable to ejectment before the decision of the High Court on appeal. If they agreed to pay the rent found equitable they considered, rightly or wrongly, that their appeal to the High Court could not proceed. In the result they agreed to pay the rent found fair and equitable by the Court stipulating that it should be subject to the result of their appeal then pending in the High Court. Their agreement is dated the 10th February 1921, corresponding to the 18th *Magh* 1328 *Fasli*. The appeal in the High Court was decided on the 3rd January 1923 the decision of the lower Courts being affirmed and the appeal dismissed. Pending this litigation the object of which was to fix a fair and equitable rent which the defendants could only refuse to pay under pain of being ejected, the defendants deposited in Court under the provisions of s. 61 of the Act the rent due at the old rate, namely, Rs. 102 per annum, a short time after the expiration of each of the three years 1325 to 1327 and notices of the deposit were served upon the plaintiff on each occasion shortly after the deposit was made. The

notices of the deposits for 1325, 1326 and 1327 were served upon the plaintiff on the 15th December 1918, 15th December 1919 and the 24th December 1920 respectively.

The first question for determination is from what date is the enhanced rent payable. The plaintiff contends that under s. 46, sub-s. (7) the enhanced rent is payable from the 18th July 1917 when the agreement mentioned in sub-s. (1) was served upon the tenants. Sub-s. (7) reads as follows: "If the *raiyyat* agrees to pay the rent so determined" that is the fair and equitable rent determined by the Court in a suit for ejectment mentioned in sub-s. (6), "he shall be entitled to remain in occupation of his holding at that rent for a term of five years from the date of the agreement under the conditions mentioned in the last foregoing section, unless he has acquired a right of occupancy." Her contention is that the date of the agreement there mentioned has reference to the agreement tendered to the tenant under sub-s. (1). It is urged that it would be unjust where the rent is below the fair and equitable rate and the landlord claims enhancement under the earlier clauses of the section to allow the tenant by refusing to pay an enhanced rent, to continue in possession at the old rate until a suit has been brought and a fair rent determined which, as in this case, might take a long time, and that once the fair rent has been determined by the Court it should take effect from the date when the enhancement was first claimed and an agreement tendered under the earlier clauses of the section. The defendants, on the other hand, contend that the date of the agreement in sub-s. (7) must refer to the earlier words of that sub-section which contemplate an agreement by the *raiyyat* to pay the rent determined by the court. They point out that the agreement mentioned in the earlier sub-ss. (1) to (5) is merely a document tendered to the *raiyyat* for execution which he may or may not execute at his option and that in fact, until executed, it is no agreement at all, and that if sub-s. (7) intended to refer to the date when that agreement was tendered it would have said so. Moreover the document tendered would not bear any date until its actual execution. They further point out that under sub-s. (3) if the agreement referred to in sub-ss. (1) and (2) had been accepted and executed by the tenant it would not take effect until the commencement of the agricultural year

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next following, and there is no reason for supposing that where a *raiyat* agrees to accept the equitable rent found by the Court after a suit for ejectment, that agreement should take effect from an earlier date than would have been the case had he accepted the proposal put forward by the landlord before litigation took place. Moreover the agreement tendered under s. 46, sub-s. (1) was to pay rent at the rate of Rs. 379 and it would be unjust that having refused to pay that rent, but afterwards having accepted a smaller rate determined by the Court, he should have to pay the enhanced rent from the date when the larger rate was unjustifiably demanded. Much may be said on purely equitable grounds as to what the law ought to be but we must interpret the section according to the natural meaning of the words, unless such interpretation would lead to a manifest absurdity which it may be presumed the Legislature did not intend.

It may be observed that s. 46 refers to two separate and distinct matters. The first sub-sections contemplate an amicable enhancement of the rent of a non-occupancy *raiyat* without litigation. The landlord proposes an enhanced rent and tenders to the *raiyat* an agreement to pay that enhanced rent which he may or may not execute at his option. If he accepts the proposal then the enhanced rent takes effect from the beginning of the next agricultural year. If he does not accept it then the landlord may sue for ejectment. The sixth and subsequent sub-sections relate to the procedure to be adopted where a suit for ejectment has been brought. They provide that before ordering ejectment the Court shall determine what is a fair and equitable rent. If the *raiyat* refuses to pay the rent so found then he may be ejected, but it seems perfectly clear that he would not be liable for anything more than the original rent up to the date when he was ejected. If, on the other hand, he agrees to pay the rent so determined he shall be entitled to remain in occupation of his holding at that rent for a term of five years from the date of the agreement. It seems to me clear that the date of the agreement there mentioned is the date when he agrees to pay the rent found by the Court. There would appear to be no more reason why he should pay that enhanced rent from an earlier date, if he accepts it, than there would be why

he should pay an enhanced rent if he refuses to accept it and renders himself liable to ejectment. The agreement in this case was dated the 10th February 1921 and, in my opinion, the enhanced rent became payable from that date. The result is that unless the suit is barred by limitation the rent payable by the tenants was at the rate of Rs. 102 up to the 10th February 1921 which corresponds to the 18th *Magh* 1328 *Fasli* and the rent payable after that date is at the rate of Rs. 252-13-0. The learned Subordinate Judge considered that the enhanced rent was not claimable until the 3rd January 1923 when the High Court finally dismissed the appeal in the ejectment suit. But it seems clear that the enhanced rent is payable at the latest from the date when the *raiyat* agrees to pay the rent determined by the Court. Sub-section (7) does not in terms say from what date the enhanced rent should be payable. It merely states that the *raiyat* shall be entitled to remain in occupation of his holding at the enhanced rent for a term of five years from the date of the agreement. But, as his liability to pay the enhanced rent only arises by reason of his agreement, it seems to me impossible to hold that he was under any liability to pay rent at the enhanced rate before that date. The fact that the defendants did not in fact agree to pay the enhanced rent until a much later date than that on which they might have been put to their election appears to have been due to the failure of the plaintiff to insist upon her rights. She could have compelled the defendants to pay the new rent or submit to ejectment as soon as the Munsif's decision was given unless the Court ordered a stay, which would only be granted on terms protecting the plaintiff's rights.

It remains to consider whether the claim is barred by the special limitation prescribed in Schedule III of the Act. If the limitation there prescribed applies to the facts of the present case then it is clear that the claim for rent for the years 1325 and 1326 *Fasli* is time-barred for the notices of deposit for those years were served on the 15th December 1918 and the 15th December 1919 respectively. The notice of deposit of the rent for the year 1327 was served on the 24th December 1920 and the learned Subordinate Judge considered that the claim for rent for that year was also barred. It appears to have escaped his notice, however, that the

present suit was instituted within six months of the 24th December 1920, namely, on the 4th May 1921, and it was conceded in argument before us that the rent for that year is not barred.

The appellant, however, contends that the claim for rent for the two previous years is not time-barred on the ground that the requirements of s. 61 of the Bengal Tenancy Act were not complied with. The section provides that in certain cases, which are applicable in the present instance, the tenant may present to the Court having jurisdiction to entertain a suit for the rent of his holding an application in writing for permission to deposit in Court the full amount of the money then due. The application must state the grounds upon which it is made and shall contain certain particulars as to the name of the person to whose credit the deposit is to be entered and it shall be signed and verified in the manner prescribed by s. 52 of the C. P. C. Under s. 62, if the Court accepts the deposit, it shall give a receipt for it under the seal of the Court and the receipt so given operate as an acquittance for the amount of the rent payable by the tenant and deposited as aforesaid in the same manner and to the same extent as if that amount of rent had been received by the person entitled to it. It is pointed out on behalf of the appellant that as the rent was not deposited until the end of the year, interest became payable from the dates of the different *kists* in each year and the amount of interest was not deposited. It has been found that the rent was payable not at the end of each agricultural year but *kist* by *kist* and this is no longer disputed. It follows, therefore, that at the end of the years some interest would be due upon the unpaid instalments and as the interest was not deposited it is contended that the defendants cannot be taken to have made a valid deposit under s. 61 of the full amount of the money then due. The limitation only applies to cases where the deposit was made under s. 61 and if no deposit was made within the meaning of that section the limitation period cannot apply. The question for determination is whether the deposit made in the circumstances stated was a sufficient compliance with the section. The learned Subordinate Judge considered that even if the amount deposited fell short of the sum actually due to the landlord at the date of the deposit it was a sufficient compliance with the section. In support of his finding he

relied upon the case of *Sasi Bhusan Dey v. Umakanta Dey* (1). In that case the previous decisions of the same Court were reviewed and the meaning and effect of the section was considered at length. The Court consisting of Mookerjee and Beachcroft, JJ., held that where there has been a *bona fide* deposit in respect of the whole amount due at the date of the deposit, and not merely in respect of a portion thereof, the deposit is validly made under the section, even though it should turn out that the whole amount due had not been deposited. In my opinion that case was rightly decided. The section appears to me to provide for the case of a *bona fide* deposit of what the tenant considers to be the full amount of the rent due at the time of deposit. The deposit, however, must be in respect of the whole rent due and not in respect of a portion only. It may well happen that there is some difference between the landlord and the tenant as to the amount of rent payable. In such a case the landlord might refuse to accept a sum which he considers falls short of the rent payable. One of the cases to which the section applies is where the rent has been tendered to the landlord and he has refused to accept it or grant a receipt. That might well happen where there was a *bona fide* dispute between the parties as to the actual amount payable. In the present case the tenants were contending that the rent was due at the end of the agricultural year and not *kist* by *kist*. If they were right in that contention no interest would be payable upon the earlier *kists*. The *bona fides* of the tenants in this case has not been impugned although the Court has decided that the rent was payable quarterly and not annually. It seems to me that the intention of the Legislature was that where a *bona fide* deposit has been made in respect of the whole rent due, then the matter must be decided by suit at the instance of the landlord within six months of the receipt of the notice. Under s. 62 a receipt given for the sum deposited acts as an acquittance to the extent of the amount deposited and the landlord can take the deposit out of Court and sue for the balance if he contends that the total amount due has not been deposited, and I think that the intention was that in such a case the dispute between the parties should

(1) 25 Ind. Cas. 171; 19 C. W. N. 1143; 20 C. L. J. 153.

be promptly decided otherwise the landlord cannot question the sufficiency of the amount paid into Court. If the appellant's contention be accepted it would follow that s. 62 could not operate if the amount paid in were less by a few annas than the amount actually due and no valid acquittance could be given to the tenant. Again if the appellant's contention be accepted it is difficult to see in what case the period of limitation prescribed would be effective for if the whole amount actually due must be paid in, so as to create a valid deposit under s. 61, it follows that any suit by the landlord, whether brought within six months or at a later period to recover the rent, must prove infructuous and there is no necessity for prescribing a period of limitation. If, on the other hand, the deposit of a smaller sum than that actually due is not a valid deposit within the meaning of the section again the limitation prescribed is of no effect. In my opinion the case of *Sasi Bhusan Dey v. Umakanta Dey* (1) was rightly decided and applies to the facts of this case. I think the claim for rent for the years 1325 and 1326 is barred by limitation and for the year 1327 the plaintiff is entitled to recover *kist by kist* at the old rate of Rs. 102 with interest at $12\frac{1}{2}$ per cent. credit being given for the amount deposited. With regard to the rent for the two *kists* of 1328 this is also recoverable at the old rate up to the 10th February 1921 and after that date at the rate of Rs. 252-13-0 together with interest at $12\frac{1}{2}$ per cent. The defendants are willing that the amount paid into Court for the years 1325 and 1326, and which we are told is still in deposit, should be paid out to the plaintiff in satisfaction of the rent for those years notwithstanding the bar. There will, therefore, be an order that the sums deposited for the years 1325 and 1326 be paid out to the plaintiff. She will also be entitled to take out of Court the deposit made for 1327 in part satisfaction of her claim for rent for that year. The decree of the lower Appellate Court will be varied in accordance with the decision above arrived at. The appellant has failed upon each of the main points argued before us but has succeeded in so far as the rent for 1327 is concerned and has succeeded in part as to the date from which the enhanced rent shall be payable. She has gained little advantage in so far as the rent for 1327 is concerned as this has been found to be payable at the old rate

and the sum deposited could have been taken out of Court by her at any time. In the circumstances I think that the parties should each bear their own costs of this appeal.

Macpherson, J.—I agree.

Z. K.

Decree varied

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 834 OF 1922.

February 2, 1925.

Present:—Mr. Justice Venkatasubba Rao.

V. K. MUHAMMAD BATCHA SAHIB

—APPELLANT

versus

ARUNACHALLEM CHETTIAR—

PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), ss. 92, 115—Sales, two, of same property—First vendee attesting second sale-deed—Disclaimer of purchase—Estoppel—S. 92, application.

The doctrine of estoppel is that if a man either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of those who have so given faith to his words or to the fair inference to be drawn from his conduct. [p. 876, col. 2; p. 877, col. 1.]

Cairncross v. Lorimer, (1860) 3 Macq. H. L. 827 at p. 829; 7 Jur. (N. S.) 149; 3 L. T. 130; 123 R. R. 906, referred to.

The terms of s. 115 of the Evidence Act did not enact as law in India anything different from the law of England on the subject of estoppel. [p. 877, col. 1.]

Where a vendee of property subsequently attests a sale-deed relating to the same property executed by his vendor in favour of another person, he holds out that the sale-deed in his own favour was inoperative, and that he is willing that the property should be dealt with as if it were at the absolute disposal of his vendor, and if a third person on the faith of this representation purchases that property from the vendor, the vendee making the representation is estopped from claiming title to the property. [p. 876, cols. 1 & 2.]

In such a case as the above, there is no conflict between s. 92 and s. 115 of the Evidence Act. There is no question of the admission of any oral evidence to rescind the earlier sale. The question simply is whether or not there was a representation made and acted upon. [p. 877, col. 1.]

Sections 92 and 115, Evidence Act, deal with two entirely different topics. When a party seeks to give evidence of a subsequent oral agreement modifying the terms of the written grant, he puts forward that agreement as true and relies upon the truth of that agreement. In the case of an estoppel, the party who pleads it does not profess to show that the representa-

tion made is true. On the contrary, his case very probably is that the representation is false but that the person who made it should not be allowed to show that it is false. [p. 877, col. 2.]

Second appeal against a decree of the District Court, Coimbatore, in A. S. No. 65 of 1921, preferred against that of the Court of the Additional District Munsif, Coimbatore, in O. S. No. 957 of 1919.

Messrs. C. S. Venkatachariar and K. G. Babu Rao, for the Appellant.

Mr. T. M. Krishnaswami Iyer, for the Respondent.

JUDGMENT.—The facts are complicated and as the Munsif has set them out clearly in his judgment, I do not propose to state them again. The 1st defendant was the owner of the property in dispute. On the 1st of August 1919, she executed a sale-deed in favour of the 2nd defendant (Ex. II). On the 10th of September 1919, she executed a sale-deed in favour of the plaintiff Ex. C. The contest is now between the plaintiff and the second defendant. The question is shortly, whose sale-deed is to prevail?

The conveyance in favour of the 2nd defendant being earlier in date would, in the ordinary course, take precedence. On behalf of the plaintiff it is urged that the conduct of the 2nd defendant created an estoppel and that he is precluded from relying upon his sale-deed. The 2nd defendant treated the sale in his favour as cancelled, but under s. 92 of the Indian Evidence Act, the subsequent agreement rescinding the sale cannot be proved. The question then is, did the 2nd defendant by any representation or by conduct amounting to representation induce the plaintiff to purchase the property parting with valuable consideration? The effect of the finding of the Courts below is that the conduct of the 2nd defendant was of an unequivocal character and that the plaintiff was thereby misled. This is a question of fact and the finding must be accepted in second appeal. Even apart from this, I am satisfied that the finding is correct. It is unnecessary to narrate the circumstances which give rise to the plea of estoppel. The outstanding facts that are relied upon by the plaintiff in this connection are, that the 1st defendant with the concurrence of the 2nd defendant agreed on the 5th of September to sell the property to the 7th defendant, that an agreement of sale was accordingly executed and that the 2nd defendant giving

up his rights under his own conveyance, attested the agreement to sell. The 2nd defendant thus held out that the sale in his own favour was inoperative, that the 1st defendant still continued to be the owner of the property, that she had authority to dispose of it and that the 2nd defendant was willing that the property should be dealt with as if it was at the absolute disposal of the 1st defendant. In short, the 2nd defendant's conduct amounted to a representation that although he took a conveyance, the 1st defendant remained the owner of the property. The Courts below have also held believing the plaintiff himself on this point that he was induced to purchase the property by this conduct on the part of the 2nd defendant. I agree with this conclusion. Can the 2nd defendant now turn round and say that he was on the date of the sale to the plaintiff, the owner of the property. I think not. In *Sarat Chunder Dey v. Gopal Chunder Laha* (1), their Lordships of the Judicial Committee made the following observations:—

“What the law and the Indian Statute mainly regard is the position of the person who was induced to act; and the principle on which the law and the Statute rest is, that it would be most inequitable and unjust to him that if another by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it.”

Their Lordships quote the following passage from the judgment of Lord Chancellor Campbell in the case of *Cairncross v. Lorimer* (2):—

“The doctrine will apply, which is to be found, I believe, in the laws of all civilised nations, that if a man either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned to the prejudice of those who have so given faith to

(1) 20 C. 296; 19 I. A. 203; 6 Sar. P. C. J. 224; 10 Ind. Dec. (N. S.) 201 (P. C.).

(2) (1860) 3 Macq. H. L. 827 at p. 829; 7 Jur. (N. S.) 149; 3 L. T. 130; 123 R. R. 906.

his words, or to the fair inference to be drawn from his conduct."

Their Lordships also held that the terms of s. 115 of the Indian Evidence Act did not enact as law in India anything different from the law of England on the subject of estoppel.

I am clearly of the opinion that the 2nd defendant cannot be allowed to deny that the 1st defendant was the owner of the property and was competent to dispose of it. I may observe that we are not concerned with the 7th defendant who does not put forward any claim.

For the appellant, it was strenuously argued that to give effect to the doctrine of estoppel would be tantamount to abrogating s. 92 of the Indian Evidence Act. I cannot follow this argument. I am not asked to admit evidence of any subsequent agreement to rescind the original sale. Under s. 92, the existence of such agreement cannot be proved. The question would arise in this way under that section. If the 2nd defendant proves by the production of the sale-deed that he is the owner of the property, no evidence can be given of a subsequent oral agreement on his part to rescind the sale. But, in the present case, the plaintiff does not rely upon any subsequent agreement. What he says in effect is, the 2nd defendant's conduct amounted to a certain representation and he acted upon it. Did he or did he not make that representation? This is the point to be decided. If he did make the representation and the plaintiff was misled by it and acted upon it, estoppel can be successfully pleaded. The Court is not called on to look at the conveyance in favour of the 2nd defendant at all. It is not in the least degree concerned with it. Neither it is necessary to look at the sale-deed nor to admit evidence of an agreement to rescind the sale. In fact the issue which the Court will have to decide is whether or not a representation was made. Considerations pertaining to the sale-deed are extraneous to this issue. Until the question of estoppel is decided against the plaintiff, there will arise no occasion to consider the applicability of s. 92 of the Indian Evidence Act. I find absolutely no conflict between ss. 92 and 115. The case in *Pichammal v. Ponnambala Bhatler* (3) cited by the appellant's learned Vakils is distinguishable and the observa-

tions relied on are *obiter*. There is another way of looking at the question. When a party seeks to give evidence of a subsequent oral agreement modifying the terms of the written grant, he puts forward that agreement as true and relies upon the truth of that agreement. In the case of an estoppel, the party who pleads it does not profess to show that the representation made is true. On the contrary, his case very probably is that the representation is false but that the person who made it should not be allowed to show that it is false. Sections 92 and 115 deal with two entirely different topics and I am unable to discover any conflict between the two.

In dealing with the question whether a transaction amounted to a sale or a mortgage, Melvill, J., in the course of his judgment in *Paksu Lakshman v. Govinda Kanji* (4) observed thus:—

"If the holder of an absolute bill of sale were not only to allow the vendor to remain in possession, but were to take interest from him on the alleged purchase money, or allow him to go on improving the property, I conceive that any Court would hold that the so-called vendee was estopped from enforcing his bill of sale. The answer to him would be, not that his conduct was evidence of an oral agreement converting the sale into a mortgage, but that, whether there had been such an agreement or not, he had by his conduct led the defendant to believe that he would treat the transaction as a mortgage, and that, on the strength of such belief, the defendant had been induced to pay money which he would not otherwise have paid, and that under such circumstances the plaintiff was estopped from denying that the original transaction was one of mortgage. In such a case it is clear that evidence of conduct would be strictly admissible under s. 115 of the Indian Evidence Act."

It has been suggested by the appellant's Vakils that the view of Melvill, J., was overruled in *Maung Kyin v. Ma Shwe La* (5) and that, therefore, the passage extracted above from his judgment cannot be taken

(4) 4 B. 594; 5 Ind. Jur. 527; 2 Ind. Dec. (N. S.) 903.

(5) 42 Ind. Cas. 642; 45 C. 320; 15 A. L. J. 825; 33 M. L. J. 648; 3 P. L. W. 185; 6 L. W. 777; 22 C. W. N. 257; 23 M. L. T. 36; 27 C. L. J. 175; 20 Bom. L. R. 278; (1918) M. W. N. 300; 9 L. B. R. 114; 11 Bur. L. T. 21; 44 I. A. 236 (P. C.).

as stating the law correctly. Whatever may be later view of the law on the point expressly decided by Melvill, J., I cannot agree that the particular passage referred to above does not correctly state the rule of estoppel.

I am clearly, therefore, of the opinion that the plaintiff must succeed on the question of estoppel.

The case may be considered from still another point of view. The 2nd defendant's conveyance was executed on the 1st of August 1919 but was not immediately registered. Misled by the conduct of the 2nd defendant (conduct to which I have already referred), the plaintiff himself took a sale deed on the 10th September and got it registered on the 11th. The 2nd defendant ignoring what had happened and with the fraudulent object of enforcing the sale in his own favour, then presented his conveyance for registration on the 13th of September and got it registered on the 20th of October. The effect of registration is to confer validity on the document from the date of its execution. Is the 2nd defendant then to be allowed to rely upon his own fraudulent conduct to give his conveyance preference over the sale-deed of the plaintiff executed later but registered earlier? For this reason also, the plaintiff is entitled to succeed.

There is just a minor point which has been raised by the appellant and relates to the discussion of Issue No. III in the Munsif's judgment. The 2nd defendant admittedly paid Rs. 350 and he will be entitled to that sum. Rs. 350 will be accordingly substituted for Rs. 227-3-7. The judgment of the lower Appellate Court will be modified to that extent. The second appeal in other respects fails and subject to the modification above is dismissed with costs.

This second appeal having been posted again to be spoken to this day the Court delivered the following

JUDGMENT.—The second appeal is now posted for being spoken to. There is no objection to the second appeal being dismissed without any reservation of the nature contained in the last paragraph of my judgment.

The second appeal is, therefore, dismissed with costs.

V. N. V.
N. H.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 388 OF 1924.

March 12, 1925.

Present:—Justice Sir Ewart Greaves, Kt.,
and Mr. Justice Cuming.

UPENDRA MOHON ROY CHOUDHRI

—OBJECTOR—APPELLANT

versus

NARENDRA MOHON ROY
CHOUDHRI AND ANOTHER—PETITIONERS—
RESPONDENTS.

Lunacy Act (IV of 1912), s. 65—Person of unsound mind—Finding as to incapacity to manage himself and his affairs, whether necessary—Person of weak memory, whether of unsound mind and incapable of managing himself and his affairs.

Under s. 65 of the Lunacy Act what the Court has to decide is whether the person before it is of unsound mind and is incapable of managing himself and his affairs, and it is open to the Court to find under that section that a man is of unsound mind so as to be incapable of managing his affairs but that he is capable of managing himself and is not dangerous to himself or to others. [p. 879, cols. 1 & 2.]

A person whose mental condition has been affected by a stroke of paralysis as a result of which his memory has become seriously defective but who is able to answer questions with regard to his family and his estate with a certain amount of intelligence cannot be said to be of unsound mind and incapable of managing himself and his affairs within the meaning of s. 65 of the Lunacy Act. [p. 879, col. 2; p. 880, col. 1.]

Appeal against an order of the District Judge, Khulna, dated the 23rd of September 1924.

Dr. Basak and Babu Radhika Ranjan Guha, for the Appellant.

Dr. Mitter and Babu Nerode Bandhu Roy, for the Respondents.

JUDGMENT.

Greaves, J.—This is an appeal from an order of the District Judge of Khulna, dated the 23rd September 1924, whereby he found that the appellant before us was of unsound mind and incapable of managing his affairs. The learned District Judge came to this conclusion upon the evidence of the Civil Surgeon of Khulna which was to the effect that the appellant was not in a sound condition and that he was suffering from a great deficiency of memory and from general weakening of mental faculties and this witness further states that he put many questions to the appellant and he could not in all cases give rational answers; and he further states that he came to the conclusion at which he arrived because he found great deficiency of memory and general weakening of mental faculties and he states the various questions that he put to the appellant in the course of his

examination. It appears that the appellant was under the observation of this gentleman for a considerable period and that he examined him some seven times in all. This witness further states that the appellant had no reasoning faculty and that his mind was not sound and that he was not able to manage his properties.

There was, further, the evidence of the appellant's wife Haridasi who states that the appellant had no power of understanding and could not say anything coherently and that he was like an inert mass and could not give any opinion after proper consideration.

There was also the evidence of a son of the appellant, Narendra and he states that his father's head was in a deranged condition since he had a stroke of paralysis and that he had no power to look after his health or his estate. He further states that the appellant did not like visitors, could not speak, would weep and call dead people.

The Pleader Promotha Nath Dutta in his evidence stated that the mental condition of the appellant was not good and that he could not recognise known men and that he had lost his memory and he speaks of seeing the appellant in a rude condition. Two other Doctors, on the other hand, gave evidence to the effect that the appellant was not of an unsound mind. One of them, Babu Satis Chandra Ghose, states that he thought the answers to the questions that he put to the appellant were sound and he says that he did not find any defect and that the appellant had a power to exercise judgment although his memory was impaired. The other Doctor is Phani Bhusan Roy who states that the appellant gave proper replies to the questions that he put to him and that the appellant also put intelligent questions to him. He further states that he noticed besides physical defect partial loss of memory probably due to paralysis combined with the old age of the appellant. This was the evidence which was before the District Judge when he arrived at the conclusion to which we have already referred and the question which we have got to decide in this appeal is whether the conclusion of the District Judge was well-founded. Under the present Lunacy Act what the Courts have got to decide is whether the person before them is of unsound mind and is incapable of managing

himself and his affairs and under the provisions of s. 65 of the Act it is open to the Courts to find that a man is of unsound mind so as to be incapable of managing his affairs but that he is capable of managing himself and is not dangerous to himself or to others. But what is to be borne in mind is that in order to arrive at the conclusion at which the District Judge has arrived it is necessary to find that the person is both of unsound mind and incapable of managing himself and his affairs. This was pointed out by a Division Bench of this Court in the case of *Mazahar-ud-din Khan v. Serajuddin Khan* (1). That was a case under the Lunacy Act of 1858, Act XXV of 1858. But the words there in s. 2 are very much the same as in the present Act, namely, that the object of enquiry is to find whether the person was of an unsound mind and incapable of managing his affairs. The only difference, therefore, is that under the Act of 1912 you have to ascertain whether the person is of an unsound mind and incapable of managing himself and his affairs. We were referred to a Bombay case in the course of the argument *In the matter of Cowasji Beramji Lilaovala* (2). That was a case under the Act of 1858 and Mr. Justice Latham there came to the conclusion that the term "unsound mind" comprehended imbecility, whether congenital or arising from old age as well as lunacy or mental alienation resulting from disease. When the matter first came before this Court we read the evidence and the judgment of the learned District Judge and we came to the conclusion that it would be better that we should see the appellant ourselves. The appellant was accordingly, produced before us yesterday in the presence of the learned Advocate who appeared on his behalf and we put various questions to him in order that we could ascertain for ourselves as also upon the evidence whether the conclusion of the District Judge was correct and speaking for myself, after having seen the appellant I am not prepared to find that he is a person of an unsound mind and incapable of managing himself and his affairs within the meaning of these words as used in the Act of 1912. There is no doubt, we think, that the mental condition of the appellant has been affected by the stroke

(1) 4 C. L. J. 115.

(2) 7 B. 15; 7 Ind. Jur. 200; 4 Ind. Dec. (N. S.) 11.

of paralysis from which he suffered and both owing to this and owing to his age his memory has, no doubt, been seriously affected and as has been pointed out to us he was unable to recognise either here or in the other Court his son-in-law and other relatives and apparently, the names of some his daughters escaped his memory. But he was able to answer questions with regard to his estate with a certain amount of intelligence and also questions with regard to his family and having regard to the evidence which was before the District Judge and which was read to us coupled with what we have gathered from the questions which were addressed to the appellant we think that the District Judge was not justified in the conclusion at which he arrived and the order which he made. We are not satisfied that the appellant is of unsound mind and incapable of managing himself and his affairs and the result is that we discharge the order of the District Judge. The manager appointed will be discharged after passing his accounts and he will hand over the property to the appellant.

Let the record be sent down at once.

Cuming, J.—I agree.

Z. K.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1489 AND 1490
OF 1922.

April 15, 1925.

Present:—Mr. Justice Phillips.

MUTHUKARUPPA MUTHIRIAN

AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SIVABHAGYATHAMMAL AND OTHERS—

DEFENDANTS—RESPONDENTS.

Hindu Law—Will—Joint tenancy—Second appeal—Question of fact.

A joint tenancy is not unknown to Hindu Law. [p. 881, col. 1.]

Venkayamma Garu v. Venkataramanayamma Bahadur Garu, 25 M. 678 at p. 687; 29 I. A. 156; 7 C. W. N. 1; 12 M. L. J. 299; 4 Bom. L. R. 657; 8 Sar. P. C. J. 286 (P. C.), followed.

Jogeswar Narain Deo v. Ram Chandra Dutt, 23 C. 670; 23 I. A. 37; 7 Sar. P. C. J. 13; 6 M. L. J. 75; 12 Ind. Dec. (N. S.) 445 (P. C.), distinguished.

A Hindu testator can create a joint tenancy by Will. The question of the testator's intention has to be considered with reference to the language of the Will and the circumstances of each particular case. [*ibid.*]

The finding as to whether a Will creates a joint tenancy or a tenancy-in-common is one of fact and as

such it cannot be challenged in second appeal. [p. 881, col. 2.]

Second appeal against the decrees of the District Court, Trichinopoly, in Appeal Suits Nos. 229 and 211 of 1921, preferred against those of the Court of the Subordinate Judge, Trichinopoly, in O. S. Nos. 108 of 1918 and 84 of 1919 respectively.

Mr. N. Rajagopalachariar, for the Appellant.

Mr. K. G. Srinivasa Iyer, for the Respondent.

JUDGMENT.

IN S. A. No. 1489 OF 1922.

The question at issue in this appeal is the construction of the Will of one Vythi Muthirian whereby he left his property to his senior wife and her daughter and to his junior wife, the first two being bequeathed a larger portion of the property than the latter. The question now is whether the senior wife and her daughter took the property as joint tenants or as tenants-in-common, the plea that they only took a life estate not being seriously pressed before me.

The District Judge has considered the language of the Will and the circumstances in which it was executed and has come to the conclusion that the bequest was to the wife and daughter as joint tenants. It is now contended for the appellants that this finding cannot be sustained as it is opposed to the decision of the Privy Council in *Jogeswar Narain Deo v. Ram Chandra Dutt* (1). In that case, in which there was a Will of a somewhat similar nature, it was held that the legatees, mother and son, to whom a joint bequest was made took the property as tenants-in-common and not as joint tenants. I may here point out that in the Will under consideration in that case there were words of inheritance used after the bequest and there were no special circumstances to guide the Court in arriving at the intention of the testator. A case of this Court reported as *Vyadinada v. Nagammal* (2) was overruled. In that case the bequest to a nephew and to his wife was held to constitute a joint tenancy. The Judicial Committee overruled that decision on the ground that this High Court was not justified in importing into the construction of a Hindu Will an extremely technical rule of English conveyancing and also on the ground that under the English Law a

(1) 23 C. 670; 23 I. A. 37; 7 Sar. P. C. J. 13; 6 M. L. J. 75; 12 Ind. Dec. (N. S.) 445 (P. C.).
(2) 11 M. 258; 12 Ind. Jur. 455; 4 Ind. Dec. (N. S.) 179.

conveyance by one joint tenant operates as a severance. In addition there is a *dictum* of their Lordships upon which the appellants now rely and that is the "principle of joint tenancy appears to be unknown to the Hindu Law except in the case of a co-parcenary between members of an undivided family." If that were a strictly accurate statement of Hindu Law and treated as an invariable preposition of law, there would be a very strong presumption that a bequest to two persons who are not members of an undivided family would not constitute joint tenancy, and such a presumption could only be rebutted by special words creating such joint tenancy. It, however, appears that this statement treated as a broad statement of law is not strictly accurate. As is pointed out in a subsequent case *Venkayamma Garu v. Venkataramanayyamma Bahadur Garu* (3) by their Lordships there are instances of Hindus taking property jointly who are not co-parceners of a joint Hindu family. It was there recognised that widows succeed jointly, as also daughters, and it has also been held that this is the case with daughter's sons. Joint tenancy is not, therefore, unknown to Hindu Law and consequently there is not the same difficulty in inferring that such an estate has been created as if such an estate were entirely unknown to Hindu Law. There is a case reported as *Narpat Singh v. Mahomed Ali Hussain Khan* (4) which is opposed to the decision in *Jogeswar Narain Deo v. Ram Chandra Dutt* (1) and is not expressly overruled by the latter and consequently I think it must be taken that the latter is to be read solely with reference to the facts of that particular case and not as laying down a principle that no joint tenancy can ever be created by a Hindu testator without specific words to that effect. If that is conceded, as I think it must be, then the question of the testator's intention has to be considered with reference to the fact of each case. Here the learned District Judge has considered the language of the document and the fact that provision was made for one wife and her daughter apart from the second wife, for whom provision was also made, and that provision was made for the joint payment of debts by the

mother and daughter, and also other considerations specified in his judgment and has come to the conclusion that the testator did intend to create a joint estate in the mother and daughter, to which the survivor would succeed. This question of intention is one of fact and so long as the Judge makes no inferences which are not justified in law the finding of intention is one which cannot be interfered with in second appeal. Assuming that the testator could create a joint tenancy, the question of whether he did so by his Will and intended to do so is one of fact. I am not prepared to say that the District Judge's finding is wrong and accordingly the appeal must be dismissed with costs.

IN S. A. No. 1490 OF 1922.

This case follows the connected case and is dismissed with costs.

N. H.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1061 OF 1922.

February 5, 1925.

Present:—Mr. Justice Ramesam and
Mr. Justice Venkatasubba Rao.

VALLURU APPALASURI AND OTHERS—
DEFENDANTS NOS. 2 TO 4—APPELLANTS

versus

SASAPU KANNAMMA NAYURALU
—PLAINTIFF—RESPONDENT.

Hindu Law—Co-widows—Nature of estate—Partition, right of—Survivorship—Alienation by one widow—Necessity—Reversioner, whether bound—Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of plaint—Subsequent events, whether can be taken notice of.

One of two Hindu co-widows who have inherited the properties of their husband cannot alienate the share of the other even for purposes beneficial to the estate without the consent of such other. [p. 882, col. 2.]

Kalliyanasundaram Pillai v. Subba Moopanar, 14 M. L. J. 139 and *Vadali Mamidigadu v. Kotipalli Ramayya*, 26 M. 334, relied on.

The estate of co-widows or other co-heiresses in Hindu Law is a joint estate, but, unlike other joint estates, it cannot be divided so as to create separate estates, such that each sharer is the owner of her share and at her death, the reversioner's estate falls in. [p. 885, col. 1.]

Such partition as is permissible is merely for the convenience of enjoyment by the widows; and may be of two kinds (a) so as to last during the lifetime of both the widows, (b) so as to bind them until the death of all of them. In the latter case if one of the widows dies before the other without alienating the

(3) 25 M. 678 at p. 687; 29 I. A. 156; 7 C. W. N. 1; 12 M. L. J. 299; 4 Bom. L. R. 657; 8 Sar. P. O. J. 286 (P. C.).

(4) 11 C. 1; 4 Sar. P. O. J. 558; Rafique and Jackson's P. C. No. 82; 5 Ind. Dec. (N. S.) 757 (P. C.).

property, it passes to the heirs of her private property and not to the other co-widow or their reversioners. [p. 885, col. 1.]

Ridnamma v. Venkataramappa, 3 M. H. C. R. 268, dissented from.

There can be no survivorship if the partition is of the second kind. But if it is of the first kind, it cannot affect the right of survivorship of the other. [*ibid.*]

One of the co-widows can alienate her share which may be defined or undefined according as there is a partition or not. If the alienor dies before the co-widow, the alienation ceases to be operative if there is no partition or if the partition is of the first kind, the property goes to the co-widow by survivorship. But if the partition is of the second kind, the property continues to be enjoyed by the alienee until the other co-widow dies. [*ibid.*]

Except in the case of an alienation for the limited purposes mentioned above, i.e., during the lifetime of the alienee, in a partition of the first kind, or during the lifetime of all the co-widows, in a partition of the second kind, there can be no alienation by a widow of her interest and whether there is necessity or not, an alienation by one co-widow cannot bind the reversioners. [p. 885, cols. 1 & 2.]

If an alienation for necessity is to bind the reversioners, all the co-widows must join in it. [p. 885, col. 2.]

[Case-law reviewed.]

Where one of two co-widows alienates certain properties of her husband for discharging a simple money-decree-debt, payable by him, the other widow in a suit against the alienee for possession after the death of the alienating widow, is entitled to an unconditional decree and is not bound to pay the amount utilised for discharging the husband's debt. [p. 886, col. 1.]

It is well-settled that events that happen even after the filing of a suit, including those that add to the title of the plaintiff, may be taken notice of. [p. 886, col. 2.]

The discretion in allowing an amendment of a plaint ought not to be exercised when there is a change of jurisdiction, when there is a great delay in making the application or if a fresh enquiry on other facts is necessary, but when these features do not exist, the amendment ought, as a general rule, to be allowed so as to avoid multiplicity of proceedings. [p. 887, col. 1.]

Second appeal against a decree of the Court of the Additional Subordinate Judge, Vizagapatam, in A. S. No. 439 of 1921, (A. S. No. 378 of 1921), on the file of the District Court, Vizagapatam, preferred against that of the Court of the District Munsif, Ranjam, in O. S. No. 100 of 1916.

Mr. Y. Suryanarayana, for the Appellants.

Mr. B. Jagannada Doss, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit by one of two Hindu widows for partition of her husband's property and possession of a share. The 1st defendant is the co-widow and she sold a part of the property under Ex. IV to the 2nd defendant who married the daughter of a deceased co-wife of plaintiff and 1st

defendant, and another part to the 3rd defendant under Ex. VI. The 4th defendant is the undivided brother of the 3rd defendant. The 1st and 2nd defendants lived in the same house. The District Munsif decreed the suit. On appeal, the Subordinate Judge remanded the suit for fresh trial. On remand, the District Munsif again passed a decree in favour of the plaintiff. In the interval, the 1st defendant died. There was again an appeal to the Subordinate Judge. The plaintiff prayed for an amendment of the plaint and prayed for possession of the entire estate as the result of 1st defendant's death. The amendment was allowed. The Subordinate Judge granted a decree to the plaintiff for possession of the entire property.

The defendants Nos. 2 to 4 appeal.

The portion of the case relating to the alienations in favour of the defendants Nos. 3 and 4 has not been seriously pressed and the other portion relating to the 2nd defendant has been fully argued.

The Subordinate Judge found that out of the Rs. 600 for which Ex. IV was executed, Rs. 516 was utilized to discharge a decree obtained by D. W. No. 6 against the husband (Ex. V). If the sale was effected by both the widows, it would have been for purposes beneficial to the estate and, therefore, binding on the daughter and other reversioners. The appellant's Vakil contended, relying on *Kalliyanasundaram Pillai v. Subba Moopanar* (1) that the sale ought to be upheld against the plaintiff. In *Sri Gajapati Radhamani v. Maharani Sripusapati Alakajeswari* (2) and *Vadali Mamidigadu v. Kctipalli Ramayya* (3), it was held that one of two co-widows cannot alienate the share of the other even for purposes beneficial to the estate without the consent of the other. The decision in *Kalliyanasundaram Pillai v. Subba Moopanar* (1) decided by Benson and Bhashyam Iyengar, JJ., (the same Judges who decided *Vadali Mamidigadu v. Kotipalli Ramayya* (3) is apparently inconsistent with this but, on a careful examination of the judgment, it seems to me that the Judges were of opinion, on its facts, that the senior widow was recognised as a manager or agent of the other. Such an inference can be made only in case where there is no known

(1) 14 M. L. J. 139.

(2) 16 M. 1; 19 I. A. 184; 17 Ind. Jur. 36; 6 Sar. P. C. J. 1; 5 Ind. Dec. (N. S.) 709 (P. C.).

(3) 26 M. 334.

hostility between the widows and is not possible when the widows are hostile to each other as in this case. We, therefore, agree with the Courts below in holding that Ex. IV is not binding on the plaintiff's half share.

The next point that has been argued in the case is that Ex. IV is at least binding on the 1st defendant's half share. The appellants rely on the unreported judgment of this Court in A. S. No. 166 of 1922. The position of two co-widows or two daughters has been the subject of consideration in several decisions of the various High Courts and the Privy Council. In *Ridnamma v. Venkataramappa* (4), Bittleson, C. J., and Ellis, J., observed: "Upon the death of the husband, the widows became jointly entitled; and that they might agree to divide the estate and hold separately distinct shares of it during their joint lives. We are not prepared to say they might not enter into such an agreement as would bind each to an absolute surrender of all interest in the other's share, so as to let in the next heirs of the husband immediately upon the death of that other.....One obtained a decree against the other for a division....It dealt only with the joint estate, and the joint estate ceased on the death of Krishnamma. Then the whole estate of the husband vested in the surviving widow; and neither Krishnamma's claim for division nor the decree for division could touch that." In another case, *Jijoyi-amba Bayi Saiba v. Kamakshi Bayi Saiba* (5), Scotland, C. J., and Ellis, J., observe at page 452*: "Now the right as contended for on behalf of the appellants, namely, to the absolute partition of the joint estate, giving to each widow a share in severalty, we are of opinion is not maintainable. In support of it reliance was placed on the language of the foregoing texts.... The division there spoken of must be understood to refer only to the distributive enjoyment of the benefits of the joint property, and no doubt two or more widows might by an agreement *inter se* not prejudicial to the rights of the next heir in succession, provide for such enjoyment by an apportionment of the property. A partition converting the joint estate into an estate in severalty, whenever either of the widows choose to insist upon it, is

(4) 3 M. H. C. R. 268.

(5) 3 M. H. C. R. 424.

*Page of 3 M. H. C. R.—[Ed.]

quite incompatible with the right of survivorship to the whole property arising out of the joint estate for life and the surviving widow or widows being the nearest heir or heirs....On the other hand, it has been recently decided by this Court in the case of *Randimma v. Venkataramappa* (4), that a division obtained under a decree was ineffectual against the claims of the survivor of two widows to the divided moiety". They then consider the question whether the relief of separate possession of a portion of the inheritance may not be granted, when it appears to be the only proper and effectual mode of securing enjoyment of her distinct right to an equal share of the benefits of the estate. This case has been approved by the Privy Council in *Gajapathi Nilamani v. Gajapathi Radhamani* (6) and at page 300* their Lordships say "It was held here that there was no objection to a transaction which was merely an arrangement for separate possession and enjoyment, leaving the title to each share unaffected; although the widows nevertheless remained co-parceners with a right of survivorship with them, and there could be no alienation by one without the consent of the other....Their Lordships, guarding themselves against being supposed to affirm by this order that either widow has power to dispose of the one-fourth of the estate allotted to her, or that they have any right to a partition in the proper sense of the term, are not disposed to vary". In *Kathaperumal v. Venkabai* (7), it was observed: "But by Hindu Law two widows of one and the same husband take a joint interest in one undivided estate, and it has been held that, although the widows may arrange for the enjoyment of the estate in separate portions, there can be no compulsory partition converting the joint estate into an estate in severalty". In *Ariyaputri v. Alamelu* (8), we have "it is true that when there are more widows than one, they take together as a class. It is also true that partition is permitted between them not as in the case of male co-parceners for the purpose of converting a joint estate into two or more separate estates to be held in severalty, but for the limited

(6) 1 M. 290; 1 Ind. Jur. 589; 4 I. A. 212; 1 O. L. R. 97; 3 Sar. P. C. J. 753; 3 Suth. P. C. J. 365; 1 Ind. Dec. (N. S.) 193 (P. C.).

(7) 2 M. 192; 4 Ind. Jur. 234; 1 Ind. Dec. (N. S.) 407.

(8) 11 M. 304; 4 Ind. Dec. (N. S.) 212.

*Page of 1 M.—[Ed.]

purpose of securing to each widow a distributive enjoyment of the benefit of joint property. In this view partition between them certainly creates no separate property in the portions placed in their separate possession and no disposing power so as to defeat the right of survivorship vesting in the co-widow, but as between them, each widow is entitled to take the income of the portion placed in her possession during her life." In *Srigajapati Radhamani v. Maharani Sripusapati Alakajeswari* (2), which arose out of the facts of *Gajapathi Nilamani v. Gajapathi Radhamani* (6), their Lordships of the Privy Council observed at page 10* "It may be assumed for the present judgment, without deciding the point, that there was a sufficient necessity for borrowing money to pay the Government revenue, or even for the payment of Nilamani's debt, but that necessity did not render a mortgage by one widow binding upon the joint estate which had descended from their deceased husband, so as to affect the interest of the surviving widow." One may add "or that of the reversioners" though this was not necessary for the case [see *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba* (5) already quoted]. It is well to remember that, in that case, part of the money borrowed by the alienating widow was applied for paying Government revenue, and still no decree even for this amount was given. The case in *Kailash Chandra Chuckerbutty v. Kashi Chandra Chuckerbutty* (9) is a case of daughters, but, as was observed in *Ramakkal v. Ramasami Naickan* (10) to be next referred to, the case is analogous to that of widows. Nor does the fact that the Calcutta case was under the Dayabhaga Law make any difference as observed in *Ammani Ammal v. Periasami Udayan* (11) by Oldfield, J., at page 4†. It was there observed "that being so, the estate that devolved on the daughters of Radhakrishna would not determine until after the death of Gaganeswari and, until that event happens, the arrangement come to between the daughters, which was assented to by all the daughters, should, in our opinion, remain in operation. This would not in any way interfere with the

rights of the reversionary heirs for the simple reason that those rights do not come into existence until after the death of Gaganeswari.....As we have already indicated its effect was to make the properties allotted to each daughter remain her property capable of being alienated by her, and if not alienated, capable of passing on her death, to the heirs of her separate property as distinguished from the property inherited by her from her father." In *Ramakkal v. Ramasami Naickan* (10), it was held that one of two widows can alienate any estate which came to her as such for her life and can, therefore, enter into such a deed as will preclude her from recovering during her life property which she has alienated, to the full extent of such alienation provided it does not extend beyond her life-interest. In *Kanni Ammal v. Ammaknnu Ammal* (12), it was held that, while one of two daughters cannot by any alienation alter the character of the daughter's estate so far as concerns the right of survivorship or the rights of reversioners, she may alienate her interest in the property. The parties in that case were ably represented as two of the Vakils for the appellant and two Vakils for the respondent have since become Judges of this Court and a full report of the argument is available and is instructive. It shows that there may be two kinds of partition between two widows or other co-heiresses (1) so as to last during their joint lives only and if one dies the other gets it by survivorship and (2) so as to last until the death of all. If one dies first, the other does not get her share by survivorship and the share will continue to be enjoyed by the alienee, if alienated or will go on to the heirs of her *stridhanam* property, if unalienated. In either case the partition is an arrangement for their own convenience and cannot affect reversioners.

In *Muthiyalu Chengappa v. Burada Gunta* (13) and *Ammani Ammal v. Periasami Udayar* (11) (in which one of us Venkata-subba Rao, J., took a part) the remark in *Ridnamma v. Venkataramappa* (4) quoted by me that the arrangement may be such that, after partition by the co-widows, the death of one may let in the reversioner's right, was disapproved, i. e., the rever-

(9) 24 C. 339; 12 Ind. Dec. (N. S.) 893.

(10) 22 M. 522; 9 M. L. J. 101; 8 Ind. Dec. (N. S.) 373.

(11) 74 Ind. Cas. 58; 45 M. L. J. 1; 32 M. L. T. 323; (1923) M. W. N. 652; (1924) A. I. R. (M.) 75.

(12) 23 M. 504; 10 M. L. J. 253; 8 Ind. Dec. (N. S.) 754.

(13) 60 Ind. Cas. 135; 43 M. 855; 39 M. L. J. 567; 12 L. W. 656; 28 M. L. T. 272; (1921) M. W. N. 29

*Page of 16 M.—[Ed.]

†Page of 45 M. L. J.—[Ed.]

sioner's interest does not begin until all the widows die (unless there is a surrender by all).

The decisions establish that (1) The estate of co-widows or other co-heiresses in Hindu Law is a joint estate but it is unlike other joint estates. It is indivisible [see *Kathaperumal v. Venkabalai* (7).] Strictly it can never be divided so as to create separate estates such that each sharer is the owner of her share and at her death, the reversioner's estate falls in. Such a division is impossible in law.

(2) Such partition as is permissible is merely for the convenience of their enjoyment by the sharers; and may be of two kinds.

(1) So as to last during the lifetime of both the widows.

(2) So as to bind them until the death of all of them. In the latter case if one of the widows dies before the other without alienating property, it passes to the heirs of her private property and not to the other co-widow or their reversioners, the *dictum* to the contrary in *Ridnamma v. Venkataramappa* (4) not being good law [*Ammani Ammal v. Periasami Udayan* (11) and *Muthiyalu Chengappa v. Burada Gunta* (13)].

(3) By the very nature of the arrangement there can be no survivorship if the partition is of the second kind. But if it is of the first kind it cannot affect the right of survivorship of the other.

(4) One of the co-widows can alienate her share which may be defined or undefined according as there is a partition or not. If the alienor dies before the co-widow, the alienation ceases to be operative if there is no partition or if the partition is of the first kind the property goes to the co-widow by survivorship. But if the partition is of the second kind, the property continues to be enjoyed by the alienee [*Ramakkal v. Ramasami Naicken* (10), *Kanni Ammal v. Ammakannu Ammal* (12) and *Ammani Ammal v. Periasami Udayan* (11)] until the other co-widow dies. The *obiter dictum* to the contrary in *Durga Dutt v. Gita* (14) has been followed here.

(5) Except for the limited purposes mentioned above, i. e., during the lifetime of the alienee in a partition of the first kind or during the lifetime of all the co-widows in a partition of the second kind there can be no alienation by a widow of her interest: [*Gajapathi Nilamani v. Gajapathi Radhamani* (4) 19 Ind. Cas. 498; 23 A. 443; 8 A. L. J. 220.

(6), *Sri Gajapati Radhamani v. Maharani Sripusapati Alakajeswari* (2) and whether there is necessity or not, an alienation by one co-widow cannot bind the reversioner *Jijoyiamba Bayi Saiba v. Kamakshi Rayi Saiba* (5), *Kailash Chandra Chuckerubty v. Kashi Chandra Chuckerbutty* (9), *Ramakkal v. Ramasami Naicken* (10), *Kanni Ammal v. Ammakannu Ammal* (12) and *Durga Dutt v. Gita* (14)].

(6) If an alienation for necessity is to bind the reversioners, all the co-widows must join in it.

It follows that I cannot agree with the decision in A. S. No. 166 of 1922. In that case the last male owner left a widow Gangalakshmi and two daughters Rattamma and Narasamma. Rattamma effected an alienation of the property along with her sons. The suit was brought by four plaintiffs, plaintiffs Nos. 1 to 3 being parties to the alienation, but the fourth plaintiff was not a party to it. Their Lordships found that there was necessity and held that the alienation was binding on the reversioners. So far as plaintiffs Nos. 1 to 3 were concerned, the decision might well have rested on the ground that they were parties to the alienation and could not question it: *Fateh Singh v. Thakur Rukmini Rawanji Maharaj* (15) and *Basappa v. Fakirappa* (16). But as to the fourth plaintiff, we are constrained to differ from the judgment and to dissent from its reasoning. The decisions in *Sri Gajapati Radhamani v. Maharani Sri Pusapati Alakajeswari* (2), *Ramakkal v. Ramasami Naicken* (10) and *Durga Dutt v. Gita* (14) were referred to and then it was observed "the facts in this case are different from those in the cases quoted. Gangalakshmi gave away or surrendered her life-interest in some property in favour of Rattamma and it is stated that by another deed she surrendered her right to some other property in favour of Narasamma. After that, both Narasamma and Rattamma began to deal with their properties as their own". We are not able to see how the surrender of the mother in favour of her daughters and the conduct of the daughters can have any effect on the rights of the reversioners. It was conceded in the judgment that the alienation cannot affect the rights of Narasamma by survivorship but it was observed that this has nothing

(15) 72 Ind. Cas. 8; 45 A. 339; 21 A. L. J. 235; (1923) A. I. R. (A.) 387.
(16) 61 Ind. Cas. 214; 46 B. 292; 23 Bom. L. R. 1040; (1922) A. I. R. (B.) 102.

to do with the reversioners who do not claim through Narasamma. Here again, I am compelled to dissent with all deference. When the surviving co-widow gets the property by survivorship after the death of the alienating widow, she represents the estate and the reversioner though he cannot be said to claim through her so as to be bound by her acts still claims through her in respect of matters where she represents the estate. But, apart from this, the cases cited by me also show that a single widow has no power of alienation except for her own convenience (*i. e.*) so as to affect the other widows (except in the partition of the second kind) or the reversioners. It seems to me that the learned Judges who decided A. S. No. 166 of 1922 did not give due weight, while referring to *Ramakal v. Ramasami Naickan* (10) to the qualification referred to at page 24, *i. e.*, the words "provided it does not extend beyond her life-interest" nor to the words "which will prejudice the right of survivorship of her co-widow or the rights of the reversioners after the death of the survivor of the widows", in *Durga Dutt v. Gita* (14) which was actually quoted by them. The cases in *Gajapathi Nilamani v. Gajapathi Radhamani* (6), *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba* (5), *Kailash Chandra Chuckerbutty v. Kashi Chandra Chuckerbutty* (9) and *Kanni Ammal v. Ammakannu Ammal* (12) were not cited at all. All the authorities show that, strictly, there is no separate estate of any kind in any one of the widows, a right of partition for the convenient enjoyment being all that is permitted. This contention of the appellants must, therefore, be disallowed.

The third point argued by the appellants is that he is entitled to the amount of Rs. 516 which was utilised for discharging the husband's decree-debt. Apart from the difficulty that the documents (Exs. IV-A and V) show that the debt was discharged by the 1st defendant and not by the 2nd defendant and assuming it is open to us to construe them as is the payment to the creditor was made by the 2nd defendant, we do not think he is entitled to any relief. The decree was not a mortgage-decree. If the debt discharged was a charged debt, the plaintiff may be entitled to the relief he claims by subrogation. But when there is no charge and seeing that any right by contribution against the plaintiff's half share can be

operative during the lifetime of the 1st defendant and not after the death of 1st defendant so as to affect plaintiff's right by survivorship, there can be no subrogation (*vide* Sheldon on Subrogation, p. 4, s. 3). Section 69 of the Contract Act cannot help the 2nd defendant, for he was not interested in the payment but his vendor, nor can s. 70 as he did not make the payment for or on behalf of the plaintiff. This contention must also be negatived. The plaintiff is entitled to mesne profits in respect of 1st defendant's half share only from the death of the 1st defendant. The decree requires no modification as no mesne profits have been awarded the additional half share.

The fourth point argued by the appellant is that the amendment of the plaint so as to enable the plaintiff to claim the whole of the property including the 1st defendant's share ought not to be allowed. He relies on *Lakshmi Ammal v. Alamelu Ammal* (17). If the decision is regarded merely as one on the question of discretion of the particular facts of the case and the stage at which the amendment was asked, we have nothing to say against it but if it meant to lay down that a cause of action that arose after the filing of the suit ought never to be taken notice of, we are constrained to dissent from it. That events that happened—even after the filing of the suit including those that add to the title of the plaintiff—may be taken notice of has been established by several cases [*vide* *Ram Ratan Sahu v. Mohant Sahu* (18), *Rai Charan Mandal v. Biswanath Mandal* (19) and *Sethrucherla Rama Chandra v. Maharajah of Jeypore* (20), reversed by Privy Council on another point, *Subbaraya Chetty v. Nachiar Ammal* (21), *Doraisami Pillai v. Chinnia Goundan* (22) and *Pendekkallu Thimmayya v. Pendekkallu Siddappa* (23)]. Specially in partition suits it will be very inconvenient if the general principle of confining the suit to the cause of action in the plaint is rigidly adhered to as can be seen from a simple case where A filed a suit against his two brothers for

(17) 79 Ind. Cas. 325; 45 M. L. J. 811; (1923) M. W. N. 839; 18 L. W. 874; (1924) A. I. R. (M.) 309.

(18) 6 C. L. J. 74; 13 C. W. N. 732.

(19) 26 Ind. Cas. 410; 10 C. L. J. 107.

(20) 34 Ind. Cas. 411; (1916) 1 M. W. N. 354; 19 M. L. T. 360.

(21) 44 Ind. Cas. 863; 7 L. W. 403; (1918) M. W. N. 199.

(22) 43 Ind. Cas. 560; 34 M. L. J. 258; 22 M. L. T. 538; (1918) M. W. N. 89; 7 L. W. 335.

(23) 75 Ind. Cas. 112; (1925) A. I. R. (M.) 63.

partition and seeks to recover a third share, and during the pendency one of the brothers dies, to say that the plaintiff cannot be awarded half instead of a third and that the decree should be limited to a one-third, he being compelled to file another suit for one-sixth is to be technical with a vengeance [*vide* Jenkins, C. J.'s judgment in *Rustomji v. Sheth Purshotamdas* (24)]. No doubt the discretion ought not to be exercised when there is a change of jurisdiction, when there is a great delay in making the application and may not be exercised if a fresh enquiry on other facts is necessary. But when these features do not exist, in our opinion, the amendment ought, as a general rule, to be allowed to avoid multiplicity of proceedings. In all such cases, the only question of consequences is one of Court-fees a matter with which the parties are not concerned and the opposite party is not deprived of any defence which is obviously open to him [see also *Pendekkallu Thimmayya v. Pendekkallu Siddappa* (23)]. This contention must be disallowed. The appeal fails on the merits. The defendants Nos. 2 to 4 say that they are not in possession of properties other than those alienated to them and in respect of which a full decree is not passed against them.

In the lower Court, the decree in respect of all the properties was passed against all the defendants including defendants Nos. 2 to 4. The plaintiff is entitled to be put in possession of all the properties but the decree, in respect of the properties other than those alienated to defendants Nos. 2 to 4 should not have been passed against the defendants Nos. 2, 3 and 4. For this reason, the parties will bear their own costs in second appeal.

V. N. V.

Appeal dismissed.

N. H.

(24) 25 B. 606 at p. 613; 3 Bom. L. R. 227.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 356 OF 1924.
July 23, 1925.

Present :—Mr. Justice Mukerji and
Mr. Justice Boys.

Seth BENI CHAND—DEFENDANT—
APPELLANT

versus

Syed EKRAM AHMAD—PLAINTIFF—
RESPONDENT.

Transfer of Property Act (IV of 1882), s. 26—

Agreement that female holding estate shall not effect transfer without consent of male claimants—Death of some male claimants—Transfer with consent of surviving claimant, validity of—“Substantial compliance” with condition, what amounts to.

An agreement, arrived at between a female claimant to an estate on the one hand and three male claimants on the other, provided that the female should remain in possession of the estate during her lifetime and should pay the debts due from the estate out of the income of the property, appropriating the balance of the income to her own use but that she would not transfer any portion of the property without the consent of the male claimants, and that on her death the latter would get the property. It was further provided that should any of the male claimants die before the death of the female, his share would descend to his heirs. After the death of two of the male claimants, who had died leaving heirs, the female executed a mortgage in respect of property comprised in the estate with the consent of the surviving male claimant. The mortgage was also consented to by the majority of the heirs of the deceased claimants, but one of them who had not consented to the mortgage brought a suit to recover possession of his share of the estate on the allegation that he was not bound by the mortgage:

Held, (1) that on a proper construction of the agreement arrived at between the claimants the consent of the heirs of a male claimant who should happen to die during the lifetime of the female was not necessary to validate a transfer by the female; [p. 889, col. 1; p. 891, col. 1.]

(2) (Per Mukerji J., Boys, J. dissenting).—that the consent of the surviving male claimant did not amount to a “substantial compliance” with the condition laid down in the agreement and that the mortgage could not, therefore, be held to be binding on the plaintiff; [p. 889, col. 1.]

Per Mukerji, J.—Broadly speaking till the majority or at least one-half of the persons whose consent is necessary to a transaction give such consent, it cannot be said that there has been a “substantial compliance” with the condition within the meaning of s. 26 of the Transfer of Property Act. [p. 889, col. 2.]

Per Boys, J.—The test to be applied to cases such as the one under consideration is whether it is possible to form upon all the known circumstances of the case as existing at the time the condition was made, a reasonable opinion as to whether the deceased persons would have been likely to agree that the consent of a survivor should be accepted as sufficient if they had foreseen the circumstances in which the sufficiency of his consent might be in question. [p. 892, col. 1.]

Second appeal from a decree of the District Judge, Cawnpore, dated the 15th December 1923.

Mr. Iqbal Ahmad, for the Appellant.

Mr. U. S. Bajpai, for the Respondent.

JUDGMENT.

Mukerji, J.—This appeal raises two points, viz., whether the mortgage dated the 14th of April 1917 is binding on the plaintiff-respondent Ekram Ahmad and (2) if not, whether the amount of share decreed to him is too large and if so, what is the proper share which should have been decreed to him.

The facts are briefly these. The pedigree of the family to which the respondent belongs is given in the judgment of the learned Additional Subordinate Judge. One Karamat Ali owned a 16-annas share in the property in suit. That property descended to his son Hashmat Ali, as Hashmat Ali's mother who was the other heir did not claim any interest. Hashmat Ali died two years after his father and then a question arose as to who should have the property. Hashmat Ali was survived by his cousin Mahmud Ali being a son of Lutf Ali, a brother of Karamat Ali and also by Yakub Ali and Qadir Ali, sons of Ilahi Bakhsh, another brother of Karamat Ali. On the 2nd of February 1907 an agreement was arrived at between Mahmud Ali, Yaqub Ali and Qadir Ali on the one side and *Musammât Imtiaz Bibi*, the mother of Hashmat Ali, on the other. It was agreed that *Musammât Imtiaz Bibi* should remain in possession of her son's property, that she should pay the debts due from the estate out of the income of the property and should spend the rest of the income as best as she liked, that she would not transfer any portion of the property without the consent of the other party to the document and that on her death the three persons constituting the other party would get the property. It was further provided that should any of the party of the three male persons die before the death of *Musammât Imtiaz Bibi*, his share would descend to his heirs.

On the 14th of April 1917, *Musammât Imtiaz* executed an usufructuary mortgage for the sum of Rs. 3,000 in favour of the appellant Beni Chand. Ekram Ahmad, the respondent, is one of the sons of Yaqub Ali. He said that he did not consent to any transfer by *Musammât Imtiaz* and that the transfer was not binding on him. *Musammât Imtiaz* is dead and hence he claimed to recover a third share in the property on the ground that he was the sole heir of Yaqub Ali. Yaqub Ali had several children besides Ekram Ahmad, viz., Khadim Ahmad, Ghulam Ahmad, *Musammât Kulsuman* and *Musammât Mahmuda*. It was part of Ekram Ahmad's case that Khadim Ahmad was an illegitimate child and, therefore, did not inherit and that the rest of the children of Yaqub Ali had relinquished their interest in the property in favour of Ekram Ahmad.

The defence was that the mortgage of

the 14th of April 1917 was executed to pay off a decree which was obtained by one Jagannath on foot of a mortgage executed in his favour on the 6th of September 1915 by *Musammât Imtiaz* with the consent of Mahmud Ali, son of Lutf Ali, and also with the consent of the plaintiff, his brothers and of the sons of Qadir Ali.

It was found that the plaintiff did not give his consent and that the mortgage of the 14th of April 1917 was not binding on him. The plaintiff sold 4 annas 3 pies out of his share, pending the suit, in favour of certain persons who were made defendants in the suit. The plaintiff's share was found to be 5 annas 4 pies and deducting 4 annas 3 pies out of the same a decree was made in his favour for 1 anna 1 pie share.

There was a connected suit which had been brought by Khadim Ahmad, already mentioned, a supposed brother of Ekram Ahmad, against the latter. In that suit the question was what was the share of Khadim Ahmad, if he was a legitimate child of Yaqub Ali. That litigation came up before us as Second Appeal No. 556 of 1924 and by our judgment of this date we held that Khadim Ahmad was entitled to get an 8 pies share in the property of his father, from Ekram Ahmad. Although the judgment in that second appeal may be no evidence in this particular case, it is conceded that the same evidence as was relied upon in that case might be read as evidence in this case. If that be so, the result would follow that Ekram Ahmad's original share would be reduced by 8 pies. The result would be that in case of his entire success, Ekram Ahmad would get a decree for a 5 pie share only, the share of 1 anna 1 pie decreed to him, having been reduced by the amount of 8 pies. This disposes of the second point.

Now we come to the first point concerning the validity of the mortgage. It is a fact that the mortgage of the 14th of April 1917 was executed to pay off a decree for Rs. 3,000 and odd obtained by one Jagannath on foot of his mortgage dated the 6th of September 1915. The mortgagee Beni Chand who is the appellant before us paid a sum of Rs. 3,059 and odd to satisfy that decree, although the mortgage in his favour is for Rs. 3,000 only. The mortgage in favour of Beni Chand is not attested by Mahmud Ali, but he identified the executant *Musammât Imtiaz* before the Sub-Registrar, at the time of registration

of the deed. It is contended from this fact that Mahmud Ali was a consenting party to the transfer in favour of Beni Chand. Further, it is pointed out that the mortgage in favour of Jagannath had been attested by Mahmud Ali and by most of the male descendants of Yaqub Ali and Qadir Ali. On foot of these facts it is argued that the transfer in favour of Beni Chand is a valid one.

We shall take up the mortgage in favour of Jagannath first. If that mortgage be valid and within the competence of Imtiaz Bibi, we shall see whether the validity of that mortgage gives any validity to the mortgage in favour of Beni Chand. The argument on behalf of the respondent is this. By the agreement dated the 2nd of February 1907, consent for a valid transfer was to be obtained from all the three male executants of the deed. It being the fact that Qadir Ali and Yaqub Ali died before the 6th of September 1915, the respondent contends, it was necessary to obtain the consent of the heirs of Qadir Ali and Yaqub Ali. We have already stated that two of the sons of Yaqub Ali and Qadir Ali did not give their consent. It is, therefore, urged that the mortgage in favour of Jagannath did not comply with the condition laid down in the deed of agreement of the 2nd of February 1907 and, therefore, it is not binding on the respondent Ekram Ahmad.

On the other hand, the contention on behalf of the appellant is this. The agreement of the 2nd of February 1907 did not provide for any consent being given by the heirs of any of the deceased executants. It provided for consent being given by the male executants alone. Two of these executants were dead and only one was alive, viz., Mahmud Ali. As Mahmud Ali gave his consent, that was sufficient and it amounted to a "substantial compliance" with the condition within the meaning of s. 26 of the Transfer of Property Act. To this it has been replied on behalf of the respondent that where out of three persons, whose consent alone would validate a transfer, only one person's consent is taken it cannot be said that there was a "substantial compliance" with the condition. In my opinion the contention for the respondent is sound. There has been no "substantial compliance" with the condition laid down in the agreement. There can be no doubt that if all the three male executants had died,

Musammatt Imtiaz could not transfer the property at all so as to bind their heirs. The mere fact that only one of the three male executants was alive would not justify the lady Imtiaz to make a valid transfer with his consent alone, unless we can say that such a transfer was a "substantial compliance" with the terms of the agreement. There must be some value to be attached to the word "substantial." If, say out of eight persons, whose consent is necessary, six be dead and only two be alive and if the consent of those two alone be taken, can it be said that there has been a "substantial compliance" with the condition? There is another word in English language which is "partial." I do not see that the words "partial" and "substantial" can have the same meaning. If it be the case, therefore, that on the death of all the three male executants the lady would be deprived entirely of her power of transfer, the mere fact that only one of the three persons was alive and consented would not, in my opinion, improve matters. Broadly speaking, till the majority or at least one-half of the people, whose consent is necessary, give it, it cannot be said that there has been a 'substantial' compliance with the condition. The compliance would be partial only. Some support to this view may be afforded by the fact that in the illustrations to s. 26 of the Transfer of Property Act (and the allied rule of law) and s. 115 of the Succession Act, the consent which has been regarded as 'substantial' was all given by the majority of the people whose consent was necessary.

In this view of the law, it is not necessary for me to express any opinion as to whether the consent of all the heirs of the deceased executants Qadir Ali and Yaqub Ali would have improved matters. Even if such consent could improve matters it is clear that two of the sons of Yaqub Ali and Qadir Ali have not consented, although they are alive, and it must follow that there has been no compliance with the terms of the agreement.

The same remarks would apply to the transfer in favour of Beni Chand himself, even if we were in a position to say that because of the validity of the transfer in favour of Jagannath, the transfer made to pay off Jagannath's debt was valid. As already stated, the transfer in favour of the appellant was consented to by only

one of the three male executants to the agreement.

I hold that the mortgage in favour of the appellant is not binding on the respondent Ekram Ahmad.

The result would be that I would allow the appeal and modify the decree of the Court below by reducing the decree in favour of the respondent to the extent of 8 pies, thus reducing the decree in his favour to 5 pies share only.

Boys, J.—The facts have been fully set out in the judgment of my brother. Beni Chand had obtained on the 14th of April 1917 a usufructuary mortgage from *Musammât Imtiazan*. *Musammât Imtiazan*'s right to mortgage the property depended on whether the transfer was made in compliance with the conditions of an agreement entered into on the 2nd of February 1907 between her and three nephews of her husband, Karamat Ali. These three nephews were Mahmud Ali, Qadir Ali, and Yaqub Ali. Briefly that agreement provided

(1) That *Musammât Imtiazan* should remain in possession of the entire property of her deceased husband Karamat Ali;

(2) that she was to pay debts out of the income as far as possible;

(3) that she was not to transfer the property without the consent of the three nephews;

(4) that on her death the remaining three nephews would take one-third each of the property; and

(5) if either of the three sons predeceased the lady, the heirs of that son would take his one-third.

The deed was silent on the questions whether in the event of a nephew predeceasing the aunt the consent of his heirs to a transfer was necessary or whether the consent of the surviving nephews was sufficient. These are the questions we have to decide.

The usufructuary mortgage in favour of the defendant Beni Chand was executed in part to discharge a decree which had been obtained by one Jagannath on a usufructuary mortgage dated the 6th of September 1915 executed by *Musammât Imtiazan*. Prior to the execution of these mortgages two of the nephews Qadir Ali and Yaqub Ali had died. The mortgage in favour of Jagannath was attested by the surviving nephew Mahmud Ali, by three out of the four sons of Qadir Ali (the fourth son Abdul Khaliq did not sign and

he is respondent to the connected Second Appeal No. 387 of 1924), and also by two out of the three sons of Yaqub Ali, that is, by Khadim Ahmad and Ghulam Ahmad, but it was not signed by Ekram Ahmad, the plaintiff-respondent in the present appeal.

The mortgage in favour of Beni Chand was not signed either by Mahmud Ali or by any of the sons of Qadir Ali and Yaqub Ali, but Mahmud Ali identified *Musammât Imtiazan*, the executant.

Beni Chand having got possession, Ekram Ahmad, the son of Yaqub Ali, sued Beni Chand claiming the 5 annas 4 pies share, the whole share of Yaqub Ali, on the allegations that his brothers and sisters had transferred their interests to him and that the two mortgages were not binding on him as the consent required by the agreement made by *Imtiazan* had not been obtained.

The plaintiff's contention as regards the question of consent was two-fold. He contended

(1) That in the event of his father Yaqub Ali predeceasing *Musammât Imtiazan* as he, in fact, did, and the property having descended to the heirs of Yaqub Ali, the consent of Yaqub Ali's heirs was necessary before *Musammât Imtiazan* could execute a transfer affecting their interests and that the consent of the plaintiff Ekram Ahmad not having been obtained, at any rate, his share and any share he might have acquired was not bound.

(2) The plaintiff contended that even if the heirs of a deceased nephew had no right to demand that their consent should be obtained, at least, it was necessary that the consent of the three nephews should have been obtained, and that, as owing to the death of two out of the three nephews their consent had not been possible even if they would have given it, if alive, there was no consent within the meaning of the agreement executed by *Musammât Imtiazan*.

As to the first contention it was urged that it was only reasonable and in accordance with the spirit of the agreement that if the consent of the father was necessary for the protection of the property while he was alive, it should similarly be required in the case of the sons who had inherited that property; in other words that it was only reasonable to construe the agreement as giving the sons the same protection as had

been stipulated for in the case of the father. This argument was supported by pointing to the fact that the agreement of 1907 had apparently been so understood by the majority of the persons alive at the time of the execution of the mortgage in favour of Jagannath. If it had not been so understood there would not have been found on that mortgage-deed the signatures of so many of the descendants of the two deceased nephews. There is to my mind considerable force in this argument.

I may note here that it found favour with both the lower Courts which decreed the plaintiff's claim and the similar claim in Second Appeal No. 387 of 1924 on the ground that the signatures of Ekram Ahmad and Abdul Khaliq had not been obtained without entering into the question whether by the signatures of most of the heirs there had been substantial compliance with the condition. But I am satisfied that the correct view is that to which expression is given in the judgment of my brother. The three nephews had complete power to dispose of their property. They thought it desirable to protect their own personal interests by stipulating for their consent being obtained. They thought it desirable to provide that their property should descend to their children. If they did not think it necessary to stipulate that the consent of those children should be obtained before any transfer was made, it is a reasonable conclusion that they were not sufficiently interested in this aspect of the case to make such a stipulation. They may well have considered that the consent of the surviving brother or brothers which in their own interests would not be recklessly given was a sufficient safeguard of the interests of their own children. In any case they did not make it any stipulation requiring the consent of their heirs and as they had power to deal with the property as they chose. I agree with my brother that we cannot read into that document a stipulation which the father did not in fact enter in it. On this point, therefore, I concur in holding against the plaintiff.

As to his second contention that the document stipulated for the consent of the three nephews being obtained and that in fact the consent of two of them Qadir Ali and Yaqub Ali was not obtained and that, therefore, the transfers were void, one thing is clear. It is admitted that the consent of the two other nephews was not obtained

because they were dead and it has not been seriously contended that there was anything in the transfers executed by Musammamat Imtiazan which was improper or which would have led to the refusal of consent by the two nephews or either of them if they or he had been alive. This point is, I think, of importance in considering the main question which we have to deal with here. That main question is whether or no there was substantial compliance with the conditions in the agreement, it being suggested that the case is analogous to that provided for in s. 26 of the Transfer of Property Act.

On what principle is it to be determined whether there was substantial compliance? Illustration (a) to s. 26 says that where the consent of C, D and E is required and E has died, the consent of C and D is to be deemed sufficient. The illustrations to s. 115 of the Succession Act are very similar. These are merely illustrations and I do not think there is any suggestion underlying them that if both D and E had died the consent of C alone would necessarily be insufficient. In other words I do not think that the test of substantial compliance can be the mere existence one way or the other of a numerical majority. It is only necessary to give one illustration of this. Where the consent of C, D and E is necessary and D and E have died and C has in fact succeeded to their property, could it be suggested that the consent of C was not a substantial compliance with the conditions which had only been inserted for the protection of the property of all the three? As regards the property of D and E C would only be an heir, and it follows from our finding on the first question in which I concur with my brother that C's consent or absence of his consent in his capacity as heir of D and E is immaterial. If, then in the case that I have stated it would be unreasonable to hold that the consent of C alone did not constitute substantial compliance, the mere existence of a numerical majority one way or the other fails to furnish a satisfactory test, at any rate, it is not a principle applicable in all cases.

Is there, then, any other principle generally applicable to test whether there has been substantial compliance? I think there is. It must, I think, be conceded that the best judges of whether the compliance was substantial would be the deceased persons, if in any way their view

could be ascertained. To ascertain that view directly is obviously impossible. But it is possible to form, upon all the known circumstances of the case as existing at the time the condition was made, a reasonable opinion as to whether the deceased persons would have been likely to agree that the consent of a survivor should be accepted as sufficient if they had foreseen the circumstances in which the sufficiency of his consent might be in question.

The test is sufficiently simple in practice. What answer must we give to the question in this case? Would Yaqub Ali have been quite content to answer in the affirmative if he had been asked at the time that he was making the condition. "In the event of your predeceasing your aunt, are you content that the consent of your surviving brother or brothers should be sufficient to enable her to deal with the property which at her death would otherwise descend to your children?" I think we have clear evidence that Yaqub Ali would have answered in the affirmative. That Yaqub Ali would have so answered is, I think, a reasonable conclusion from the circumstances existing at the time the condition was made and to one of which I have referred in dealing with the first question. Yaqub Ali contemplated the possibility of his death prior to the widow as is evidenced by the provision for the children inheriting, yet he did not think it necessary to provide for any special consent being required in place of his own when it could no longer be given. Is it not reasonable, then, to assume that he was content in the knowledge that the consent of his surviving brothers or brother would still be necessary?

The arrangement made by the deed was a perfectly natural and proper arrangement by which the old lady was provided for during her life subject to very reasonable conditions. It has not been contended that there was anything in the transfer made by the lady which would have led to the refusal of his consent by the plaintiff's father if he had been alive. It has not been contended before us that there is any evidence that Yaqub Ali had any reason whatever to distrust either of his brothers and that he would not, therefore, have been likely to consider their consent sufficient in the event of his own earlier death. He may well have considered the consent of his surviving brother or brothers a sufficient safeguard.

It was pressed upon us that if we were to hold that the absence of consent of the two deceased nephews did not invalidate a transfer made by the aunt a logical conclusion would be that the absence of consent of the third nephew also if he had been dead would not invalidate a transfer and that such a result would give the lady unfettered power to transfer. But that is not so. To hold that Yaqub Ali would, as evidenced by the circumstances, have been content with the security afforded by the necessity for the consent of even one surviving brother does not compel or even logically suggest the conclusion that he would have been satisfied that no consent at all should be requisite. I hold, therefore, that it is a reasonable and proper conclusion from the circumstances that Yaqub Ali would have considered the requirement by his surviving brothers or brother sufficient and I hold that there was substantial compliance with the condition requiring consent.

I may add that I am satisfied further that this conclusion is also in accordance with the equities of the case, though, of course, they cannot affect the purely legal question. There is no suggestion that either Jagannath or Beni Chand took advantage of the widow or of those who were interested in the property after her death, nor is there any evidence of collusion to defeat the interests of plaintiff. There is no suggestion of any unfair dealing, and that there was no such unfair dealing is further evidenced by the fact that no less than six out of the eight male members interested in this property were signatories of the transaction in favour of Jagannath and the surviving nephew was also a witness identifying the executant in the case of the later mortgage by which the decree on the first was paid off. The plaintiff makes no pretence of explaining how Ekram Ahmad would account for his alleged ignorance of transactions which were spread over several years. If, like his cousin, Abdul Khaliq, he was away on military service, that is only one more indication of the good faith attending the transactions, for it would explain why the parties to the mortgage were unable to obtain his signature when obtaining the signatures of all the other male heirs. Lastly it is noticeable that it was after the mortgages in question that the plaintiff secured a transfer to himself of the shares of his sisters and a second brother and

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alleged a third brother to be illegitimate (found by the lower Courts to be legitimate), and this would suggest that he was making the most of a chance to upset a *bona fide* transaction by taking advantage of the absence of his signature.

For these reasons I would hold that the consent of the heirs was not necessary; and that the consent of the surviving nephew, Mahmud Ali, was a substantial compliance with the condition in the agreement. I would, therefore, allow the appeal.

As my brother would allow the appeal to the extent of 8 pies only and I would allow it to the full extent of dismissing the plaintiff's suit in its entirety, there is concurrence between us that the appeal should be allowed as to the 8 pies. As regards the remaining 5 pies, there is a difference of opinion between us and as my brother would to the extent of this 5 pies maintain the decree of the lower Courts though on different grounds from those on which the lower Courts proceeded, my judgment in so far as it would allow the appeal as to the 5 pies also will form no part of the order of the Court.

By the Court.—The order of the Court is that the appeal is allowed to this extent that the decree of the Court below be modified by reducing the decree in favour of the respondent to the extent of 8 pies and maintaining the decree in his favour as to the remaining 5 pies. The parties will receive and pay costs in proportion to their respective failure and success.

Z. K.

Appeal allowed.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 38 OF 1923.

March 13, 1925.

Present :—Justice Sir Ewart Greaves, Kt.,
and Mr. Justice Cuming.

ASHRAF ALI AND OTHERS—PLAINTIFFS
—APPELLANTS

versus

ARMAN KHAN—DEFENDANT—

RESPONDENT.

*Bengal Tenancy Act (VIII of 1885), ss. 48, 178—
Lease granted by raiyat—Rent payable at a rate not recoverable under Act—Covenant for renewal—Failure of lessee to pay stipulated rent—Renewal, whether can be claimed—Ejectment after expiry of lease—Notice, whether necessary.*

A lease granted by a *raiya* for a period of nine years stipulated for a rent which was more than the rent which the lessor was entitled to exact from the lessee under the provisions of s. 48 of the Bengal Tenancy Act. The tenant agreed that if he did not pay the rent at the stipulated rate he was liable to be ejected without notice and the lease also contained a covenant for renewal if the lessee observed all the provisions of the lease. The lessee failed to pay rent at the rate stipulated in the lease and paid rent only at the rate at which he was liable to pay it under the provisions of the Bengal Tenancy Act. After the expiry of the period of the lease the lessor sued to eject the lessee from the land. The defendant objected that he was entitled to continue in possession of the land under the covenant for renewal contained in the lease :

Held, Per Greaves, J.—that the tenant having observed all the provisions of the lease which he was by law bound to observe, the mere fact that he had declined to pay rent at a rate at which he was not bound to pay by virtue of the provisions of the Bengal Tenancy Act did not disentitle him from obtaining a renewal of the lease ; [p. 894, col. 1.]

Per Cuming, J.—(1) that there was nothing illegal in the stipulation to pay rent at a rate higher than that recoverable under the Bengal Tenancy Act and that the contract providing for the payment of such rent was not void; the mere fact that it was not enforceable in law did not prevent it from being a condition of the contract of renewal, the failure to comply with which justified the lessor in not carrying out his part of the contract ; [p. 894, col. 2.]

(2) that the tenant having failed to fulfil his part of the contract, viz., to pay the enhanced rent, the landlord was absolved from his part of the contract, viz., to grant a renewal of the lease ; [*ibid.*]

(3) that the period of the lease having expired the landlord was entitled to eject the lessee from the land without any notice. [*ibid.*]

A person who has entered into a contract should be held to it unless it can be shown that the contract is contrary to some provision of the law or has been obtained by fraud or undue influence. [p. 895, col. 1.]

Letters Patent Appeal against a decree of Mr. Justice Newbould, dated the 2nd of May 1923, in Appeal from Appellate Decree No. 978 of 1921.

Babu Santosh Kumar Bose, for the Appellant.

Babu Subodh Chandra Roy Choudhury, for the Respondent.

JUDGMENT.

Greaves, J.—This appeal turns on a provision for renewal contained in a lease. The lease provides for a demise for a period of nine years at a rent which is more than the rent which the landlord the *raiya*, is entitled to exact from the under-*raiya* under the Bengal Tenancy Act. The lease ends with this stipulation that the landlord will execute a fresh *kabuliyat* on the expiry of the period and the question that now arises is whether the tenant is entitled to a renewal by virtue of that provision. The two lower Courts decided that he was entitled to a renewal and Mr. Justice

Newbould has agreed with their conclusion and this Letters Patent Appeal is against the decision of Mr. Justice Newbould. Now what is stated is this that it was a term of the renewal that the tenant should observe all the provisions of the lease and that inasmuch as he has declined to pay rent at the higher rate reserved in the lease and thus has broken one of the covenants he is not entitled to a renewal at the expiration of the period. The Bengal Tenancy Act does not make a provision for a higher rate of rent than what the Act allows illegal but it provides that the higher rent cannot be enforced against a tenant. It seems to me that the tenant has observed all the provisions of the lease that he is by law bound to observe and the mere fact that he has declined to pay rent at a rate which he is not bound to pay by virtue of the provisions of the Tenancy Act does not, in my opinion, disentitle him from obtaining the renewal which he now claims. The Tenancy Act was enacted amongst other things for the protection of the tenant and I think that it would be a dangerous principle if the landlord by indirect means of this nature were in a position to exact or try to exact a higher rate of rent from the tenant than the law allows and I can well imagine that it would be a great inducement to a tenant to pay a higher rate of rent than he is bound to pay under the law if he is sure that by so doing at the end of his term he will secure a renewal of his tenancy for another period and that he cannot otherwise obtain a renewal.

I think that for the reasons I have indicated the decision of Mr. Justice Newbould is correct and that this Letters Patent Appeal should be dismissed. My learned brother takes a different view but under the circumstances in accordance with the practice of this Court the appeal is dismissed and with costs.

Cuming, J.—This is an appeal against the decree of my learned brother Mr. Justice Newbould dismissing an appeal against the decision of the Additional District Judge of Noakhali which affirmed the decision of the First Munsif of Lakhipur. The facts are these:—The plaintiff is a *raiyat* and the defendant is an under-*raiyat*. They entered into an agreement whereby the plaintiff covenanted to let his land to the defendant for nine years. The defendant agreed to pay the landlord rent at higher rate than was recoverable under s. 48 of the Bengal

Tenancy Act and the tenant agreed that if he did not pay rent at that rate he was liable to be ejected without notice.

There was a further agreement for a renewal of the lease on the expiry of the said period of nine years. No terms were given for the renewal of the lease. The tenant did not pay rent as agreed at the higher rate. The nine years have now expired and the landlord refuses to renew the lease on the ground that the tenant has broken the terms of the agreement by refusing to pay rent at the rate at which he stipulated and, therefore, he is not entitled to a renewal of the lease. Mr. Justice Newbould held that as the condition to pay rent at a higher rate than was recoverable under the provision of the Bengal Tenancy Act was illegal the failure to observe it cannot be regarded as a breach of the condition of the covenant and that as they had not given an opportunity of renewal which they were bound to do under the lease they cannot eject him. I regret that I am obliged to differ from the decision. There was nothing illegal in the stipulation to pay rent at a rate higher than that recoverable under the Act. Such a stipulation does not fall within the provision of s. 178, Bengal Tenancy Act. Neither is the contract void [see *Sitanath Midda v. Basudeb Midda* (1).] The mere fact that it is not enforceable in law does not prevent it from being a condition of a contract the failure to comply with which would justify the other party in not carrying out his share of the contract. The covenant to pay the rent at a higher rate than is recoverable under the Act may not be enforceable but it may still be a condition precedent to renewal.

The language in s. 48 is very different from the language in s. 29 (b) or s. 85, Bengal Tenancy Act.

It seems to me that the tenant having failed to fulfil his part of the contract, *viz.*, to pay the enhanced rent the landlord is absolved from his part of the contract, *viz.*, to grant a renewal of the lease. No notice it seems to me is necessary. The lease has expired. The defendants are trespassers and by his filing the suit the landlords clearly show the intention of not renewing the lease. I need not consider whether the Tenancy Act is an Act for the protection of the tenant or whether it is an Act to define the respective rights of landlords

and tenants. It seems to me that a person who has entered into a contract should be held to it unless it can be shown that it is contrary to some provision of the law or has been obtained by fraud or undue influence.

I would allow the appeal and decree the plaintiff-appellant's suit.

Z. K.

Order accordingly.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1277
OF 1922.

June 22, 1925.

Present :—Sir Dawson Miller, Kt.,
Chief Justice, and Mr. Justice Macpherson.
TARNI SINGH alias TOMI SINGH
AND OTHERS—DEFENDANTS—APPELLANTS

versus

SATNARAIN MAHARAJ AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 5 (5), 103A
—Landlord and tenant—Status of tenant, determination of—Test—Reclamation of land by tenure-holder
—Appeal, second—Finding of fact—Interference by High Court—Suits Valuation Act (VII of 1887), ss. 11
—Suit tried by Court not having jurisdiction—Appeal, interference in, when justified.

In determining whether the status of a tenant under the Bengal Tenancy Act is that of a tenure-holder or a *raiyat*, what has to be considered is the purpose for which the land was granted and the extent of the tenancy. Where the original lease is inconclusive the attendant circumstances may be looked at for determining the purpose for which the tenancy was created. [p. 897, cols. 1 & 2.]

The expression "*jot wa abad karke wa krake*" in a *kabuliyat* is consistent both with the status of a *raiyat* and the status of a tenure-holder. [p. 897, col. 2.]

Though reclamation of the whole of a large *jot* by a settlement-holder and cultivation by his own ploughs may not be absolutely inconsistent with a tenure, it is entirely contrary to experience in the Province of Behar in cases where the tenancy is a tenure or the tenant proposes to settle *raiyats* upon the land and become a rent receiver, more especially where the settlement-holder belongs to an agriculturist caste or tribe. [p. 898, col. 1.]

In a second appeal the High Court is not entitled to go behind the findings of fact of the lower Appellate Court unless such findings result from the misconstruction of a document of title or the misapplication of law or procedure. [p. 897, col. 1.]

The trial by a Court of a suit beyond its pecuniary jurisdiction is not in itself a ground for setting aside its order on appeal unless the Appellate Court is satisfied that the under-valuation has prejudicially affected the disposal of the suit on the merits. [p. 899, pp. 2.]

Appeal from a decision of the District Judge, Monghyr, dated the 16th June 1922, affirming that of the Munsif, Monghyr, dated the 19th February 1921.

Messrs. Nirsu N. Singh and S. M. Mullick,
for the Appellants.

Messrs. Sultan Ahmad and Jagannath Prasad, for the Respondents.

JUDGMENT.

Macpherson, J.—This appeal has been preferred by the defendants first party from the decree of the District Judge of Monghyr in which he affirmed the decree of the Munsif for the ejectment of the appellants and of the defendants-second party from the land in suit.

The land in suit is a reputed area of 137½ *bighas* which at the time of the Cadas-tral Survey was found to be actually 157 *bighas* 2 *kathas*. In the Record of Rights finally published in 1908 the adoptive mother of plaintiff No. 1 and the plaintiff No. 2, who is his natural mother, as guardians of their respective minor sons were entered in the Record of Rights as *jotdar istimrari lekin mukarrari nahi*, signifying "permanent tenant but not at a fixed rent", the defendants first party, now appellants, as *dar-jotdar istimrari lekin mukarrari nahi* signifying "permanent under-tenant but not at a fixed rent", and the defendants-second party as occupancy *raiyats* under the *dar-jotdar*. The defendants-first party were also entered as in cultivating possession of a portion of the area and as Receiving Rs. 350 as rent from defendants-second party.

The plaintiffs sued for adjudication that the plaintiff No. 1 is occupancy *raiyat* of the land in suit, the defendants-first party are *dar-raiyat* of the land and not *dar-jotdar istimrari lekin mukarrari nahi* as shown in the Record of Rights, and the defendants-second party have no concern with the land, for *khas* possession thereof from the defendants and for mesne profits from Asin 1327.

The case on behalf of the plaintiffs was briefly as follows :—

The land in suit was a *jot* held by Hibharan Singh as an occupancy *raiyat*. On 29th November 1893 the *jot* was sold in execution of a rent decree and purchased by Nand Maharaj, the right sold being shown as "*hak mokabzat*". On the 25th October 1897 Nand Maharaj granted a *dar-jote* of the *jot* so purchased by him for the years 1305-1311 at an annual rent of

Rs. 400 to Khanro Singh father of defendants Nos. 1 to 3. This grant is described as *thika patta* and the grantee as *thikadar* and as *mustajir*; and it is set out that after expiry of the term of the *thika patta* the *thikadar* shall not retain possession over the lands in suit without executing a new *patta* and will give up possession after the expiry of the term or if the grantor sells the land. On the expiry of that *patta* a new *patta*, Ex. D-1, for the period 1312-1320 was executed on the 5th February 1904 by Musammatt Mini widow of Jaisa Maharaj for herself and as guardian of plaintiff No. 1 and by plaintiff No. 2 who is the widow of Nand Maharaj for herself and as guardian of Durgapat Maharaj, her son now deceased. (It may be here observed that Jaisa Maharaj and Nand Maharaj were brothers, and Jaisa adopted plaintiff No. 1 that plaintiff No. 1 is the sole surviving male member of the joint family and that plaintiff No. 2 has been joined in this litigation merely to avoid future dispute). The *patta* Ex. D-1 differs considerably from the *patta* of 1897. The executants set out therein that they "have executed a *patta* conferring a *dar-karindgi jot* in respect of the land demised for a term of nine years at an annual rental of Rs. 400" and that "objection on the score of (loss through) inundation, drought, hail and storm will be the concern of you the *raiyyat*" and make provision for renewal which will be quoted and discussed later. The grantee is referred to as '*jot-dar*' and in particular there is no mention of *thika*, *thikadar* or *mustajir*.

In the Record of Rights of 1908 the lessee is shown as Khanro Singh and Nandlal Singh, of whom the former is the father of defendants Nos. 1 to 3 and the latter (his brother) is the father of defendants Nos. 4 and 5. These five defendants constitute the defendants first party though plaintiffs do not admit that defendants Nos. 4 and 5 have any concern with the land.

Towards the end of the settlement operations the Banili Raj which besides being proprietor of the village, had then become the immediate landlord of the plaintiffs' tenancy, applied under s. 105 of the Bengal Tenancy Act for settlement of a fair and equitable rent in respect of it, the tenant having been, as will be remembered, recorded as *jotdar istimrari lekin mukarrari nahi*. The tenant thereupon

claimed under s. 105-A to be an occupancy *raiyyat* and that claim was sustained. That decision, however, does not bind either defendants-first party or defendants-second party as they were not parties to the litigation.

After the expiry of the lease Ex. D-1 in 1913 the plaintiffs sued the defendants for recovery of possession of the leased land and for mesne profits. It was held in appeal that as plaintiffs had realized some rent for 1321, the year after the expiry of the period of the *kabuliyat*, notice under s. 49 of the Bengal Tenancy Act was necessary before the defendants could be ejected. The suit was accordingly dismissed. The plaintiff thereafter issued notice upon the defendants-first party under s. 49, which was served in 1325, calling upon them to relinquish the land from 1327; and as the defendants-first party failed to comply therewith, plaintiffs instituted the suit for ejectment out of which this appeal has arisen.

The suit was contested by defendants Nos. 1 to 5. They contended that they were in fact occupancy *raiyyats*, and that in any case the plaintiffs could not, in view of the *patta* of 1904, eject them.

The Munsif decreed the suit holding that Hibharan Singh and, therefore, the purchaser of his interest, Nand Maharaj, who is now represented by the plaintiff No. 1, was a *raiyyat*, and that the defendants-first party have neither occupancy right nor any permanent right. On appeal the District Judge affirmed the decision holding that the evidence on record established that the tenancy of the plaintiff No. 1 is *raiyyati* and that the defendants have no permanent tenancy over the land in suit and are liable to be ejected.

In second appeal the decision of the lower Appellate Court is assailed on the following three grounds:

(1) The plaintiff No. 1 has wrongly been held to be of *raiyyati* status and entitled on that ground to eject the appellants.

(2) Even if the land is the occupancy holding of the plaintiff No. 1 the defendants-first party are not in view of the terms of the lease of 1904, liable to ejectment since that lease confers upon them a permanent tenancy.

(3) The suit was not within the pecuniary jurisdiction of the Munsif and his decision being void for want of jurisdiction, there should be a remand of the suit to a competent Court for trial.

Now as laid down in *Debendra Nath Das v. Bibudhendra Mansingh Bhramarbar Roy* (1), in determining whether the status of a tenant under the Bengal Tenancy Act is that of a tenure-holder or a *raiyat*, what has to be considered is: (1) the purpose for which the land was acquired, and (2) the extent of the tenancy.

In the present case the area exceeds 100 *bighas* and, therefore, there is under s. 5 (5) of the Bengal Tenancy Act a presumption, until the contrary is proved, that the tenancy is a tenure. But if the first criterion is established the second does not arise, while if the first is not established the second is conclusive.

The finding of the final Court of fact is that the presumptions in favour of the defendants under s. 103-A and s. 5 (5) of the Bengal Tenancy Act have been rebutted by the evidence adduced by the plaintiffs and though a substantial question of law may and generally does arise in determining whether a tenant is a *raiyat* or a tenure-holder the point, as indicated by Lord Sumner in *Rajani Kanta Ghose v. Secretary of State for India* (2), depends ultimately on questions of fact. In second appeal the High Court is not entitled to go behind the findings of fact of the lower Appellate Court unless such findings result from the mis-construction of a document of title or the misapplication of law or procedure [*Midnapur Zemindary Co. v. Uma Charan Mandal* (3)].

On behalf of the appellants it is contended by Mr. N. N. Singh in regard to the finding on the question of status, first, that it is based on a mis-construction of the document of 1876 by which the tenancy of Hibharan Singh was created, and secondly, that there is a misapplication of the law inasmuch as the finding that the plaintiff No. 1 is a *raiyat* is based on evidence legally insufficient to support it, or rather that there is no evidence to support the finding.

Now Ex. B. the document of 1876, is a brief *patta kaulkarar* (agreement) in favour of Tekan Singh and Hibharan Singh executed by the *darmustajirs* in respect of

275 *bighas* for a period of seven years from 1284 at an annual rental of Rs. 221. The only relevant provisions are "It behoves that you cultivate and get cultivated the land in the said village (*jot wo abad karke wo karake*) and pay the said rent, etc." (literally). "It behoves that you (by doing and getting done ploughing and cultivation (reclamation) pay the said rent, etc.)" and "objection on the score of (loss through) inundation, drought and calamities of the sky will be your concern". The learned District Judge held that the expression "*jot wo abad karke wo karake*" was consistent either with the status of a *raiyat* or the status of a tenure-holder. It is now urged that taken in conjunction with the area of 275 *bighas* [or even with the moiety of that area held by each of the two lessees and (as the sale in 1903 of half of the area shows), accepted by the landlord as a separate tenancy] the word "*karake*" points to the grant of a tenure. In my opinion such is not necessarily the case, and it is impossible on that word alone to hold that a tenure rather than a holding is implied, especially when the grantees take from a *darmustajir*. Apart from the fact that the words '*jot wo abad*' would seem in the word "*abad*" to imply reclamation of the soil in addition to cultivation, the lessees and each of them in his own moiety might well contemplate cultivation of such an area by their (or his) own family or hired servants without any idea of settling *raiya*ts upon it. Much the same language was indeed used in the leases discussed in *Debendra Nath Das v. Bibudhendra Mansingh Bharamabar Roy* (1), and in *Rajani Kanta Ghose v. Secretary of State for India* (2), but in those leases there were further clear indications that a tenure was intended, and it was so found by the final Court of fact. The District Judge has, in my judgment, taken a correct view of the terms of the original lease.

The original lease being inconclusive the attendant circumstances may be looked at to determine the purpose for which the tenancy was created. The learned District Judge found that that purpose was established by three pieces of evidence: (1) the statement of Kamla Singh, one of the original settlement-holders, who deposed that originally the settlement was a *raiya*ti one, (2) the deposition of Tilak Singh who is a nephew of Hibharan Singh and 71 years of age and who stated that the land

(1) 45 Ind. Cas. 411; 45 C. 805; 5 P. L. W. 1; 27 C. L. J. 543; 22 C. W. N. 674; 16 A. L. J. 522; 23 M. L. T. 384; (1918) M. W. N. 379; 20 Bom. L. R. 743; 35 M. L. J. 214; 45 I. A. 67 (P. O.).

(2) 51 Ind. Cas. 226; 46 C. 90; 23 C. W. N. 649; 45 I. A. 190 (P. O.).

(3) 52 Ind. Cas. 497; 24 C. W. N. 201; 37 M. L. J. 199; 17 A. L. J. 1004; (1919) M. W. N. 817; 26 M. L. T. 489; 22 Bom. L. R. 7; 11 L. W. 371 (P. O.).

was jungle at the time of the settlement and that the settlement-holders got the jungle cut and cultivated the land with their own ploughs, and (3) the mention in the sale certificate of 1893 "that Hibharan Singh, judgment-debtor, had '*hak mokabzat*' i.e., occupancy right in the land sold".

Mr. N. N. Singh strenuously contends that the evidence relied upon by the District Judge is inconclusive as to the status of Hibharan Singh and his successor-in-interest and could not, especially as it is not contemporaneous, negative the statutory presumptions arising under ss. 103-B and 5 (5) of the Bengal Tenancy Act. It is urged that the opinion of the witness Kamla Singh is valueless especially as the area is so large, that the reclamation of the land by the lessee is not altogether inconsistent with an intention to settle *raiyyat* upon it and so is inconclusive, and that "*hak mokabzat*" is not occupancy right" as used technically in the Bengal Tenancy Act, but is simply a loose expression meaning "the right to possession".

Now the lower Appellate Court had before it the evidence of Kamla Singh which has not been shown to us, and it is, therefore, impossible to say that he ought not to have relied upon it. Again, though reclamation of the whole *jot* by the settlement-holders and cultivation by their own ploughs may not be absolutely inconsistent with a tenure, it is entirely contrary to experience in this Province in cases where the tenancy is a tenure or the tenant proposes to settle *raiyyats* upon the land and become a rent-receiver, more especially where the settlement-holder belongs to an agricultural caste or tribe. It has also not been shown that from 1876 to the date of sale in 1893 there were any under-tenants. It was only when the "landlord and stamp-vendor", as Nand Maharaj describes himself, came into possession that sub-leasing began. Finally it is not possible to say that in the circumstances the term "*hak mokabzat*" does not, as the District Judge held, denote the "occupancy right" of the Bengal Tenancy Act which had been in force for eight years at the time of the sale.

There is no substance in the complaint of the learned Advocate that the defendants' evidence on the subject of status has not been considered. The learned Judge having referred to the presumptions proceeded to examine the nature of the settlement

and as will be seen below, the *patta* of 1904 does not throw any light on the character of the tenancy of Hibharan Singh.

Findings of fact of the lower Appellate Court cannot be assailed in second appeal, however, gross and inexcusable the error therein—if as Lord Macnaghten said in *Durga Chowdhuri v. Jowahir Singh Chowdhuri* (4), "the lower Appellate Court had before it evidence proper for its consideration in support of its finding". It is impossible to say that the learned District Judge had not before him evidence on which a finding of fact could legally be based that the presumptions in favour of plaintiff No. 1 being a tenure-holder were rebutted and that he is in fact a *raiyyat* as he claims to be. The first point, therefore, fails.

It is next urged that even if the plaintiff No. 1 is a *raiyyat* he is not entitled to eject the appellants. In support of this contention reliance is placed on a provision in the *patta* of 1904 which runs as follows:—"When the term of the *patta* will expire, you again taking a fresh *patta* from us (the executants) will cultivate, and if contrary to this provision you cultivate, then rent will be realised at the rate of Rs. 3 per *bigha*, the rate for adjoining lands, and if you the *karinda* will all along pay faithfully (?) punctually) the rent fixed under the *patta* then the land shall remain in your possession and occupation as before".

There are two branches to the argument. In the first place reference is made to s. 18 of the Bengal Tenancy Act and it is urged that it is for plaintiff No. 1 to show that he is not "a *raiyyat* at fixed rates" who is not precluded by s. 85 of the Bengal Tenancy Act or any other enactment from making such a transfer as is involved in the provision quoted. The plaint, however, sets out that the plaintiff No. 1 is an occupancy *raiyyat* and presumably an entry to that effect was also made in the Record of Rights under s. 109-D of the Bengal Tenancy Act after the decision under s. 105-A. The appellants also never asserted that their landlord plaintiff No. 1, held his tenancy at fixed rates. Indeed the point was never previously taken, and it is not mentioned in the grounds of appeal. It, therefore, cannot be taken now. But apart from that the implied finding throughout

(4) 18 C. 23; 17 I. A. 122; 5 Sar. P. C. J. 560; 9 Ind. Dec. (N. S.) 16 (P. C.).

is that the plaintiff No. 1 is an occupancy *raiyat*.

The main contention, however, is that the plaintiff is in some manner estopped by the provision quoted from ejecting the appellants. In support of it reliance is placed upon the Full Bench decision of the Calcutta High Court in *Chandra Kanta v. Amjad Ali* (5), and it is urged that as in the lease of 1904 the plaintiffs' predecessors held themselves out to be tenure-holders, and so s. 85 (2) of the Bengal Tenancy Act was not a bar to the registration of the deed of sub-lease, though it purports to create a term exceeding nine years, the grantor, even if a *raiyat*, cannot now be permitted to derogate from his own grant and eject the grantee to whom he made a permanent grant. This argument manifestly lacks foundation unless it is found that the lessors of 1904 held themselves out as having a right higher than that of occupancy *raiyat*. The learned District Judge was not satisfied that the *pardanashin* ladies who executed the deed were even aware of the provision or accepted it. But apart from that finding, I am unable to hold that the executants of the lease of 1904 at all professed to have a higher status than the status of a *raiyat*. The period of nine years is a very common one for a sub-lease by a *raiyat* and less probable in a grant of an under-tenancy or a *raiyati* settlement. The word '*raiyat*' is indeed used in Ex. B, but only in the stipulation that "objection on the score of (loss through) inundation, drought, hail and storm will be the concern of you, the *raiyat*" which, is merely an adaptation of the similar provision in the *patta* of 1876. The word "*raiyat*" has here not the usual technical meaning nor any special significance, being merely equivalent to grantee. Manifestly it must be interpreted in conjunction with the definite statement in the deed that the grantors have executed a *patta* conferring a *darkarindgi jot*, the literal meaning of which is "a sub-management *jot*". In the course of the document the term "*karinda*" signifying 'agent' or 'manager' is twice used of the grantee. The description in the last sentence of the lessee as '*jotdar*' must also be read in the light of that description of the tenancy. The lease is perhaps one which might equally be executed by a *raiyat* or by a

tenure holder, but that is all that can be said in favour of the contention on behalf of appellants. Accordingly it must be regarded as a sublease granted by the executants in the capacity which they actually occupied. Plaintiff No. 1 is, therefore, not estopped from denying that he holds a higher status than that of an occupancy *raiyat*. Exhibit D-1 appears to have been admitted to registration contrary to the provisions of s. 85 (2) through a misconception on the part of the Registering Officer, and whether the misconception was that the term of the sublease granted by a *raiyat* was not more than nine years, or was that the executants held a tenure, is immaterial. There is certainly no evidence that lessor and lessee conspired by false or equivocal recitals to evade the provision of the Statute. Exhibit D-1, therefore, does not affect the property demised, at any rate beyond the period of nine years. The first of the three cases dealt with in the Full Bench decision cited is that which applies to the present circumstances and the *raiyat* is entitled to eject the grantee upon giving notice under s. 49 (2), as has been done in the present instance. The second point also cannot prevail.

As to the third point the suit was valued at Rs. 1,100 and was instituted in the Court of the Munsif having jurisdiction to try suits of value not exceeding Rs. 2,000. Objection to the jurisdiction of the Court was taken before the Munsif. Before the District Judge in appeal the objection was renewed. But the trial by a Court of a suit beyond its pecuniary jurisdiction is not in itself a ground for setting aside his order on appeal unless the Appellate Court is satisfied that the under-valuation has prejudicially affected the disposal of the suit on the merits. The District Judge recorded that he was not so satisfied. It is, however now argued that in fact the disposal of the suit on the merits was prejudicially affected because the forum of appeal would, on a correct valuation of the suit, have been the High Court and not the District Judge and *Mohini Mohan v. Gour Chandra Rai* (6) is cited in support of the contention. That decision does not assist the appellants. Therein it was held that wherein a suit tried by a Subordinate Judge the appeal was wrongly preferred to the District Judge in disregard of his pecuniary jurisdiction in

(5) 61 Ind. Cas. 466; 48 C. 783 at p. 794; 25 C. W. N. 4; 32 C. L. J. 206.

(6) 56 Ind. Cas. 762; 5 P. L. J. 397; 1 P. L. T. 390; 2 U. P. L. R. (Pat.) 123; (1921) Pat. 105.

appeal, the appeal was incompetent and s. 11 of the Suits Valuation Act, 1887 was inapplicable as in fact the under-valuation prejudicially affected the disposal of the appeal on the merits. In the present case the appeal lay to the District Judge whether the correct valuation of the subject-matter was Rs. 1,100 or was Rs. 3,650 as the District Judge found it to be for purposes of assessment of Court-fee. The real plea on behalf of the appellants is that the true valuation exceeded Rs. 5,000 so that the appeal from the decision in the suit would lie to the High Court. But that plea must fail in the first place because it is not taken in the grounds of appeal and in the second place because there is nothing before us which would lead us to hold that the valuation of Rs. 3,650 is erroneous and the appeal in a suit so valued lies to the District Judge and not to the High Court. The third submission also fails.

I would, therefore, dismiss this appeal with costs.

Miller, C. J.—I agree.

Z. K.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1110 OF 1923.

January 19, 1925.

Present:—Mr. Justice Phillips.

SINNANNA GOUNDAN—APPELLANT

versus

VEERAPPA GOUNDAN AND OTHERS—

RESPONDENTS.

Easements Act (V of 1882), s. 13 (f)—Easement—Increased burden.

The plaintiff and defendant were owners of two adjoining sites with houses thereon which fell to them on a family partition. The water from the plaintiff's site drained off across the defendant's site, and without flowing in any channel across the defendant's land used to be absorbed as it spread over the whole area. Subsequent to the partition, between the two sites a wall was built by both the parties in common and the plaintiff claimed the right to drain off the water from his house and site through a hole in the wall across the yard in the defendant's house to the street:

Held, (1) that the easement enjoyed before partition was of a different nature to that claimed, namely, collecting all the water into one spot and directing it on to the defendant's land in a concentrated form;

(2) that the easement right not being necessary for enjoying the plaintiff's share as it was enjoyed when

the partition took effect, and the burden cast upon the defendants being a more onerous burden now than it was before, plaintiff's claim must fail.

Second appeal against a decree of the Court of the District Judge, Coimbatore, in A. S. No. 366 of 1922, preferred against that of the Court of the District Munsif, Gobichettipalayam, in O. S. No. 697 of 1922.

Mr. T. R. Venkatarama Sastri (Advocate-General), for the Appellant.

Messrs. C. V. Ananthakrishna Iyer and K. B. Ranganatha Iyer, for the Respondent.

JUDGMENT.—This appeal relates to a question of easement. The plaintiff's father and the first defendant effected a partition about 25 years ago and now the plaintiff claims to have a right to drain off the water from his house and site through a hole in the wall, marked A, R, W on the plan and across the defendant's yard to the street in the north.

It is contended that this is not an easement of necessity but the learned Advocate-General contends that it is an easement within the meaning of s. 13 (f) of the Easements Act, namely, that it is an apparent and continuous easement and that it was enjoyed before the partition. It is however, admitted that since the partition took place this wall A, R, W has been built by the parties jointly. It is further clear that prior to the partition, there was no particular easement right to take water through that one point R. It is possible and indeed probable from the lie of the land that the water from the plaintiff's site did drain off towards the north across the defendant's site. That easement is of a different nature to collecting all that water into one spot and directing it on to the defendant's land in a concentrated form as sought to be done now. Before the partition it is unlikely that water flowed in any channel across the defendants' land and it would be likely to be absorbed as it would be spread over the whole area. Now that the whole amount of this water is concentrated into a narrow channel five inches across, it imposes a burden upon the defendants of a very different nature to that which was in existence before the partition. It cannot, therefore, be said that it is now necessary for enjoying the plaintiff's share as it was enjoyed when the partition took effect. The burden cast upon the defendants is undoubtedly a more onerous burden now than it was before.

It is further argued that this arrangement must have been by agreement between the parties and from the fact that the wall was built by both in common and that this opening has been there for some time past it might be possible to infer such an agreement. Both the lower Courts have considered the question of agreement which was pleaded by the plaintiff and have definitely found that there was no such agreement. In this view, I do not think that this finding can be interfered with or that fresh finding is called for.

In the result the appeal fails and is dismissed with costs.

V. N. V.

Appeal dismissed.

N. H.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 44
OF 1923.

March 12, 1925.

Present:—Justice Sir Hugh Walmsley, Kt.,
and Mr. Justice Mukerji.

JATINDRA NATH ROY CHOWDHURY
AND OTHERS—DEFENDANTS—APPELLANTS

versus

NARAYAN DAS KHETRY—PLAINTIFF—
RESPONDENT.

*Bengal Land Revenue Sales Act (XI of 1859), s. 37—
Revenue sale—Purchaser, rights of—Structures on
land, whether pass by sale—Structures, whether
encumbrance.*

What passes at a revenue sale is the land or the share in the land and not the structures or buildings thereon. [p. 902, col. 2.]

The rights of a purchaser at a revenue sale are radically different from those of a purchaser at a voluntary sale. [p. 902, col. 2; p. 903, col. 1.]

Structures and buildings are not "encumbrances" within the meaning of s. 37 of the Bengal Land Revenue Sales Act. [p. 903, col. 1.]

Where land is sold for arrears of revenue the owner of a house built on the land is entitled as against the auction-purchaser to reside in or enjoy the house paying an equitable ground rent for the site to such purchaser and that whether the house was built by a person holding under a lease granted by the former proprietor or by the ex-proprietor himself. [ibid.]

Thakoor Chunder Pramanick v. Ramdhone Bhutta-charjee, 6 W. R. 228, *Surjakanta Acharjya Bahadur v. Sarat Chandra Roy*, 25 Ind. Cas. 309; 18 O. W. N. 1281; 16 M. L. T. 290; 27 M. L. J. 365; 1 L. W. 807; (1914) M. W. N. 757; 16 Bom. L. R. 925; 20 O. L. J. 563 (P. C.), *Shib Doss Banerjee v. Bamun Doss Mookerjee*, 15 W. R. 360; 8 B. L. R. 237, and *Ram Koomar Sen v. Mohesh Chunder Sen*, (1860) 1 Sudder Dec. 637, referred to.

On the failure of an owner to pay the Government assessment his estate or interest in the land is deter-

mined and sold under the provisions of the Bengal Land Revenue Sales Act. Under such a sale what is sold is not the interest of the defaulter owner, but the interest of the Crown, subject to the payment of the Government assessment. In a sale held under that Act the estate is sold in the condition in which it stood at the time of the settlement; the purchaser does not derive his title from the defaulting proprietor but takes the estate from the Crown in the state in which it was at its inception at the time of the settlement. [ibid.]

Appeal against a decree of the Subordinate Judge, First Court, 24-Parganas, dated the 24th August 1922.

Mr. N. C. Bose, Babus Bireswar Bagchi and Anilendra Nath Roy Chowdhury, for the Appellants.

Sir Provash Chunder Mitter and Babu Satindra Nath Mukerji, for the Respondent.

JUDGMENT.

Walmsley, J.—The appellants are the defendants, the successors-in-interest of Satyendra Nath Roy Chowdhury, who was the proprietor of a *khas mahal* holding. This holding was sold under the Revenue Sales Law by the Collector on December 17, 1919, and bought by the plaintiff. Satyendra's efforts to have the sale set aside were fruitless and on July 6, 1920, a certificate was issued to the plaintiff saying that his purchase took effect from May 1, 1920. Then on August 2, 1920, a declaration was made under the provisions of the Land Acquisition Act in respect of the holding and on March 11, 1921, the Deputy Collector awarded Rs. 2,181 for the land, and Rs. 12,388 for the building standing on it. This building was admittedly erected at the expense of Satyendra, and it was standing on the land at the time of plaintiff's purchase. The suit was brought to determine whether the plaintiff or defendants were to take the compensation money. There is, of course, no question about the compensation for the land: that must go to the plaintiff. The learned Judge has held that the plaintiff should also get the compensation for the building. It is against that finding that the appeal is directed.

It is conceded on all hands that the holding is one that can be sold under the Revenue Sales Law. Unfortunately the language of Act XI and Act VII seems hardly to refer to a small holding like the present one. Here the holding is a homestead or a residential site, and in the occupation of the proprietor. The learned Judge proceeds frankly on the doctrine *omne quod solo inædificatur solo cedit*, although he admits

that it has but a limited application in this country.

In this I think, he was wrong. The point was discussed, and settled in 1866, in the case of *Thakoor Chunder Pramanick v. Ramdhone Bhattacharjee* (1) and incidently it was pointed that the Civil Law gave some protection to the man who being in possession of land in good faith erected a building on it. On the authority of that decision I think it is clear that the plaintiff had the option of calling upon the defendants to remove the building or to accept such sum as might be found to be reasonable compensation. The plaintiff did not exercise that option. He says that he took delivery of possession through the Collector in August 1920, but that allegation is denied by the defendants and there is no evidence adduced in support of it. I need not consider when a purchaser must exercise his option in such a case: for my present purpose it is enough to say that the plaintiff had not exercised his option. It appears to me to follow from this failure on the part of the plaintiff that ownership of the building remained with the defendants, and that it was still with them when the award was made. Consequently, I think that the learned Judge's decision is wrong, and that it must be reversed. The defendants, however, are not entitled to the whole of the compensation for the building: they allowed it to stand on the plaintiff's land for a long time and they ought to pay a reasonable sum for the use of the land. I agree with my learned brother as to the sum.

We are told that the whole of the compensation money was withdrawn by the plaintiff after the decision by the first Court. The plaintiff must refund the balance after deducting the amount allowed to him as indicated above.

The appeal will be allowed and the suit decreed in the form indicated with proportionate costs in both Courts.

Mukerji, J.—I agree and wish to add a few words.

Act XI of 1859 is described in its title as an Act to improve the law relating to the sales of land for arrears of revenue in the Lower Provinces under the Bengal Presidency. In the Regulations and Enactments dealing with settlement of revenue it is the land which is assessed to revenue.

Under Act XI of 1859 what is sold for arrears of revenue is the 'estate.' The word is not defined in that Act but in Act VII of 1868. In the latter Act 'estate' has been defined as meaning any land or share in land subject to the payment to Government of an annual sum in respect of which the name of a proprietor is entered on the register known as the General Register of all Revenue paying estates, or in respect of which a separate account may in pursuance of s. 10 or s. 11 of the Act XI of 1859 may have been opened. These Registers are now prepared and maintained under the Land Registration Act VII of 1876, s. 2 of which gives a definition of 'estate' as including land, and it is the lands which are so entered as assessed or unassessed *prima facie*, therefore, and in the absence of anything else, I should think that it is the land or the share in the land, as stated above, which passes at the sale, and not the structures or buildings on the land.

To make out that the structures and buildings pass with the land or the share therein, several arguments have been put forward and I propose to consider them in their order.

Reference is made to the definition of 'land' as given in s. 3, sub-s. (a) of the Land Acquisition Act (I of 1894) and the definition of 'immovable property' as given in s. 3 of the Transfer of Property Act (IV of 1882). Both these definitions, however, are expressly restricted to the enactments in which they appear and cannot be imported into Act XI of 1859, with which the provisions of Act VII of 1868 have to be read by reason of s. 30 of the latter.

It is urged that though the provisions of s. 8 of the Transfer of Property Act do not apply to a sale by operation of law the principles underlying those provisions will apply to a purchase made at a revenue sale. It is urged that at such a sale an unqualified transfer takes place which conveys all the interest which the defaulting proprietor possessed and the rule of interpretation that every grant is to be most strongly taken against the grantor is to be applied. It is contended that where there is no reservation the structures and buildings will pass by necessary implication. This argument is based upon a supposed analogy between a transaction as between a vendor and a vendee and a revenue sale. The rights of a purchaser at a revenue sale are entirely and radically different from

those of a purchaser at a voluntary sale. The Judicial Committee in the case *Surja Kanta Acharjya Bahadur v. Sarat Chandra Roy* (2) dealing with the case of a sale held under Act XI of 1859 enunciated the proposition that on the failure of an owner to pay the Government assessment his estate or interest in the land is forfeited or rather determined, and that under such a sale what is sold is not the interest of the defaulter owner, but the interest of the Crown, subject to the payment of the Government assessment. In a sale held under that Act the estate is sold in the condition in which it stood at the time of the settlement; the purchaser does not derive his title from the defaulting proprietor but takes the estate from the Crown in the state in which it was at its inception at the time of the settlement.

The decision of the learned Subordinate Judge is not, and, in my opinion, rightly not, sought to be supported by a reference to the expression 'free from encumbrance' appearing in s. 37 of Act XI of 1859. Structures or buildings are not encumbrances within the meaning of the section and the said expression is irrelevant for our present purposes.

It is conceded that the law of fixtures has but a limited application to this country and that the provisions of s. 108, cl. (h) of the Transfer of Property Act have no application.

The precise effect of a revenue sale on the building erected by the ex-proprietor was incidentally considered by this Court in the case of *Shib Doss Banerjee v. Bamun Doss Mookerjee* (3) wherein at page 361* Norman, C. J., observed as follows: "If the land had been sold for arrears of Government revenue; the owner of a house built on the land might have been entitled as against the auction-purchaser to reside in or enjoy the house paying an equitable ground-rent for the site to such purchaser and that whether the house were built by a person holding under a lease granted by the former proprietor—Act I of 1845, ss. 3, 26 and 27 and Act XI of 1859, ss. 3, 7 or even by the ex-proprietor himself, see *Ram Koomar Sen v. Mohesh Chunder Sen* (4)."

tion of law enunciated so far back as 1871 has not been dissented from at any time till now, and I am not convinced that there is any reason to hold that it is otherwise than a correct one. It has been argued that the case of *Ram Kumar Sen v. Mohesh Chunder Sen* (4) presents certain distinguishable features. I think it does; but the principle is there and that is entirely in consonance with the general rule which must govern the rights and liabilities of the purchaser on the one hand and the ex-proprietor on the other. That general rule was laid down by a Full Bench of this Court in the case of *Thakoor Chunder Pramanik v. Ramdhone Bhattacharjee* (1): "We think it should be laid down as a general rule that, if he who makes the improvement is not a mere trespasser, but is in possession under any *bona fide* title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil—the option of taking to the building, or allowing the removal of the material, remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess".

Applying this general rule in the present case there is no escape from the conclusion that the ownership of the structures or buildings, which were admittedly erected by the appellants' predecessor, the defaulting proprietor, did not pass to the respondent, the purchaser.

From this, however, it does not follow that the appellants are entitled to the whole of the compensation awarded by the Land Acquisition Collector for the structures and buildings. We must take into consideration all the facts and circumstances of the case and we are competent to pass such orders as the equities of the case demand. The learned Advocate for the appellants with his usual candour has conceded that we may allow reasonable compensation to the respondent for the appellants' laches in not removing the materials of the structures and buildings before 1st of May 1919 which was the date mentioned in the certificate from which the sale was to take effect and the fact that the latter did not exercise the option of calling upon the ex-proprietor to remove them

..... This proposi-
(2) 25 Ind. Cas. 309; 18 C. W. N. 1281; 16 M. L. T. 290; 27 M. L. J. 365; 1 L. W. 807; (1914) M. W. N. 757; 16 Bom. L. R. 925; 20 C. L. J. 563 (P. C.).

(3) 15 W. R. 360; 8 B. L. R. 237.

(4) (1860) 1 Sudder Dec. 437.

*Page of 15 W. R.—[Ed.]

suggests that he allowed them to stand subject to payment of reasonable ground rent. The structures and buildings remained on the land till the 11th March 1921, on which date the Collector took possession of the premises. In the absence of any arrangement which it was clearly the duty of the ex-proprietor to make with the purchaser for allowing the buildings and structures to remain on his land, I think we may reasonably assess the compensation at the rate of Rs. 100 per month.

The result is that out of the compensation awarded for the structures and buildings, the appellants should be held entitled to the whole amount less a sum of Rs. 2,300 due to the respondent, as compensation for 23 months during which period the structures and buildings stood on the land. There is no controversy as to the rest of the compensation money, that is to say, that awarded for the land or the trees.

The decree of the Court below is set aside and in lieu thereof a decree will be drawn up declaring the plaintiff's title to the whole of the compensation awarded for the lands and trees and also to the sum of Rs. 2,300 stated above, out of the amount awarded in Land Acquisition Case No. D, 37-95-96 of 1920-21 of the Land Acquisition Deputy Collector's Court at Alipur, and the rest will go to the defendants.

Having regard to the circumstances of the case, and the proportion of success and defeat of the respective parties I think the proper order to make is to allow proportionate costs in this Court as well as in the Court below.

Z. K.

*Appeal allowed;
Decree modified.*

ALLAHABAD HIGH COURT.

PRIVY COUNCIL APPEAL No. 25 OF 1925.

July 27, 1925.

*Present:—*Mr. Justice Lindsay and
Mr. Justice Kanhaiya Lal.

Kunwar SURAJ SINGH AND ANOTHER
—PLAINTIFFS—APPLICANTS

versus

Rani PHUL KUMARI AND ANOTHER—
DEFENDANTS—OPPOSITE PARTY.

*Civil Procedure Code (Act V of 1908), ss. 109, 115,
Sch. II, paras. 1, 15, 16—Arbitration—Reference by
Court—Objection, disposal of—Revision—Order passed
in revision, whether passed "on appeal"—Appeal to His
Majesty in Council, whether competent.*

An order passed by the High Court in the exercise of its revisional jurisdiction is not an order passed "on appeal" within the meaning of cl. (a) of s. 109 of the C. P. C. Such an order may, however, be open to appeal to His Majesty in Council under cl. (c) of the section, if it is shown that the case is a fit one for appeal. [p. 904, col. 2; p. 905, col. 1.]

Under the C. P. C. of 1908 the policy of the law is to make all decisions in arbitration cases final and it is contemplated that any objection taken in respect of the validity of an award should be determined by the Court through which the reference was made, including an objection that what purports to be an award is by reason of certain events which are said to have happened prior to the reference not an award at all. [p. 905, col. 2; p. 906, col. 1.]

Where, therefore, in such a case an award is upheld by the Court which made the reference and a petition for revision of such order is dismissed by the High Court, an order of the Trial Court or of the High Court is not open to appeal to His Majesty in Council inasmuch as the order of the High Court being passed in revision cannot be said to have been passed "on appeal" within the meaning of cl. (a) of s. 109 of the C. P. C., and cl. (c) of the section is inapplicable for want of the case being a fit one for appeal within the meaning of that clause. [p. 905, col. 1.]

Application for leave to appeal to His Majesty in Council.

Mr. P. L. Banerji, for the Applicants.

Sir Dr. T. B. Sapru and Dr. K. N. Katju,
for the Opposite Party.

JUDGMENT.—We have decided, after hearing arguments of Counsel in this case, to refuse this application for leave to appeal to His Majesty in Council.

The order which it is sought to take in appeal is an order which was passed by this Bench in Civil Revision No. 125 of 1923. In other words it was an order passed under the provisions of s. 115 of the C. P. C. The matter came before this Court in connection with an arbitration award. The award having been attacked in the Trial Court was accepted by the learned Judge of the Court below, and we decided by our order that there was no case for interference in revision. We, therefore, allowed the order of the District Judge to remain as it was.

A preliminary objection has been raised before us and it is argued in this connection that having regard to the language of s. 109 of the C. P. C., cl. (a), the applicants have no right to apply for leave to appeal to His Majesty in Council. This argument is based on the consideration that the order which was passed by this Bench, and which is the order complained of, was not an order passed "on appeal" by a High Court. We agree with the argument and we do not think that an order which has been passed by this Court in the exercise of its revisional jurisdiction is an order passed

"on appeal." We understand there is authority for the contrary view in a case reported as *Harish Chandra Acharya v. Nawab Bahadur of Murshidabad* (1). The view there taken followed the view which was adopted by the Madras Court in *Chappan v. Moidin Kutti* (2). This latter was a case in which the matter under discussion was the right of appeal under the Letters Patent.

We are not prepared to take the view that an order passed by this Court in the exercise of its revisional jurisdiction is an order passed "on appeal." There is a substantial difference between the powers of this Court when exercised in appeal and when exercised in revisional jurisdiction. As was very properly pointed out, the jurisdiction of this Court under s. 115 is a discretionary jurisdiction and the Court is not bound to interfere even if it is satisfied that an error of law has been committed by the Court below. It would be otherwise in a case which came before this Court "on appeal." We are, therefore, of opinion, that this application does not lie under s. 109 (a). On the other hand it is argued that if it does not lie under cl. (a) it does lie under cl. (c) which provides that an appeal would lie to His Majesty in Council from any decree or order when the case as hereinafter provided is certified to be a fit one for appeal to His Majesty in Council. We are of opinion that the application could be entertained under this clause if it is made to appear that the case is a fit one for appeal. It was argued before us that in the present case, as in the case reported as *Saadatmand Khan v. Phul Kuar* (3), the application for a certificate ought to be made to the Court which passed the decree. We do not think this is so, and it may also be mentioned that in the case reported as *Saadatmand Khan v. Phul Kuar* (3), the matter never came before the High Court at all. There was no order by the High Court in that case.

We are left then to consider whether this application ought to be granted on the ground that the case is one certified to be a fit one for appeal to His Majesty in Council. It is argued by Mr. Peary Lal Banerjee, who appears on behalf of the

applicants, that a substantial question of law is raised and one of general importance. The argument is put in this way. It is said that it would be a great hardship on litigants who engage in arbitration proceedings if they were deprived of the opportunity of showing by means of an appeal that what purported to be an award was not an award at all. We think instead (and the law is so settled in this Court) that under the present C. P. C., the policy of the law is to make all decisions in arbitration cases final. We may refer in this connection to the Full Bench decision of this Court reported as *Lutawan v. Lachiya* (4) and to the observations of the learned Chief Justice at page 74* of the judgment where he says:—

"It seems to me that it was the clear intention of the Legislature by this amendment of the Code that objections to the award on the ground of invalidity *from any cause whatever* should be decided by that Court and by no other Court."

Similarly Mr. Justice Banerji observes at page 75* of the report:—

"It is manifest from the provisions of the C. P. C., that the intention of the Legislature is to give finality to the decisions of arbitrators and to the decrees passed in accordance therewith."

We agree respectfully with these observations on the scope of the arbitration law as it now stands and we think it is impossible to say that any hardship is caused whereas at present, the law contemplates that any objection taken in respect of the validity of an award is to be determined by the Court through which the reference was made. This is clear from the provisions of Sch. II, para. 1, sub-para. (1) (c) of the C. P. C., when the award is returned by the arbitrator any party then has the opportunity of attacking the award in the Court which made the reference and showing that it is invalid for various reasons which are specified in para. 15 "or otherwise." It seems to us, therefore, that this paragraph contemplates the entertaining by the first Court of all possible grounds which can be urged against the validity of the award and amongst those grounds, we conceive, is included the ground which has now been raised here, namely, that what purports to be an award is by reason of certain events

(1) 11 Ind. Cas. 65; 13 C. L. J. 688; 15 C. W. N. 879.

(2) 22 M. 68; 8 M. L. J. 231; 8 Ind. Dec. (N. s.) 49.

(3) 20 A. 412; 2 C. W. N. 550; 25 I. A. 146; 7 Sar. P. J. 380; 9 Ind. Dec. (N. s.) 624 (P. C.).

(4) 21 Ind. Cas. 989; 36 A. 69; 12 A. L. J. 57.

*Pages of 36 A.—[Ed.]

which are said to have happened prior to the reference not an award at all.

Paragraph 16, Sch. II, shows clearly that the right of appeal in the case where an award has been made is of a strictly limited nature, and it was, no doubt, for that reason, that the Full Bench held, as we have said above, that it was the policy of the Legislature to give finality to the decisions of arbitrators. We, therefore, hold that no proper case has been made out which would justify our granting the certificate asked for, and we accordingly dismiss this application with costs including fees on the higher scale.

Z. K.

Application dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1443 OF 1921.

April 9, 1924.

Present:—Mr. Justice Madhavan Nair.

RAMASWAMI NAICKER AND ANOTHER

—APPELLANTS

versus

NARAYANASWAMI NAICKER—

RESPONDENTS.

Contract Act (IX of 1872), s. 72—Mistake of fact—Payment of money towards non-existing debt—Suit for refund—Cause of action, accrual of, subsequent to suit—Relief, right to.

A person is entitled to recover money which he pays to another under a *bona fide* forgetfulness of fact. [p. 907, col. 1.]

The plaintiff sent money to the defendant with intent to discharge a particular promissory note, but by mistake wrongly described it. The defendant took advantage of the mistake and allotted the money for the discharge of this fictitious pro-note and thereupon endorsed the real pro-note to a third person who ultimately got a decree. In a suit by the plaintiff against the defendant for recovery of money paid under mistake:

Held, that the plaintiff was entitled to a decree, and it was immaterial that his suit was instituted before the endorsee's suit was actually decreed. [*ibid.*]

There is no general rule that Courts have no power to grant a decree where the cause of action arises subsequent to the suit. [*ibid.*]

Subbaraya Chetty v. Nachiar Ammal, 44 Ind. Cas. 863; (1918) M. W. N. 199; 7 L. W. 403, followed.

Second appeal against a decree of the Court of the Subordinate Judge, Ramnad, at Madura, in A. S. No. 40 of 1920, (A. S. No. 676 of 1919, on the file of the District Court, Ramnad), preferred against that of the Court of the Additional District Munsif, Srivilliputhur, in O. S. No. 87 of 1918, (O. S. No. 977 of 1917) on the file of the Court of the Principal District Munsif, Srivilliputhur.

Mr. K. V. Venkatasubramania Iyer, for the Appellants.

Messrs. T. R. Venkatarama Sastri (Advocate-General) and K. S. Ramabhadra Iyer, for the Respondents.

JUDGMENT.—The facts so far as they are necessary for the purpose of this second appeal may be thus shortly stated. Defendants Nos. 1 and 2 are members of a joint family carrying on money-lending business sometimes taking documents in the name of one and sometimes in that of the other and one or the other collecting money and giving discharges on the documents. The plaintiff borrowed a sum of Rs. 1,250 and executed to the 2nd defendant a promissory note Ex. R in Ananda Chitrai (29th April 1914). To discharge this promissory note the plaintiff sent money to the 1st defendant and, in so sending it, the promissory note for discharging which the money was sent was by mistake referred to as executed to the 1st defendant in Ananda Vaikasi (see Ex. D). This was on account of forgetfulness as the plaintiff had kept no copies of memoranda of the various promissory notes. Availing himself of this mistake in the dates, the 1st defendant allotted this money for the discharge of a promissory note of Ananda Vaikasi which, as a matter of fact, did not exist. Later on the promissory-note executed to the 2nd defendant for which really the money was intended by the plaintiff when he sent it was endorsed to another person and he instituted a suit against the plaintiff for the recovery of that amount. It was decreed against him since the institution of this suit. I may here mention that, in a preliminary order passed in the suit instituted by the endorsee, the District Munsif, overruling the plea of payment urged by the present plaintiff, who was defendant therein, said that "The defendant may no doubt have his remedy to claim back the amount paid by mistaken understanding of the real claimant to the money." The suit out of which this second appeal arises has been instituted by the plaintiff for the recovery of the amount declared due from him to the 1st defendant in the circumstances which I have narrated. Both the lower Courts, holding that the money was paid by the plaintiff under a mistake of fact, have given a decree in his favour and the defendants have preferred this second appeal against that decree.

The learned Subordinate Judge has found

"that there was no second promissory note for Rs. 1,250, that the plaintiff executed only one promissory note for Rs. 1,250, Ex. R, dated the 29th April 1914, that the reference in Ex. D to a promissory note for Rs. 1,250 in Ananda Vaikasi was made owing to the forgetfulness, and that the defendants are not entitled to appropriate it towards that fictitious promissory note but are bound to refund it." At the very outset I may point out that the arguments of the learned Counsel for the appellants at the bar were not directed to show that there is any equity upon which the appellants could retain this money. It is conceded that the defendants have committed a deliberate fraud, but it is argued that since the plaintiff intended to send the money to the 1st defendant, the finding of the Subordinate Judge based upon a mistake of fact cannot stand. It appears to me that, when once it is conceded that the money that was sent was intended for quite a different promissory note, though it was sent to the 1st defendant, it was money which he had no right to retain and which he had from the date of its receipt been holding for the plaintiff. The circumstances of the case show that the money was sent by the plaintiff to the 1st defendant under a *bona fide* forgetfulness of fact which disentitles the 1st defendant to receive it. I think, therefore, the plaintiff is entitled to recover the money which he has paid to the 1st defendant on the ground of mistake.

It was argued that the suit is premature inasmuch as it was instituted before the decree in the suit brought by the endorsee was actually passed. I do not think that there is any substance in this argument. I have already pointed out that in the preliminary order the District Munsif had indicated that the plaintiff had no defence to the endorsee's suit. The defect indicated can certainly be cured by an amendment. Further it cannot be said as a general rule that Courts have no power to grant a decree where the cause of action arose subsequent to the suit; see *Subbaraya Chetty v. Nachiar Ammal* (1). In the special circumstances of this case I overrule this plea. I may also mention that this argument does not appear to have been put forward in the lower Appellate Court.

I dismiss the second appeal with costs.

V. N. V.

Appeal dismissed.

N. H.

(1) 44 Ind. Cas. 863; (1918) M. W. N. 199; 7 L. W. 403.

RANGOON HIGH COURT.

SECOND CIVIL APPEAL No. 12 OF 1924.

March 20, 1925.

Present:—Mr. Justice Lentaigne.

MAUNG PO KA—DEFENDANT

—APPELLANT

versus

MAUNG SAN PE—PLAINTIFF—

RESPONDENT.

Notice sent to person in occupation of land not to cultivate it—Damages, suit for—Malice—Burden of proof.

The law encourages persons who have *bona fide* rights to give notice to other persons who are likely to be affected by such rights, and it is not the policy of the law to presume either malice or *mala fides* in such cases on the part of the person who gives such notice, but to require clear proof of the same. [p. 910, col. 1.]

Where in consequence of such a notice warning the person to whom the notice is sent to desist from cultivating the land without the permission of the person sending the notice, the person to whom the notice is sent ceases to cultivate the land, he cannot claim damages from the person who sent the notice unless he proves actual malice on his part. If the defendant in such a case proves that he sent the notice in the *bona fide* assertion of his own right, real or supposed, to the property, the action will not lie. [*ibid.*]

Mr. Leong, for the Appellant.

Mr. Ko Ko, for the Respondent.

JUDGMENT.—This Second Appeal No. 12 of 1924 has been heard with two other Second Appeals Nos. 13 and 14 of 1924; and as the three appeals cover the same points with the only material difference as to the amount of damages decreed, this judgment will cover all three cases, which had been similarly decided by the same judgment in the lower Appellate Court.

The facts which gave rise to all three suits are summarised in the judgment of the lower Appellate Court as follows:—The lands to which these suits relate originally stood in the name of one Ma Nge Le, who died; and the appellant Po Ka claimed that on the death of Ma Nge Le the land devolved on her sister Ma Pu who was the wife of the appellant. Ma Pu died shortly after Ma Nge Le and the appellant then claimed that the lands became his property. The lands, however, were, in the possession of Ma Sein who was the aunt of Ma Pu and Ma Nge Le; and shortly afterwards the appellant Po Ka is said to have executed a registered deed of gift of the lands in favour of Ma Sein. Then the appellant is said to have changed his mind and to have executed a registered deed purporting to cancel the deed of gift to Ma Sein; and he is also said to have instituted a suit for the cancellation of the deed of gift to Ma Sein.

and that in such suit he was unsuccessful. This suit does not appear to have been made an exhibit in the cases now under appeal, but these facts have been referred to as explanatory of the facts more directly concerned with the three cases now under appeal.

The plaintiffs in each of these cases were tenants who had leased separate portions of the land from Ma Sein; and after they had partially cultivated the land, the appellant Maung Po Ka informed these tenants that he claimed the land and that they must pay the rents to him; and he then served each of them with a copy of the written notice of which the following is a translation:—"On the first Waning *Tazaungmon* 1283 B. E., I, Maung Po Ka, send this written notice to you, Ko On, Maung San Pe and Maung San Ba. On the eighth Waning *Tabaung* 1282 B. E. corresponding to the 31st March 1921, I gave and kept my own paddy land with Ma Sein. As I now did not want to give it to her, I took it back into my possession in accordance with law on the thirteenth Waning *Tazaungmon* 1283 B. E. corresponding to the 12th November 1921. So the rental paddy amounting to 1,050 baskets of the said paddy land must be given to me. If you fail to do so or use it in any way without my permission, legal steps will be taken and you shall incur payment of costs. Moreover, you shall not grow without my permission any crop or sugarcane, etc., on the paddy land belonging to me either this year or next year, and you are hereby forbidden."—*Signed* Maung Po Ka.

The plaintiffs, the said tenants, subsequently on the 24th October 1922 instituted the three suits now under appeal alleging that portions of the land had been leased to them respectively by Ma Sein, and they had ploughed certain portions; that the defendant (appellant) Maung Po Ka sent for each plaintiff and "prevented him and others from cultivating the land both orally and by the written notice" (as above); and that owing to the action of the defendant the plaintiff could not plant certain crops; and the prayer was for specified sums as compensation for the losses so sustained.

The defendant in each case admitted sending the notice but denied liability for any of the damages alleged in the plaint; and he pleaded that the losses and damages alleged in the plaint were too

remote as a basis for the claim of the plaintiff. At settlement of issues the defendant stated that Ma Nge Le, the owner of the land died in March 1921 leaving no children; that his wife Ma Pu inherited the land; that his wife died seven days later, and then the land became his; that pitying Ma Sein the aunt of his wife, he had given the land to Ma Sein by a registered deed dated the 31st March 1921; but that as Ma Sein failed to give him the jewellery of Ma Nge Le which belonged to him, he cancelled the deed of gift by a registered deed to which Ma Sein was not a party; and he had then instituted the suit in the District Court for the cancellation of the deed of gift, but before doing so, he had sent the notice to the plaintiffs and that he did not know whether the plaintiffs had stopped work; and he also admitted that his suit against Ma Sein was dismissed. He further admitted having verbally told the plaintiffs not to work the land before he sent the written notice.

Five issues were framed:—

(1) Was the plaintiff a tenant of Ma Sein in the year 1283 B. E. in respect of a portion of holding No. 6 of 1921-22;

(2) If so, what was the area of that portion?

(3) Did the plaintiffs suffer any loss in consequence of the written or verbal notice of the defendant?

(4) If so, how much? and

(5) What relief, if any, is the plaintiff entitled to;

These issues did not satisfactorily raise the points of the defence, as to denial of liability and remoteness of damage, though the last issue would cover the defence.

The learned Township Judge stated in his judgment that the defendant had set up the defence that when he gave the notice, the plaintiffs had replied that they could not stop planting; and he held that this reply was not proved satisfactorily, but that even if it were proved, it would not matter, because the plaintiffs might have subsequently stopped further planting through fear of consequences on account of the notice. The remainder of his judgment was occupied with the discussion of the value of crops which might have been got from a small area alleged to have been left unplanted in each case; and he awarded as damages Rs. 224-7-8 for an area of decimal 92 of an acre alleged to have been left unplanted in San Pe's case; Rs. 244 for

an area of about one acre alleged to have been left unplanted in San Ba's case; and Rs. 430-5-0 for an area of 1.78 acres alleged to have been left unplanted in Ko On's case. He granted the plaintiffs decrees for these amounts with costs in the respective cases.

Both sides appealed in each case to the District Court, which dismissed the appeals in all the cases and allowed costs to the original plaintiffs. The learned District Judge considered the question whether the plaintiffs are entitled to any damages at all.

He held that as the defendant was a townsman and the plaintiffs were cultivators, they would be impressed with the order forbidding them to work the land, and that they were not bound to continue working until the defendant resorted to any means of forcible prevention; but the learned Judge did not consider any precedents or authorities or attempt to clearly indicate what branch of the law of torts was applicable. He expressed the opinion that if a man orally forbids another to work certain land and then serves him with a written notice forbidding him to do so, and invests his actions with all the forms of formality that he can, it is quite impossible for him to plead afterwards (when the man whom he has forbidden to stop work does actually stop work) that this stopping is not the natural and probable consequence of his action in ordering a stoppage.

The present second appeal is against that decision. I think that it is obvious that if the above were a correct statement of the law, the amount of litigation in India would be greatly increased for a time, as numerous lawyer's notices warning persons not to take certain specified action with property pending a law suit would at once give rise to claims for damages and encourage the recipients to take or pretend to take an immediate holiday on receipt of the notice in anticipation of the damages to be recovered from the other party. Consequently, it is necessary that such a class of claim should be carefully scrutinised with grave suspicion. The first question for determination is to ascertain under what category of the law of torts the claim can lie. I think that it is clear that it cannot be treated as a trespass to the lands of the plaintiff, because the nature of such class of tort is indicated by the old writ *quare clausum fregit* (wherefore he

broke the close); which indicates that there must be an entry on the land in order to enable plaintiff to maintain the suit. In this case it is not alleged that there was any entry on the land in the possession of the plaintiff, and consequently I do not think that there can be any claim on an allegation to a trespass.

The only cases which might appear to be analogous are actions for slander of title; but clearly such a cause can only arise when the slander is uttered to a third person and damage arises in consequence. It is pointed out in Pollock's Law of Torts that slander of title is in truth a special variety of deceit, which differs from the ordinary type in that third persons, not the plaintiff himself, are induced by the defendant's falsehood to act in a manner causing damage to the plaintiff. I think that the only cause of action which the plaintiffs could have had, if at all, for the loss arising on the receipt of the notice in question would be a claim as on an action for deceit. But it is clear that the essential points for an action for deceit have not been alleged or proved in this case. It would be necessary for the plaintiffs to allege and prove not merely that the statements in the notice were untrue in fact, but also that the person making the statement knew the statement to be untrue or was culpably ignorant, that is, recklessly and consciously ignorant whether it be true or not, besides the further elements as to the intent and the acting upon it in the manner intended or contemplated and the consequent suffering of damage. It was held in *Derry v. Peek* (1) that there is no cause of action in such a case without both fraud and damage. Here there is no allegation of fraud; and no attempt has been made to prove fraud.

If we test the question on the analogy of cases of slander of title, the same point becomes apparent. Such cases are commonly cases in which a property is being sold by public auction and the sale is stopped and damage is caused to the owner by reason of disparaging remarks being made as to the title of the owner or as to the disadvantages which the purchaser will be under from certain facts.

(1) (1889) 14 A. C. 337; 58 L. J. Ch. 864; 61 L. T. 265; 38 W. R. 33; 1 Meg. 292; 54 J. P. 148.

It was held in the case of *Pater v. Baker* (2) that it is necessary for the plaintiff to prove actual malice to sustain the action. It has also been held in the case of *Hargrave v. Le Breton* (3) that if the statement is made in the *bona fide* assertion of the defendant's own right, real or supposed, to the property, no action lies. It was similarly held in *Halsey v. Brotherhood* (4) as regards warnings by the holder of a patent to the public warning them against infringement that the wrong is a malicious one in the only proper sense of the word and the absence of good faith is an essential condition of liability.

If that is the position in the case of a statement disparaging a title made to a stranger to the title, who is more likely to be misled than the owner or tenant interested in the property, *a fortiori*, the same points must be established when the statement is made to the owner or tenant so interested in disregarding the notice. The law encourages persons who have *bona fide* rights to give notice to other persons who are likely to be effected by such rights; and consequently it is obviously not the policy of the law to presume either malice or *mala fides* in such cases, but to require clear proof of the same. If the plaintiffs in this case had any doubt as to the right or wrong of the notice which they had received, it was to their interest to go at once to Ma Sein, who would have informed them of the strength of her title. If the plaintiffs were foolish enough to act on the notice, it was their own lookout and they acted at their own risk. As I have indicated above, I believe that if such cases were encouraged, it would quickly result in persons deliberately pretending to take a rest and to have been misled by the notice in the hopes of levying blackmail from the sender of the notice. Where a litigant fails in a case, it is more difficult for him to prove his *bona fides* than if he had won, but that is no reason for presuming that he was not *bona fide*, and it is often noticeable that many persons who bring erroneous claims are more confident of success than those who do succeed.

In the cases now before me there is no

(2) (1847) 3 C. B. 831; 16 L. J. C. P. 124; 11 Jur. 370; 136 E. R. 33; 71 R. R. 503.

(3) (1769) 98 Eng. Rep. 269; 4 Bur. 2422.

(4) (1882) 19 Ch. D. 386; 51 L. J. Ch. 233; 45 L. T. 640; 30 W. R. 279.

allegation or evidence that the defendant was acting maliciously or that he was not acting *bona fide*; and under these circumstances I am satisfied that no cause of action for the recovery of damages was made out against him.

I, therefore, allow this second appeal, and I set aside the decrees of both the lower Courts in all three cases and I direct that all three suits be dismissed with costs.

Z. K.

Appeal allowed.

RANGOON HIGH COURT.

SECOND CIVIL APPEAL No. 34 OF 1925.

March 23, 1925.

Present:—Mr. Justice Heald and

Mr. Justice Lentaigne.

MAUNG PO AUNG AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

U BYA AND OTHERS—DEFENDANTS—

RESPONDENTS.

Limitation Act (IX of 1908), ss. 5, 12—Appeal, second—Appeal filed after expiry of period of limitation—Time spent in obtaining copy of Trial Court's judgment, whether can be excluded.

Where under the rules of the High Court a copy of the judgment of the Trial Court is required to be attached to a memorandum of second appeal, and it appears that several days were spent in obtaining such copy, whereas copies of the judgment and decree of the lower Appellate Court were obtained within a comparatively short time, the appellant is entitled to the indulgence of the Court under s. 5 of the Limitation Act if the appeal is filed after the expiry of the period of limitation, provided it appears that he acted with diligence. [p. 911, col. 1.]

Second appeal against a decree of the District Court, Pyapon, in Civil Appeal No. 97 of 1924.

Mr. Ze Ya, for the Appellants.

JUDGMENT.

Lentaigne, J.—This is a second appeal against the judgment of the District Court of Pyapon confirming the judgment and decree of the Sub-Divisional Court of Pyapon and dismissing the suit and appeal of the plaintiffs-appellants with costs in both Courts.

The appeal was presented on the 21st January 1925 and would be one day too late, if time is allowed for the one day occupied in obtaining the certified copies of the judgment and decree of the lower Appellate Court; but the appellant has applied that he should also be allowed the period of nine out of the ten days occupied in obtaining a certified copy of the judgment of the Trial Court which was applie

for on the 4th November 1924 and was ready for delivery to appellant on the 13th November 1924. Technically, under s. 12 of the Indian Limitation Act, 1908, the only deduction should be for the time occupied in obtaining the copies of the decree and judgment of the lower Appellate Court, but it has apparently been held in certain cases reported in unofficial reports that where the rules of the High Court required that a certified copy of the judgment of the Trial Court should also be filed with the appeal, the Court might in its discretion excuse the delay caused in obtaining the copy of the judgment of the Court of first instance. It is obvious that second appeals in the High Court are usually filed by Advocates who have not appeared in the lower Courts, and that it is difficult for them to advise on the question whether an appeal should be filed without seeing a copy of the judgment of the Trial Court, and in a case like that now before us where only one day was occupied in obtaining the copies of the lower Appellate Court, whilst the much longer period of ten days was occupied in obtaining the copy of the judgment of the Trial Court, there would appear to be some ground for exercising the discretion where only one extra day beyond the unusually short period of one day allowed would be required. The question seldom arises in cases where the more experienced Advocates have been concerned, because they usually have the common sense to apply for both sets of copies at the same time, with the result that even the shorter judgment and decree of the Appellate Court are entered as ready and supplied on the same date as the usually longer copy of the judgment of the Trial Court; but where an inexperienced Advocate is engaged or the client makes his own application for copies, we are apt to find first an application for the copies of the judgment of the Appellate Court and then an application for the equally necessary copy of the judgment of the Trial Court, as has occurred in this case. The question, therefore, resolves itself into the question whether the rules should be strictly enforced for the purpose of penalising inexperience. Under the rule it is open to an Advocate to file an appeal without the copy of the judgment of the Trial Court if he applies for time to comply with the rule requiring the filing of both judgments with the appeal; but that rule

would not apply here where all copies had been previously obtained. If this were otherwise a suitable case for admission, I would, under the circumstances, exercise the discretion; but on a perusal of the evidence for the plaintiffs in the case, I have come to the conclusion that it is a case which should not be admitted in any event; and that the case against the appellants is much stronger even than appears on the judgments appealed against.

Heald, J.—I concur.

Z. K.

Order accordingly.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 235 OF 1924.

September 7, 1925.

Present:—Mr. Simpson, A. J. C.

Thakur SUMER SINGH AND OTHERS—
APPELLANTS

versus

DALTHAMMAN SINGH AND OTHERS—
RESPONDENTS.

Second appeal—Construction of document—Report of Commissioner, construction of—Question of law.

It is not every document, the construction of which is to be treated as involving an issue of law. [p. 912, col. 2.]

The report of a Commissioner under O. XXVI, r. 10, C. P. C., cannot be regarded as a document, the construction of which involves a point of law for the purposes of a second appeal. [*ibid.*]

Midnapur Zemindary Co. Ltd. v. Uma Charan Mandal, 74 Ind. Cas. 482; 21 A. L. J. 423; 4 P. L. T. 627; 33 M. L. T. 291; (1923) M. W. N. 832; 45 M. L. J. 663; 25 Bom. L. R. 1287; 40 C. L. J. 16; 29 C. W. N. 131; (1923) A. I. R. (P. C.) 187 (P. C.), referred to.

The report of a Commissioner is not documentary evidence which might be misconstrued. It is, in fact, an investigation made by him and it takes the place of oral evidence. [*ibid.*]

Second appeal from the judgment and decree of the Subordinate Judge, Sitapur, dated the 24th March 1924, modifying that of the Additional Munsif, Sitapur, dated the 26th February 1923.

Mr. K. P. Misra and Mr. Rajeshwari Prasad, for the Appellants.

Mr. M. Wasim for Mr. A. P. Sen, for the Respondents.

JUDGMENT.—This is a second civil appeal. The defendant is the appellant. There were nine plaintiffs. Admittedly they are the owners of *abadi* Nos. 124 and 117 in the village of Kakori. Their case was that in January 1922, the defendant, without any right, took possession of 6 *biswas* of land in these plots and planted a Banyan tree there, and in March

1922, he began to build a *chabutra* and a *pucca* wall. The actual construction at that time appears to be true. Defendant admits that he made the construction. In fact he calls the building a temple. No doubt he says that it is very much older, but a Commissioner, who was directed to report upon the point, reported both the building and the tree to be of about that age. There was no temple. The idols were there but they were in the open or in a box. Defendant, in the third paragraph of his written statement, admitted that he was in possession of a portion of land out of plots Nos. 124 and 117, but went on to say that his possession was not what the plaintiffs allege. That admission was evidently considered to be withdrawn, or at least much whittled down, because an issue was framed in these words ;

"Does the plot marked by red letters, A, B, C, D in the map filed by Babu Jhumman Lal form part of the No. 124 *abadi*? Have the plaintiffs been in possession of it within limitation?"

In the same written statement, in para. 12, it was stated that the plaintiffs are in possession of some land in plots Nos. 40 and 74, which belonged to the defendant, and that there had been an agreement between the parties that plaintiffs might keep possession of that, and in return they would not object to the building of the temple on Nos. 124 and 117. It has been found, however, by the Courts below that the agreement as regards Nos. 40 and 74 was in consideration of land is plot No. 412 and had nothing to do with these plots Nos. 124 and 117. The usual course was taken of directing a commission to take measurements on the spot before issues were framed. The object, no doubt, was that the issues should be directed to the real points of dispute. Accordingly one Nabi Bakhsh, an *amin*, was appointed, and he submitted a report in which he said that the land in question was part of plaintiffs' plot No. 124. Objections were taken to his report, and it was rejected by the Court on the ground that he had not taken his measurements on a proper basis of fixed points agreed upon between parties. Accordingly a second commission was issued in favour of Babu Jhumman Lal, a Pleader. The learned Munsif, after considering a considerable mass of oral evidence and also the report of the Commissioner, decided the suit in favour of

plaintiffs and gave them a decree for possession of the land.

The defendant appealed, and the learned Subordinate Judge came to the conclusion that none of the oral evidence was trustworthy. He said, "We have got no satisfactory evidence to decide the point in issue and we have only to fall back upon the report of the Commissioner, Babu Jhumman Lal, whose report is the only satisfactory evidence upon the point on the record." Basing himself on that report the learned Subordinate Judge varied the Munsif's decree by allowing the plaintiff slightly less land than had been given him by that decree.

The defendant comes here on second appeal. He admits that the finding against which he appeals is a finding of fact, but he says that it is vitiated by an error of law, namely, a misconstruction of the report and map of the Commissioner. This report being a document, a misconstruction of it is an error in law. The respondents contend that the report of the Commissioner is not documentary evidence which might be misconstrued. It is, in fact, an investigation made by him and it takes the place of oral evidence. I think that this contention is sound. It was laid down by their Lordships of the Privy Council in *Midnapur Zemindary Co. Ltd. v. Uma Charan Mandal* (1) that it is not every document, the construction of which is to be treated as involving an issue of law. I know of no authority for saying that the report of a Commissioner, under O. XXVI, r. 10, is to be regarded as a document, the constructing of which involves a point of law. This is sufficient for the determination of the appeal which is dismissed with costs as involving no point of law.

The cross-objection is not pressed in view of this finding. The cross-objection is dismissed. No order as to costs.

G. H.

Appeal dismissed.

(1) 74 Ind. Cas. 482; 21 A. L. J. 723; 4 P. L. T. 627; 33 M. L. T. 291; (1923) M. W. N. 832; 45 M. L. J. 663; 25 Bom. L. R. 1287; 40 C. L. J. 16; 29 C. W. N. 131; (1923) A. I. R. (P. C.) 187 (P. C.).

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 435 OF 1925.

July 6, 1925.

Present:—Mr. Justice Banerji.

RAM HARA KH PATHAK—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 30, 477—Valuable security—Invalid document, whether valuable security—Intention to cause damage or loss, whether necessary.

A document, which upon certain evidence being given may be held to be invalid, but on the face of it creates or purports to create a right in immoveable property, although a decree could not be passed upon it, falls within the purview of the definition of "valuable security" in s. 30 of the Penal Code. [p. 914, col. 1.]

In the absence of an intention to cause damage or injury a conviction under s. 477 of the Penal Code cannot be maintained. [p. 914, col. 2.]

Criminal appeal from an order of the Additional Sessions Judge of Basti, dated the 22nd May 1925.

Dr. N. C. Vaish, for the Appellant.

The Government Pleader, for the Crown.

JUDGMENT.—The appellant has been convicted by the Additional Sessions Judge of Basti under s. 477, Indian Penal Code, and sentenced to 2½ years' rigorous imprisonment.

The charge against him is that he destroyed a *patta* which he and Sheo Agyan had executed in favour of Sheobalak, son of Jagai, on the 11th of February 1925.

It appears that there was a suit filed in the Court of the Munsif of Basti by the accused and some others against Jagai for a declaration that certain land was their *khudkasht*. Jagai defended the suit on the ground that the land was his occupancy tenancy. Jagai was referred by the Munsif under the provisions of s. 202 of the Tenancy Act to the Revenue Court to get his status *qua* this land declared. In the meantime a riot took place in the village, and he the appellant, and several others were prosecuted for offences of rioting and hurt. While that case was pending, a *patta* (together with a *kabuliyat*) was executed on the 1st of October 1924 in favour of Sheobalak, son of Jagai, relating to the land which was in dispute in the Court of the Munsif. This *patta* along with many others was executed the same day, and this *patta* was kept with Thakur Ansuman Singh, Vakil, at whose house they were executed, on condition that the entire litigation, both civil and

criminal, was to be compromised after which the *patta* would be registered, and Thakur Ansuman Singh was to hand over the *patta* to the adversary of the party that did not carry out the terms of the compromise. The land comprised in the *patta* belonged to a family of six, of which Ram Harakh and Sheo Agyan were members, and the *patta* although written on behalf of all the members of the family, was only signed by Ram Harakh and Sheobalak.

After this Jagai confessed judgment in the civil case and a decree was recorded by the Munsif against him. It appears that an attempt was made to compromise the riot case, but the Trying Magistrate did not allow the case to be compromised. The result was that Ram Harakh and others were convicted and sentenced to substantial fines. Ram Harakh refused to register the *patta* and thereupon Jagai instituted a suit to set aside the "confession decree" on the ground of fraud. This suit was instituted on the 18th of November 1924 against all six members of the family whose names appear in the first part of the *patta*, praying that the *patta* be registered. On the 4th of January 1925 a written statement was filed by Ram Harakh and Sheo Agyan in that suit, and the averments of fact with reference to this *patta* were not traversed by these two persons. Various legal pleas were taken as to the validity of the *patta*, but, as I have stated, there is no controversy as to what was written in the *patta*. It appears that on the 11th of February the clerk of Ansuman Singh gave this *patta* to Jagai, and Ram Harakh and Jagai had a dispute as to the possession of this document, the result of which was that a portion of it was left in possession of Jagai, and another portion in that of the accused Ram Harakh. These are the main facts upon which the charge has been framed against Ram Harakh. Jagai has in Court given details which are at variance with those given by him in the first report, but there can be no doubt, whether the account given by Jagai in the first report is correct or whether the account now given by him is correct, that the *patta* was torn in a struggle between Jagai and Ram Harakh, and that it is proved beyond all doubt, and that the account given of it by Balramji, to whom Jagai made a statement immediately after the occurrence, is substantially

correct. The points for consideration in this case are:—

(1) whether the document was or was not a valuable security, and (2) whether Ram Harakh destroyed the document with intent to cause damage or injury to Jagai.

It has been argued by the learned Counsel for the appellant that this document was not a valuable security, inasmuch as the document purports to have been executed by six persons, but that two only signed the document, and that, therefore, it was not a document which could be said to be a valuable security within the meaning of s. 30 of the Indian Penal Code. I am, however, of opinion that the document comes within the definition of valuable security in s. 30. That document purports to create a legal right in Sheobalak in the land referred to therein. The use of the words "which is" or "purports to be" in s. 30 of the Indian Penal Code to my mind indicates that a document, which, upon certain evidence being given, may be held to be invalid but on the face of it creates, or purports to create a right in immovable property, although a decree could not be passed upon the document, is contemplated within the purview of that section. Had it not been so, any forged document, if the forgery was admitted, or any document which was not executed or stamped according to law and on which no decree could be passed by a Civil Court, could not be called a valuable security. In this case we have not the written statement in the civil suit of the other four members of the family. If the two persons, namely, Ram Harakh and Sheo Agyan had signed the document as representing the family, there was nothing illegal in that. Reference has been made to the cases reported as *Jawahir Thakur v. Emperor* (1) and *Ramasami Iyer v. Emperor* (2) by the Government Pleader. I do not think that these cases have any bearing on the point before me. They are clearly distinguishable.

With regard to the next point, I am of opinion that the prosecution has not been able to show that the act of Ram Harakh in destroying the *patta* was done with the intention of causing any damage or injury to Jagai. The facts as set out in the plaint of Jagai in the civil suit are

(1) 34 Ind. Cas. 315; 38 A. 430; 14 A. L. J. 643; 17 Cr. L. J. 203.

(2) 43 Ind. Cas. 593; 41 M. 589; 19 Cr. L. J. 177.

admitted by the accused. It is admitted that the *patta* only bore the signature of Ram Harakh and Sheo Agyan. There is no controversy on any point regarding the facts, and I do not see how it could be said that Ram Harakh in any way intended to cause damage or injury to Jagai, and in the absence of any such intention the charge under s. 477 of the Indian Penal Code fails. I am, therefore, of opinion that the act of Ram Harakh was not proved by the prosecution to have been with intent to cause damage or injury. The act of destroying the *patta* may have been a very foolish act, but I am of opinion that the conviction of Ram Harakh under s. 477 of the Indian Penal Code cannot be maintained. I, therefore, set aside the conviction and sentence of Ram Harakh. He need not surrender to his bail.

Z. K.

Conviction quashed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 440 OF 1924.
(CRIMINAL REVISION PETITION No. 368 OF 1924.)

January 23, 1925.

Present:—Mr. Justice Devadoss.

KRISHNAMURTHI IYER—ACCUSED—
PETITIONER

versus

NARAYANASWAMI IYER—
COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 227, 234, 235—Misjoinder of charges—Offences committed at different times—Single trial—Irregularity—Procedure—Striking out of one charge and conviction for another, legality of.

Under ss. 234 and 235 of the Cr. P. C., a Magistrate is entitled to try an accused person for more offences than one in one trial, if the offences have been committed in the course of the same transaction, or for three different offences of the same kind committed during the course of a year. [p. 915, col. 1.]

What can be done under s. 227, Cr. P. C., is only to alter or modify the charge at any time before judgment. The section does not permit a Court to try two distinct offences, such as assault and abuse, which are in no way connected with one another, and which were committed at different times, in the same trial. [p. 915 col. 2.]

Where it is discovered that two charges have been improperly joined together the proper procedure is to initiate separate trials in respect of each charge. [p. 915, col. 1.]

Where a Magistrate on discovering that he had improperly joined together two charges merely struck out one of the charges already framed and convicted the accused under the other charges:

Held, that the procedure adopted was illegal and that the conviction could not be sustained. [p. 915, col. 2.]

Manavala Chetty v. Emperor, 29 M. 569; 1 M. L. T. 409; 5 Cr. L. J. 94, followed.

Petition, under ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Tanjore, in Criminal Appeal No. 16 of 1924, preferred against that of the Court of the Stationary Second Class Magistrate, Papanasam, in C. C. No. 120 of 1923.

Mr. K. S. Jayarama Iyer, for the Petitioner.

Mr. S. Panchapegesa Sastri, for the Complainant.

The Public Prosecutor, for the Crown.

ORDER.—This is an application to revise the order of the Second Class Magistrate of Papanasam, who convicted the petitioner under s. 504, Indian Penal Code, confirmed by the Sub-Divisional Magistrate of Tanjore. The Magistrate inquired into the complaint preferred by the complainant and framed a charge under ss. 352 and 504. At the time of writing the judgment, he discovered that the occurrences were different and that the charges under ss. 504 and 352 could not be tried together and finding the illegality of the charges he struck out the charge framed, and framed a charge under s. 504 alone, against the accused and asked the accused whether the prosecution witnesses were to be re-called and examined and whether he had any defence witnesses to examine. The accused stated that he did not want to examine the witnesses and the Magistrate convicted him under s. 504.

It is contended before me that this procedure is irregular. Under the Cr. P. C. a Magistrate is entitled to try an accused for more than one offence in one trial, if the offences have been committed in the course of the same transaction or three different offences of the same kind committed during the course of a year. Here the offences were of different kinds committed at different times. The one was an assault and the other one was an abuse. Therefore the Magistrate was wrong in trying the two charges in one trial. When he discovered the irregularity of it, instead of starting a fresh enquiry in respect of the two offences, that is, separate enquiries, one in respect of s. 504 and another in respect of s. 352 he struck out the charge framed already and framed a charge under s. 504. This procedure is not

sanctioned by s. 227, Cr. P. C.; and what could be done under s. 227 is only to alter or modify the charge at any time before judgment. But it does not permit the Court to try two distinct offences which are in no way connected with one another, in the same trial. That the procedure adopted by the Sub-Magistrate is illegal is clear from the judgment of the late Chief Justice in *Manavala Chetty v. Emperor* (1).

The conviction is, therefore, set aside and considering the length of time that has elapsed since the occurrence I do not think I should order a re-trial. The fine imposed on the petitioner will be refunded to him.

V. N. V.

Z. K.

Conviction set aside.

(1) 29 M. 569; 1 M. L. T. 409; 5 Cr. L. J. 94.

ODDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 120 OF 1925.

September 14, 1925.

Present :—Mr. Simpson, A. J. C.

SRI KISHAN AND OTHERS—APPLICANTS
versus

DEBI DAYAL AND OTHERS—OPPOSITE
PARTY.

Criminal Procedure Code (Act V of 1898), ss. 190 (1) (c), 191—Magistrate transferring person from witness-box to dock—Right of such person to be tried by another Court—Error of law—Revision.

A Magistrate takes cognizance of an offence, not of offender. Therefore, if he transfers a person from the witness-box to the dock, he does not act under s. 190 (c), Cr. P. C., and take cognizance of an offence at all. Consequently the person so transferred is not entitled, under s. 191 of the Code, to be tried by some other Court. [p. 916, col. 1.]

Mehrab v. Emperor, 83 Ind. Cas. 885; (1924) A. I. R. (S.) 71; 17 S. L. R. 150; 26 Cr. L. J. 181, *Jagat Chandra Mozumdar v. Queen-Empress*, 26 C. 786; 3 C. W. N. 491; 13 Ind. Dec. (N. S.) 1103 and *Dedar Bux v. Syamapada Malakar*, 24 Ind. Cas. 954; 41 C. 1013; 18 C. W. N. 921; 15 Cr. L. J. 546, referred to.

An order based on an error of law but within the jurisdiction of the Court passing it, will not be interfered with in revision. [p. 916, col. 2.]

Application against an order of the Sessions Judge, Lucknow, dated the 27th July 1925, affirming that of the Officiating District Magistrate, Lucknow, dated the 6th June 1925.

Mr. Nazir-ud-din, for the Applicants.

Messrs. Har Prasad Sand and S. S. Chaudhri, for the Opposite Party.

The Government Pleader, for the Crown.

JUDGMENT.—This is an application in criminal revision. The order complained

of is one by the learned Sessions Judge of Lucknow refusing to interfere with an order of the District Magistrate. The District Magistrate's order was one transferring a case in the following circumstances:—

Bhawani Din lodged a complaint against the present applicant, Sri Kishan, charging him with an offence under s. 420, Indian Penal Code. This complaint was lodged before the Bench Magistrates of Kakori, who have power to receive complaints. They took cognizance of the case on the complaint. They issued process and they proceeded to try the case. One Debi Dayal, *patwari*, was produced as prosecution witness. After hearing his deposition, the learned Magistrates transferred him from the witness-box to the dock. Thereupon, Debi Dayal applied for a transfer on the ground that the Magistrates had taken cognizance of the offence, so far as he was concerned, under s. 190 (1) (c), and, therefore, that s. 191 was applicable, and that he was entitled to be tried by some other Court. The District Magistrate, taking the same view of the law, transferred the case to the Court of Syed Hasan Zaheer, I. C. S. Sri Kishan, co-accused, objecting to this transfer which had been made without hearing him, applied in revision to the Sessions Judge. The Sessions Judge, taking the same view of the law as the District Magistrate, refused to interfere, holding that the District Magistrate was bound to act as he did. Sri Kishan and Shiam Lal, who are both accused in the case, now apply to this Court in revision.

The first point for decision is, whether the Magistrates when they put Debi Dayal in the dock, were acting under s. 190 (1) (c). My own view is that they were not. I hold that when they put Debi Dayal in the dock they were not taking cognizance of the offence at all. They had already done that when they decided to issue process against the accused. As was pointed out by a Full Bench of the Court of the Judicial Commissioner of Sind in *Mehrab v. Emperor* (1), a Magistrate takes cognizance of an offence, not of an offender. When he adds an accused person at any stage of the proceedings he is not acting under s. 190 at all. In *Jagat Chandra Mozumdar v. Queen-Empress* (2), the facts were that a complaint

(1) 83 Ind. Cas. 885; (1924) A. I. R. (S.) 71; 17 S. L. R. 150; 26 Cr. L. J. 181.

(2) 26 C. 786; 3 C. W. N. 491; 13 Ind. Dec. (N. S.) 1103;

was filed before a Magistrate against certain persons, of whom Jagat Chandra Mazumdar was not one. The Magistrate summoned and examined the complainant's witnesses before issuing process. Then, after hearing evidence, he drew up a charge-sheet against certain persons including the petitioner. It was held that cognizance had been taken under s. 190 (1) (a) of the Code, and not under s. 190 (1) (c). In *Dedar Bux v. Syamapada Malakar* (3), there was a complaint before a Magistrate.

There was a proceeding under s. 202, and there was a withdrawal of the complaint. The Magistrate refused to drop the case and ordered the witnesses to be summoned. After examining the witnesses he issued process against the petitioner. The learned Sessions Judge referred the matter to the High Court because he considered that after the complaint was withdrawn, the action taken by the Magistrate would have to be under s. 190 (1) (c), and that the Magistrate was not empowered to act under that section. The High Court, however, refused to interfere, considering that the Magistrate having begun to act under s. 190 (1) (a), continued to do so. There were two of the petitioners who were made accused on evidence which came to light after the complaint. This case, therefore, also supports my view. No doubt there is a case to the contrary, namely, *Khudiram Mookerjee v. Queen-Empress* (4), but in that case no authorities were referred to, and that case was itself considered in *Dedar Bux v. Syamapada Das Malakar* (3) and was by implication dissented from. I know of no other authority for the view taken by the District Magistrate and the learned Sessions Judge.

I have now to consider whether I ought to interfere in revision. I do not think so. The order of transfer proceeds upon an error of law. But apart from that error it may, for aught I know, be a proper order. The District Magistrate had jurisdiction to make the transfer. If he wishes to do so, he has jurisdiction to transfer the case back to the Bench. I have laid down the law, and I leave it to the discretion of the District Magistrate to act or not as he pleases in the matter. His order of transfer is not set aside.

S. D.

Order not set aside.

(3) 24 Ind. Cas. 954; 41 C. 1013; 18 C. W. N. 921; 15 Cr. L. J. 546.

(4) 1 C. W. N. 105.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 420 OF 1925.

July 15, 1925.

Present:—Mr. Justice Daniels.

EMPEROR—PETITIONER

versus

MEWA RAM AND OTHERS—CONVICTS—
ACCUSED.*Criminal Procedure Code (Act V of 1898), ss. 420, 421, 439—Appeal preferred through mukhtar—Subsequent appeal through jail, rejection of, effect of—Revision.*

Where in ignorance of the fact that a convict had already preferred an appeal against his conviction through a *mukhtar*, the Sessions Judge rejected an appeal subsequently preferred by the convict through Jail:

Held, that the High Court had, in revision, power to set aside the order of rejection and to direct the Sessions Judge to re-hear the appeal after giving the convict an opportunity of appearing by Counsel.

Reference made by the Sessions Judge, Budaun, dated the 11th July 1925.

REFERRING ORDER.—I have the honour to report for the information of the Hon'ble High Court that a criminal appeal on behalf of four persons Mewa Ram, Khiali Ram, Sobha Ram and Chunni Lal was presented in this Court on 12th June 1925 through a *mukhtar* along with an application for bail. As I had been permitted by the Hon'ble High Court to avail of the first half of the vacation, the application for bail together with the appeal was sent to the Sessions and Subordinate Judge of Bareilly, who was to receive and pass orders on urgent criminal applications of this Judgeship during that period. The papers reached Bareilly on the 13th June, but the postman delivered the envelope containing them to the Subordinate Judge on 6th July 1925 when the Courts re-opened. The Sessions and Subordinate Judge, Bareilly, sent the papers to me on 7th and I received them on the 8th July. On 16th June four appeals on behalf of the very same four persons were received through jail. Through mistake of my office it was not brought to my notice that an appeal through a *mukhtar* on behalf of the very same persons was presented on 12th June and was sent to Bareilly with an application for bail. After the expiry of the usual period of one week, which is allowed to enable an accused to engage a Pleader to support his jail appeal, I took up the jail appeals on 27th of June for disposal and after perusing the judgment and going through the record rejected them

summarily. If an appeal through a *mukhtar* had been presented after the disposal of the jail appeals, then according to the ruling of the Hon'ble Chief Justice and the Hon'ble Mr. Justice Piggott the subsequent appeal would have been rejected. But in this case an appeal through a *mukhtar* was presented before the jail appeals were received, heard and decided and it was through the mistake of the office that the institution of the appeal through *mukhtar* was not brought to my notice when I decided the jail appeals. Under s. 421 (1) of the Cr. P. C. the appeal presented by the *mukhtar* cannot be disposed of without hearing him.

I, therefore, beg to suggest that if the Hon'ble Court thinks fit my order rejecting the jail appeals summarily be set aside and I may be permitted to hear the appeal presented by the *mukhtar*, or any other order, which the Hon'ble Court thinks fit, may be passed.

The clerk of the office, who is at fault, is being punished and the Postal Authorities are being asked to make enquiry into the long delay made in delivery of the envelope to the addressee at Bareilly.

JUDGMENT.—In this case the Sessions Judge of Budaun has reported that while jail appeals on behalf of four persons, Mewa Ram, Khiali Ram, Sobha Ram and Chunni Lal were pending a petition of appeal on behalf of some persons was filed through a *mukhtar*. The Sessions Judge was away on vacation at the time, and the latter petition of appeal, which was accompanied by an application for bail was placed before the Sessions and Subordinate Judge of Bareilly who was receiving urgent criminal applications relating to the Budaun Judgeship at that time. Owing to some delay in the post the learned Sessions Judge decided and summarily rejected the jail appeals in ignorance that an appeal from a *mukhtar* in which Counsel was to be heard had been presented. The learned Judge asks if he has power to set aside his own order dismissing the appeals. He has no such power, but this Court has power to do so, and in the exercise of the revisional jurisdiction of this Court I hereby set aside the orders rejecting the appeals of the four persons mentioned above, and direct the learned Judge to re-hear the appeals after giving

them an opportunity of appearing by Counsel,

Z. K.

Order set aside.

RANGOON HIGH COURT.

CRIMINAL APPEAL No. 287 OF 1925.

April 8, 1925.

Present:—Mr. Justice Rutledge and
Mr. Justice Maung Gyi.

MAUNG TOK AND OTHERS—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Evidence Act (I of 1872), s. 6—Penal Code (Act XLV of 1860), ss. 149, 325—Rioting—Statements made by members of unlawful assembly prior to occurrence, whether admissible—Buddhist Law, Ecclesiastical—Pongyis, duties of—Participation in politics, whether permissible.

Where a procession attempts to pass through certain streets of a town in defiance of an order of the Superintendent of Police prohibiting it from passing through such streets, and a collision takes place between the members of the procession and the Police force resulting in a riot, evidence led on behalf of the prosecution in the riot case to prove statements made by the members of the procession showing their determination to force their way into the streets into which their entry was prohibited in spite of the resistance of the Police is admissible as forming part of the *res gestæ* and indicating that the intention of the members of the procession was to ignore the order of the Superintendent of Police. [p. 921, col. 1.]

Under the Burmese Buddhist Law it is the bounden duty of the laity to do their utmost to discourage *pongys* from transgressing the bonds which the *vinaya* lays down for them and the rules which, by donning the yellow robe, they voluntarily promised to observe. And it is the bounden duty of a *pongyi* who desires to participate in party politics to put off the yellow robe and re-assume the responsibilities as well as the privileges of ordinary civil life. [p. 922, col. 2.]

Pongyis are subject to the laws of the land they live in. If they are dissatisfied with such laws it is not for them to oppose the authorities but to move to other parts where the laws will be more congenial. So long as the civil laws are not in conflict with the rules to be observed by monks they must be obeyed by them. [p. 922, col. 2; p. 923, col. 1.]

According to Burman Buddhist ideas he who dons the yellow robe has one of two duties to perform:—

- (1) to practise austerities and meditation in order to work out his own salvation; or
- (2) to learn the sacred scriptures and to impart the knowledge to others.

Those who follow the first are known as Patibatti Sangha and those who adopt the second as Pariyatti Sangha.

When a *pongyi* belongs neither to the Pariyatti nor to the Patibatti, he is no longer entitled to live on the offerings of the laity, nor to receive respect from them. He has no *raison d'être*. [p. 923, cols. 1 & 2.]

In attempting to oppose the orders of the executive a monk not only breaks his own personal law but sets an example to the laity which is greatly to be lamented. [p. 923, col. 2.]

Criminal appeal from an order of the Sessions Judge, Mandalay, in Sessions Trial No. 25 of 1924.

Mr. Lambert, for the Appellants.

Mr. Lutter, for the Crown.

JUDGMENT.—By way of preface we take this opportunity of thanking the learned Advocates in this case for the great help we have received from them in dealing with this heavy appeal. Mr. Lambert has stated the appellants' case with great clearness and has argued it with great care and ability.

This is an appeal from the convictions and sentences passed upon eleven appellants by the Sessions Judge of Mandalay in what is commonly spoken of as the Mandalay Riot case.

The appellants were found guilty of offences under s. 326, read with s. 149, Indian Penal Code, and sentenced as follows:—

- | | | |
|----------------------|----------------|---------------------------------|
| (1) Maung Tok | ... | 7 years' rigorous imprisonment. |
| (2) Maung Saw Maung | 2 | " " |
| (3) U Thuseikta | ... 18 months' | " " |
| (4) Maung Mya | ... 7 years' | " " |
| (5) U Zagaya | ... 1 year's | " " |
| (6) Maung Maung Gyi | 3 years' | " " |
| (7) C. P. Khin Maung | 4 | " " |
| (8) Maung Shwe Po | ... 1 year's | " " |
| (9) Maung San Nyun | 7 years' | " " |
| (10) Maung Saung | 18 months' | " " |
| (11) Maung Tun Aung | | |
| Gyan | 7 years' | " " |

In addition Maung San Nyun was found guilty under s. 325, Indian Penal Code. He was sentenced to suffer seven years' rigorous imprisonment under s. 325, Indian Penal Code, besides one year's rigorous imprisonment under s. 326 read with s. 145, Indian Penal Code, the sentences to run concurrently.

As stated by the appellants' Advocate and indeed what is familiar to any resident in Burma the advent of the Constitutional Reforms in Burma led to a split in the ranks of the General Council of Burmese Associations familiarly known as the G. C. B. A., one party known as the twenty-one or Council Entry Party urging co-operation with Government for the successful working of the Reforms and the other the Hlaing-Pu-Gyaw Party whose policy was to boycott the Councils and refuse to co-operate with Government. The name is derived from the leaders of the party. U

[90 I. C. 1925]

Chit Hlaing, a Barrister of Moulmein, U Pu, a Pleader of Tharrawaddy and U Tun Aung Gyaw, the 11th appellant, Manager of the Burma Urban Co-operative Bank whose head-quarters are in Rangoon with branches, among other places, at Mandalay. In 1923 certain politicians endeavoured to bring about a re-union between the two parties and in this connection formed an association called the Union Party with its head-quarters at Mandalay and with one U Kyaw Yan as President. It is in evidence that certain Buddhist monks, more especially those of the Mogoung Taik, sympathised with the Union Party. The Hlaing-Pu-Gyaw Party were opposed to the policy of the Union Party and were backed by a powerful association of Buddhist monks called the Sangha Samaggi. The Union Party in August last invited a leading Buddhist monk, the Weluwun Sayadaw, to come to Mandalay and deliver a lecture at the Eindawya Pagoda on the advantages of good fellowship and unity. The Hlaing-Pu-Gyaw Party invited a leading monk of their party, one U Ottama, at present undergoing three years' rigorous imprisonment for an offence under s. 124-A of the Indian Penal Code, to visit Mandalay and deliver a series of lectures. The principal organization of the latter party in Mandalay is the Ratanabon Council whose head-quarters were in the premises of the Burma Urban Co-operative Bank in 84th Street, of which Bank the 11th appellant was the head. The Ratanabon Council appointed a Reception Committee to organize the welcome to be given to U Ottama consisting of U Nyaneinda, Maung Tok, the 1st appellant, C. P. Khin Maung, the 7th appellant, Maung Maung Gyi, 6th appellant, Maung Kyu, Saya Lon and Ba Than. Handbills were printed and circulated inviting the public to attend the reception and to join in the procession keeping to the left hand side of the road. The route was to be from the Shanzu Railway Station through the Arakan Pagoda up 84th Street through the Zegyo Bazaar along 26th Street turning south past the Mogoung Taik to the Sagu Taik whose monks are adherents of the Sangha Samaggi where U Ottama was to stay during his visit. It was not until the 15th August that application dated the 14th was made by the 2nd appellant, Saw Maung, Secretary of the Ratanabon Council, for a permit for the procession,

both to the Deputy Commissioner and District Superintendent of Police. No mention of the route was made in the application itself, but it was indicated in the handbill attached to the application. The Deputy Commissioner was absent on tour, but the head-quarters assistant sanctioned the application, but his sanction was not communicated till 8 A. M., on the 16th and did not lay down any route for the procession. The District Superintendent of Police at first sanctioned the procession and the proposed route, but before the permit was issued circumstances were brought to his notice which led him to alter the proposed route. A deputation waited on him on the afternoon of the 15th pointing out that on that day a procession of first four *gharries* and afterwards 50 *gharries*, filled with *pongyis* with objectionable placards and bands playing, encircled the Pitaka Taik where the Union Party were holding a meeting, with the object of disturbing it and that if the Ottama procession were permitted to pass along the proposed route past the Mogoung Taik they anticipated trouble by the processionists annoying and provoking the monks there who were opposed to them. He thereupon altered the route by making it go first along Des Vœux Road and thence north to the Sagu Taik. For the appellants it is urged that the District Superintendent of Police's action in this respect was unreasonable. We consider that the District Superintendent of Police was fully justified. The route prescribed by the District Superintendent of Police was shorter and more direct and admittedly broader than one part of the original route at or near the Zegyo Bazaar, but the deciding factor from the point of law and order was that it obviated a likely collision at the Mogoung Taik.

The District Superintendent of Police's permit with the new route prescribed was conveyed to the Ratanabon Council by U Po Hnon, Sub-Divisional Police Officer East, at about 8 P. M. on the 15th. He states that he was accompanied by Inspector Udailak Ram and the witness Ba Tun. He met Tun Aung Gyaw, Maung Mya, Maung Tok, Saw Maung and three others whom he did not notice. Of these latter, Ba Tun states that C. P. Khin Maung was one. Po Hnon treated Tun Aung Gyaw as the responsible leader and gave him the order which he read and passed

to Maung Mya who in return read it and passed it Saw Maung. The change of route was objected to and Po Hnon referred them to the District Superintendent of Police. In conversation Po Hnon referred the *pongyis*' procession of *gharries* at the Betaka Taik that afternoon and Tun Aung Gyaw told him that the *pongyis* threatened to go on foot to the Betaka when he hired fifty *gharries* and paid Rs. 240 to drive them round it. It is urged that this is unlikely as the fare would not be Re. 1 each. Tun Aung Gyaw may have exaggerated the extent of his bounty. It is not uncommon or he may have had to pay as the Sessions Judge suggests extra to induce the *gharry-wallahs* to undertake what might well bring injuries to themselves and their *gharries*. But we see no reason to disbelieve U Po Hnon in this particular, as his evidence has impressed us as truthful and has been given with care not to press it beyond what he actually observed. This incident must be borne in mind when considering the presence and co-operation of a large body of *pongyis* at the time of the riot. Saw Maung, the Secretary, sent an application to the District Superintendent of Police to revise his order and sanction the original route proposed about 11 P. M. On this being communicated to the District Superintendent of Police early next morning he refused to alter the route and gave orders for this refusal to be communicated at once. Ba Zin, Head Constable, took the message and was received by Maung Mya who declined to receive a verbal order and refused to allow the Head Constable to speak to Tun Aung Gyaw who with Maung Tok, C. P. Khin Maung and Saw Maung were seated at a table within hearing. The written order was communicated about 11 A. M., to the Ratanabon Council Secretary, Saw Maung, who replied by Ex. F, stating that he didn't think the original route could be changed and that the District Magistrate had granted permission to hold the procession along the original route. As the Sessions Judge has remarked the latter statement is inaccurate as no route was prescribed in the letter from Deputy Commissioner's Office. The Ratanabon Council must have known perfectly well that the District Superintendent of Police was the proper officer to prescribe the route for the procession and their duty was, if dissatisfied

with his decision, to get it reversed on application to his superior, or else to obey it. It is perfectly clear that they chose to do neither.

It may be a matter for regret that the District Superintendent of Police does not seem to have realized the full significance of Ex. F, as if he had, one would have expected him to have requisitioned such a force of Military Police as would have ensured compliance with his request. But the question whether a different disposition of the Police or Military Police would have prevented the riot or ensured a different result is not before us but rather the intention of the appellants.

Before the train conveying U Ottama arrived at Shanzu, Maung Mya and Tun Aung Gyaw were informed of the District Superintendent of Police's order confirming the previous orders that the procession was to turn west into DesVœux Road, and both appellants said that they had got the District Magistrate's order permitting them to go along the route advertised by the Reception Committee. U Ottama arrived at Shanzu Station shortly after 1 P. M. on the 16th August and he entered the Arakan Pagoda to pray. When he came out of the west entrance the procession formed and started along 84th Street on which tram lines are laid. A number of *pongyis* led the van. Then came what is referred to as the *sundawgyi*. It means the offering for the Lord Buddha. It generally consists of the food served up to *pongyis* and other requisites allowable to *pongyis* according to the *vinaya*. But no *sundawgyi* is ever offered after mid-day as *pongyis* are not allowed any meals after that hour. This so called *sundawgyi* seems to have been a pretext for doing exceptional honour to U Ottama and carrying him round in royal state. The *sundawgyi* was followed by *osi* players and men dancing, then came women; and U Ottama in his litter with a golden umbrella over his head. Under the Burmese regime any commoner assuming any of the insignia of royalty especially in public would very soon die of official colic. To the Burmese mind only those equipped with proper *karma* can safely assume high dignities or the insignia thereof and the more ignorant masses are only too ready to assume the converse that those who do assume such insignia belong to high estate and are possessed of *karma* which makes them independent of the law,

and they are eager to follow in the train of such persons.

From the evidence of the two detective officers Maung Talok and Maung Ba Shin, Maung Tok, Maung Saw Maung, U Thuseikta, Maung Mya and Tun Aung Gyaw were with or near U Ottama when the procession left the Arakan Pagoda.

Another significant feature is that long before the procession appeared *pongyis* had begun to concentrate in front of the Ratanabon Council premises and the *Pariyatti Taik* immediately to the south of DesVœux Road in 84th Street. Trams stopped here and several witnesses depose to *pongyis* visiting several trams and requesting the passengers both *pongyis* and laymen to alight; so that a large crowd had concentrated here when the van of the procession arrived. The District Superintendent of Police and about 40 men were stationed immediately to the north of DesVœux Road in 84th Street outside Ma Mya's building. It is noteworthy that though the procession was advertised to pass north up 84th Street to the Zegyo Bazaar no appreciable gathering of *pongyis* or laymen had concentrated north of Ma Mya's building. There is a considerable amount of evidence about statements by members of the procession and by those concentrated outside the Ratanabon Council premises of their determination to force their way through the Police. The learned Advocate for the appellants has objected to its admissibility as hearsay. We consider that it was rightly admitted. It indeed forms part of the *res gestæ* and indicates that the promoters' intention to ignore the District Superintendent of Police's orders had been communicated to sections of the crowd.

When the van of the procession neared DesVœux Road the *pongyis* concentrated to the south-west side, joined in and swelled the van which moved north till stopped by the District Superintendent of Police and the Police. The judgment of the Sessions Judge sets out in some detail what occurred and we do not intend to repeat it. For the appellants it is urged that the whole affray was unpremeditated, that the Union Party had an office in Maung Mya's building and that stones thrown were from that building at the processionists and that this precipitated the riot. We consider that it is clearly established that the first stones did not come from Maung Mya's building, but from the south-west corner,

i.e., from the direction of the *Paryatti Taik*, and that the first stones thrown were succeeded so quickly by such a shower of stones as to negative the suggestion of accident or unpremeditation. The Trial Court has classified the appellants into major and minor accused. Among the former are Maung Tok, Saw Maung, Maung Maung Gyi, C. P. Khin Maung, Maung Mya and Tun Aung Gyaw, while Shwe Po, Maung Saung, San Nyun, U Thuseikta and U Zagaya were among the latter or followers. The Sessions Judge has dealt with the evidence in detail and analysed it, and on this evidence we are bound to accept his finding except as to the following appellants, Maung Maung Gyi, Maung Saung and Maung Shwe Po. We consider that it is clearly established that there was a conspiracy in which Tun Aung Gyaw, Maung Tok, Maung Mya, C. P. Khin Maung and Saw Maung took a leading part to overawe the Police and disobey their lawful orders, that in pursuance of this conspiracy there was an unlawful assembly with the common object of overawing the Police and disobeying their orders, and that in pursuance of that common object, offences under ss. 325 and 326, Indian Penal Code, were committed by members of the unlawful assembly. While we cannot accede to the argument of the appellants' Advocate to regard the riot as over once the District Superintendent of Police left the scene, we think for the reasons given by the Sessions Judge that it will be sufficient if the appellants are punished under ss. 325 and 326 read with s. 149, Indian Penal Code.

We shall now deal with the findings of the Sessions Judge which we are not prepared to accept.

Maung Maung Gyi.—It is clear that this appellant was not present at the Ratanabon Council on the evening of the 15th when the orders of the District Superintendent of Police were communicated. He allowed his name to appear among the members of the Reception Committee. He was present at the station on U Ottama's arrival and he was present at the earlier part of the riot, but there is no evidence that he took an active part in urging the mob to break through. In these circumstances we consider that there is not enough evidence on the record to justify us in classing him as one of the leaders. His appeal will be allowed and the conviction and sentence set aside.

Maung Saung.—The evidence of his throwing stones rests upon the two detective witnesses Maung Talok and Ba Shin. The learned Sessions Judge considers that certain of Ba Shin's statements are inaccurate to say the least though he regards, Maung Talok as a truthful witness. Even though truthful, in a situation so full of changing incidents as a riot, corroboration is very needful. It is true that Maung Kyu states that he saw him among the crowd that threw stones at the Police, but he does not say that Maung Saung actually threw. In these circumstances we think that the case is not established beyond a reasonable doubt. His appeal is allowed and the conviction and sentence are set aside.

Maung Shwe Po.—The case against him rests upon the evidence of Maung Kywe, Paw Byu and Maung Thoung. The lower Court considers Maung Kywe to be a truthful witness but he only states that he saw Shwe Po and Maung Daung among the crowd who were throwing stones, not that Shwe Po actually threw stones. Maung Daung was discharged by the Committing Magistrate. Paw Byu does not inspire, one with confidence and his evidence does not go any further than Maung Kywe's. Maung Thoung alone states that Shwe Po and Maung Yeik (discharged) threw stones. He appears to be a casual witness. Though present as he says at the corner of Des Vœux Road he cannot or will not give evidence against any other accused. We do not consider that the case against Shwe Po is established beyond a reasonable doubt. His conviction and sentence will be set aside.

The learned Advocate for the appellants has urged us in case we hold them guilty to reduce their sentences. We are unable to do so. The riot has resulted in four deaths and a large number of injuries, a considerable number of the latter being grievous. As far as the leaders were concerned, their intention, their common object was deliberate and the results that followed were such as a reasonable person must know were likely to be committed in prosecution of that common object.

This case is another illustration of the growing participation of the yellow robe in public affrays. And we desire to emphasize the grave responsibility incurred by any political leader who employs or allies himself with *pongyis* for any party object. From the evidence on the record there is no

doubt that among those who assaulted the Police the majority were *pongyis*, yet such is their hold over the people that only two of them have been sent up for trial. It is the bounden duty of the laity to do their utmost to discourage *pongyis* from transgressing the bonds which the *vinaya* lays down for them and the rules which, by donning the yellow robe, they voluntarily promised to observe. And it is the bounden duty of a *pongyi* who desires to participate in party politics to put off the yellow robe and re-assume the responsibilities as well as the privileges of ordinary civil life.

In 1226 B. E. (1864) at the request of the King of Burma the *Thathanabaing* in Council in the presence of monks and laymen examined exhaustively the sacred Pali texts, the commentaries and sub-commentaries bearing on the question of the status and duties of a Buddhist monk.

Relying on the Pali text which begins:—

"*Na mundake na samano, abhato alikam bhanam, icchalobha samapanno samano kim bhavissati.* The mere shaving of the head and begging with an alms bowl does not make one a *rahan* (*pongyi*). How can any one be a *rahan* who does not control his senses, does not observe his personal law, discourses on subjects unprofitable (to a *rahan*) and is still filled with a craving for worldly things." The *Thathanabaing* in Council declared that those who having entered the order did not observe their personal law (The *vinaya*) were not true *rahans*; that laymen who supported such persons were like the man who waters a poison tree and that when they pass out of this existence both the *pseudo raahan* and his supporter will be consigned to *avichi* or the lowest of the hells.

On page 391, Volume XIII, Sacred Books of the East, which is a translation of the *vinaya* text by the late Professor Rhys Davids, we have this passage "I prescribe O Bhikkhus, that you obey Kings."

This was in connection with the request of the King of Maghada that the Sangha should begin their lent on a certain day fixed by him. When the Bhikkhus told this to the Lord Buddha, he replied that Kings must be obeyed, that is Bhikkhus are subject to the laws of the land they live in. If they are dissatisfied with such laws it is not for them to oppose the authorities but to move to other parts where the laws

ground that as he had been cross-examined at length his examination as defence witness was not necessary :

Held, that in the absence of any prejudice to the accused as the result of the refusal of the Magistrate to summon the witness, it could not be said that the Magistrate had acted entirely without jurisdiction. [p. 925, col. 1.]

Criminal revision from an order of the Sessions Judge, Shahabad, dated the 17th March 1925, affirming that of the Deputy Magistrate, Arrah, dated the 16th February 1925.

Mr. *Devaki Prasad Sinha*, for the Petitioners.

Mr. *D. L. Nandkeolyar*, for the Opposite Party,

JUDGMENT.—This was an application in criminal revisional jurisdiction made by some persons who were convicted by the Deputy Magistrate of Arrah on the 16th of February last of offences punishable under the provisions of ss. 143 and 379 coupled with s. 34, Indian Penal Code. The applicants appear to have been sentenced each to pay a fine of Rs. 50 under the provisions of s. 379, Indian Penal Code and in default of payment thereof to undergo rigorous imprisonment for two months, no separate sentence was passed upon them in connection with the provisions of s. 143, Indian Penal Code.

The only ground which has been put forward upon which it is urged that this Court should interfere, is because it is suggested that there has been a wrongful exercise of jurisdiction by the Deputy Magistrate in connection with the procedure. It is unnecessary to go into the facts relating to the offences with which these men were charged further than to say that the affair related to blocking up of a water-course. In the course of the trial which proceeded in the usual manner a certain Sub-Inspector of Police was examined as a witness for the prosecution, he was cross-examined at considerable length by the defence. Now it would seem that the defence wished to call this Sub-Inspector either as a defence witness or for the purpose of what was in effect further cross-examination, and on the 28th of January last it seems that the Magistrate at that time was ready to agree that this should be done. At a later stage, however, namely, on the 9th of February he altered his view. The note in the order sheet of the 28th of January last so far as it is here material, reads: "The defence prays that Sub-Inspector of Sahar who had

been summoned has not turned up to-day and his evidence is necessary. Summon him afresh". The Magistrate's note on the 9th of February last reads: "The defence filed a petition that the Sub-Inspector is not forthcoming to-day and that his examination is necessary as a defence witness. It appears that he was examined as a prosecution witness (No. 5) and he was cross-examined at length by the defence side. I have already granted two adjournments for this, and I cannot wait any longer for time now".

Now it is suggested that this action taken by the Deputy Magistrate is illegal. The Deputy Magistrate in his explanation, which appears to be dated about the 28th of May last, says:—

"The Sub-Inspector in question was examined as a prosecution witness (No. 5) on 3rd January 1925.

"Charge was framed against the accused on 14th January 1925, and the accused persons had ample opportunity of cross-examining the Sub-Inspector, before charge and after the charge.

"The Sub-Inspector was cross-examined, at great length by the defence side on 15th January 1925 and then discharged.

"Technically speaking, the Sub-Inspector could not have been summoned as a defence witness, under such circumstances.

"He could have only been summoned under s. 257, Cr. P. C., for further cross-examination, on the discretion of the Court, if the Court was satisfied that it was necessary. But no such necessity appears to have been mentioned in the petitions of the accused dated 28th January 1925 (*vide* flag A) and 9th February 1925 (*vide* flag B). Even then, I had granted two adjournments for this. But the Sub-Inspector was not available. So I did not think it proper to drag on the case any more, thereby causing delay in the administration of justice".

Now the defence applied to the Sessions Judge of Shahabad upon this point and the learned Sessions Judge dealt with the matter on the 17th of March last. It is perhaps useful to refer to what the learned Sessions Judge has said in his judgment. It reads "On behalf of the petitioners it has been urged that once the Magistrate had directed that the Police Sub-Inspector should be re-called for cross-examination after the accused had entered on their defence, he was bound to insist on his appearance. The proposition so stated is

will be more congenial. The commentary on the passage which begins "*anujanami bhikkhave rajuman, etc.*," explains that so long as the civil laws are not in conflict with the 227 rules to be observed by monks they must be obeyed.

In the Pali text of the Pacittiya we have the passage which begins "*vigarahi buddho bhagava kathamhinama tumhe mogha parisa vikale gamam pavicitva, etc.* (page 206), (Pacittiya Palidaw, Kavimyetmhan Press).

In this text the Lord Buddha admonishes certain of the monks for frequenting the villages after the hour of noon and indulging in talk which is unprofitable to a Bhikkhu, i. e., will not help him to attain Nirvana. The text says—

"What is this unprofitable talk:—

Politics and official matters, dacoities, the doings of ministers and officials, warriors, dangers, wars, feed, drink, clothing, dwelling, scents and flowers, relatives, etc., etc.

Any discourse on these subjects is unprofitable to *rahans* or *pongyis*.

There are three baskets of the Law as preached by the Lord Buddha, viz., Abhidhamma, Vinaya and Suttas.

The Abhidhamma is the Dhamma taught to those who are more spiritually evolved. The *vinaya* or the Sama Dharma adopted for monks: and the Suttas contain the Sama Dharma explained popularly for those who are less spiritually evolved.

The preceding passage of the Pacittiya finds its parallel in the Samanna-phale Sutta of the Digha Nikaya. There is an excellent translation of this Sutta by the late Professor Rhys Davids (Volume II, Sacred Books of the Buddhists) Dialogues of the Buddha. The meaning of the Sutta is "the fruits of the life of a recluse." This Sutta has a bearing on the *vinaya* and its ethical precepts.

According to Burman Buddhist ideas he who dons the yellow robe has one of two duties to perform:—

(1) to practise austerities and meditation in order to work out his own salvation; or

(2) to learn the sacred scriptures and to impart the knowledge to others.

Those who follow the first are known as Patibatti Sangha and those who adopt the second as Pariyatti Sangha.

When a *pongyi* belongs neither to the Pariyatti nor to the Patibatti, he is no longer entitled to live on the offerings of

the laity, nor to receive respect from them. He has no *raison d'être*.

We have touched on this point as the majority of those concerned in the riot were according to the evidence, members of the order. In attempting to oppose the orders of the executive they are not only breaking their own personal law but are setting an example to the laity which is greatly to be lamented. As for the laymen we have shown from the pronouncement of the *Thathanabaing* in Council in 1226 B. E. that those who support *pongyis* who do not live in accordance with the *vinaya* are but watering a poison tree which will prove fatal to themselves.

In view of what we have stated, we are unable to accept Mr. Lambert's prayer for any reduction of sentence. In the circumstances we are of opinion that the sentences passed by the lower Court are not unduly severe.

The appeals of (1) Maung Tok, (2) Maung Saw Maung, (3) U Thuseikta, (4) Maung Mya, (5) U Zagaya, (7) C. P. Khin Maung, (9) Maung San Nyun and (11) Tun Aung Gyaw are dismissed and the convictions and sentences passed upon them are confirmed.

Z. K.

Appeals dismissed.

PATNA HIGH COURT.

CRIMINAL REVISION No. 248 OF 1925.

June 11, 1925.

Present:— Justice Sir John Bucknill, Kt.

RAMSAKAL RAI AND OTHERS—

PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 257—
Procedure—Defence witness, summoning of—Refusal
of Magistrate to summon witness as unnecessary, legality
of—Prejudice to accused.*

Ordinarily once a Magistrate has given orders that a certain witness should be called he should take such steps as may be necessary or possible to enforce the attendance of the witness. It cannot, however, be laid down that in no case is it possible for the Magistrate, if he comes to the conclusion that the attendance of the witness is not really necessary, to dispense with his attendance. [p. 925, cols. 1 & 2.]

A prosecution witness was cross-examined at length before and after charge. Subsequently the accused made an application that the witness may be summoned and examined as a defence witness. The Magistrate acceded to this request and granted two adjournments for the purpose of summoning the witness, who, however, could not attend and eventually the Magistrate dispensed with the attendance of the witness on the

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will be more congenial. The commentary on the passage which begins "*anujanami bhikkhave rajuman, etc.*," explains that so long as the civil laws are not in conflict with the 227 rules to be observed by monks they must be obeyed.

In the Pali text of the Pacittiya we have the passage which begins "*vigarahi buddho bhagava kathamhinama tumhe mogha parisa vikale gamam pavicitra, etc.* (page 206), (Pacittiya Palidaw, Kavimyetmhan Press).

In this text the Lord Buddha admonishes certain of the monks for frequenting the villages after the hour of noon and indulging in talk which is unprofitable to a Bhikkhu, i. e., will not help him to attain Nirvana. The text says—

"What is this unprofitable talk:—

Politics and official matters, dacoities, the doings of ministers and officials, warriors, dangers, wars, feed, drink, clothing, dwelling, scents and flowers, relatives, etc., etc.

Any discourse on these subjects is unprofitable to *rahans* or *pongyis*.

There are three baskets of the Law as preached by the Lord Buddha, viz., Abhidhamma, Vinaya and Suttas.

The Abhidhamma is the Dhamma taught to those who are more spiritually evolved. The *vinaya* or the Sama Dharma adopted for monks; and the Suttas contain the Sama Dharma explained popularly for those who are less spiritually evolved.

The preceding passage of the Pacittiya finds its parallel in the Samanna-phale Sutta of the Digha Nikaya. There is an excellent translation of this Sutta by the late Professor Rhys Davids (Volume II, Sacred Books of the Buddhists) Dialogues of the Buddha). The meaning of the Sutta is "the fruits of the life of a recluse." This Sutta has a bearing on the *vinaya* and its ethical precepts.

According to Burman Buddhist ideas he who dons the yellow robe has one of two duties to perform:—

(1) to practise austerities and meditation in order to work out his own salvation; or

(2) to learn the sacred scriptures and to impart the knowledge to others.

Those who follow the first are known as Patibatti Sangha and those who adopt the second as Pariyatti Sangha.

When a *pongyi* belongs neither to the Pariyatti nor to the Patibatti, he is no longer entitled to live on the offerings of

the laity, nor to receive respect from He has no *raison d'être*.

We have touched on this point as the majority of those concerned in the riot were according to the evidence, members of the order. In attempting to oppose the orders of the executive they are not only breaking their own personal law but are setting an example to the laity which is greatly to be lamented. As for the laymen we have shown from the pronouncement of the *Thathanabaing* in Council in 1226 B. E. that those who support *pongyis* who do not live in accordance with the *vinaya* are but watering a poison tree which will prove fatal to themselves.

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Z. K.

Appeals dismissed.

PATNA HIGH COURT

CRIMINAL REVISION No. 248 OF A. 25.

June 11, 1925.

Present:— Justice Sir John Bucknill, Kt.

RAMSAKAL RAI AND OTHERS—

PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

*Criminal Procedure Code (Act V of 1898), s. 257—
Procedure—Defence witness, summoning of—Refusal
of Magistrate to summon witness as unnecessary, legality
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Ordinarily once a Magistrate has given orders that a certain witness should be called he should take such steps as may be necessary or possible to enforce the attendance of the witness. It cannot, however, be laid down that in no case is it possible for the Magistrate, if he comes to the conclusion that the attendance of the witness is not really necessary, to dispense with his attendance. [p. 925, cols. 1 & 2.]

A prosecution witness was cross-examined at length before and after charge. Subsequently the accused made an application that the witness may be summoned and examined as a defence witness. The Magistrate acceded to this request and granted two adjournments for the purpose of summoning the witness, who, however, could not attend and eventually the Magistrate dispensed with the attendance of the witness on the

ground that as he had been cross-examined at length his examination as defence witness was not necessary :

Held, that in the absence of any prejudice to the accused as the result of the refusal of the Magistrate to summon the witness, it could not be said that the Magistrate had acted entirely without jurisdiction. [p. 925, col. 1.]

Criminal revision from an order of the Sessions Judge, Shahabad, dated the 17th March 1925, affirming that of the Deputy Magistrate, Arrah, dated the 16th February 1925.

Mr. *Devaki Prasad Sinha*, for the Petitioners.

Mr. *D. L. Nandkeolyar*, for the Opposite Party.

JUDGMENT.—This was an application in criminal revisional jurisdiction made by some persons who were convicted by the Deputy Magistrate of Arrah on the 16th of February last of offences punishable under the provisions of ss. 143 and 379 coupled with s. 34, Indian Penal Code. The applicants appear to have been sentenced each to pay a fine of Rs. 50 under the provisions of s. 379, Indian Penal Code and in default of payment thereof to undergo rigorous imprisonment for two months, no separate sentence was passed upon them in connection with the provisions of s. 143, Indian Penal Code.

The only ground which has been put forward upon which it is urged that this Court should interfere, is because it is suggested that there has been a wrongful exercise of jurisdiction by the Deputy Magistrate in connection with the procedure. It is unnecessary to go into the facts relating to the offences with which these men were charged further than to say that the affair related to blocking up of a water-course. In the course of the trial which proceeded in the usual manner a certain Sub-Inspector of Police was examined as a witness for the prosecution, he was cross-examined at considerable length by the defence. Now it would seem that the defence wished to call this Sub-Inspector either as a defence witness or for the purpose of what was in effect further cross-examination, and on the 28th of January last it seems that the Magistrate at that time was ready to agree that this should be done. At a later stage, however, namely, on the 9th of February he altered his view. The note in the order sheet of the 28th of January last so far as it is here material, reads: "The defence prays that Sub-Inspector of Sahar who had

been summoned has not turned up to-day and his evidence is necessary. Summon him afresh". The Magistrate's note on the 11th of February last reads: "The defence filed a petition that the Sub-Inspector is not forthcoming to-day and that his examination is necessary as a defence witness. It appears that he was examined as a prosecution witness (No. 5) and he was cross-examined at length by the defence side. I have already granted two adjournments for this, and I cannot wait any longer for time now".

Now it is suggested that this action taken by the Deputy Magistrate is illegal. The Deputy Magistrate in his explanation, which appears to be dated about the 28th of May last, says:—

"The Sub-Inspector in question was examined as a prosecution witness (No. 5) on 3rd January 1925.

"Charge was framed against the accused on 14th January 1925, and the accused persons had ample opportunity of cross-examining the Sub-Inspector, before charge and after the charge.

"The Sub-Inspector was cross-examined, at great length by the defence side on 15th January 1925 and then discharged.

"Technically speaking, the Sub-Inspector could not have been summoned as a defence witness, under such circumstances.

"He could have only been summoned under s. 257, Cr. P. C., for further cross-examination, on the discretion of the Court, if the Court was satisfied that it was necessary. But no such necessity appears to have been mentioned in the petitions of the accused dated 28th January 1925 (*vide* flag A) and 9th February 1925 (*vide* flag B). Even then, I had granted two adjournments for this. But the Sub-Inspector was not available. So I did not think it proper to drag on the case any more, thereby causing delay in the administration of justice".

Now the defence applied to the Sessions Judge of Shahabad upon this point and the learned Sessions Judge dealt with the matter on the 17th of March last. It is perhaps useful to refer to what the learned Sessions Judge has said in his judgment. It reads "On behalf of the petitioners it has been urged that once the Magistrate had directed that the Police Sub-Inspector should be re-called for cross-examination after the accused had entered on their defence, he was bound to insist on his appearance. The proposition so stated is

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not without force. But in this case the petitioner had had an opportunity of cross-examining the Sub-Inspector before the framing of the charge and had cross-examined him at some length after the charge had been framed. The attendance of the Sub-Inspector, therefore, was not to be compelled unless it was necessary for the purpose of justice. It appears that his non-attendance on the first date, 28th January 1925, was due to the fact that he never received the summons till 31st January 1925 (the application for his attendance made by the accused was filed so late as 23rd January 1925) and that it was due on the second date, 9th February 1925, to his inability to attend the Court owing to an accident. It is now said that the petitioners wished to question this officer for the purpose of finding out whether he had observed any sign of the placing of the *karah* in, or of the removal of the *karah* from, the *pyne*, a question of importance which they had omitted when the officer was cross-examined. I have consulted the record of the case, and am doubtful whether the Sub-Inspector could have afforded useful assistance to the Court on this point. There is no doubt but that the *pyne* was blocked and that of the materials used for this purpose, bamboos and paddy bundles formed a part; there is corroboration here of the prosecution story. I am not satisfied that this is a fit case for interference".

I entirely agree with what the learned Sessions Judge has written. The question of the saucepan appears to me to be one of very slight importance. As the learned Judge has pointed out, the principal matter was the blocking up of the *pyne* with various materials and what assistance could seriously have been afforded to the defence by the Police Officer's remarks upon a saucepan it is difficult to gather. Did I in the least think that the applicants had been in any way prejudiced by what has taken place I should have no hesitation in interfering, but as it has in no way been shown or proved to me that there has been the least prejudice against the applicants I do not think that it is proper that I should interfere. It may be said as has been pointed out by the learned Sessions Judge, that as a general proposition it should be considered that once a Magistrate has given orders that a certain witness should be called he should take such steps as may be necessary and possible to enforce his attendance. I,

however, am not prepared to assent to the suggestion that in no case it is possible for the Magistrate, if he comes to the conclusion that the attendance of the witness is not really necessary, to dispense with that person's attendance. In this case the circumstances were such that I think he was not only competent to dispense with this Sub-Inspector's further attendance but that he was right in so doing.

The application, therefore, will be dismissed.

Z. K.

Application dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 108 of 1925.
September 8, 1925.

Present :—Mr. Simpson, A. J. C.
Babu ALI BAHADUR—APPLICANT
versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 146—Attachment of property, withdrawal of—Delivery of possession—Discretion of Court.

Where property attached under s. 146, Cr. P. C., is released by the Magistrate on being satisfied that there is no longer any likelihood of a breach of the peace, it is open to the Magistrate to make over possession of the property to any party he thinks fit. He is not bound simply to direct the Receiver to abandon the property, leaving the parties to scramble for the estate. There may, however, be cases in which it might be sufficient for him to make an order withdrawing the attachment, and leave some party to take possession.

Application against an order of the Sessions Judge, Fyzabad, dated the 20th April 1925, rejecting an application for revision against an order of the District Magistrate, Sultanpur, dated the 26th March 1925.

Messrs. Niamatullah, Naimullah and M. H. Kidwai, for the Applicant.

Mr. H. K. Ghosh (with him Mr. A. P. Sen), for the Opposite Party.

ORDER.—This is an application in revision. The order complained of is one by the learned Sessions Judge of Fyzabad rejecting an application for revision against an order of the learned District Magistrate of Sultanpur. It is this last order which is really attacked. Certain property had been attached under s. 146 of the Cr. P. C. The District Magistrate, acting under the proviso, has released it because he was satisfied that there is no longer any likelihood of a breach of the peace. It is

argued before me that there is a likelihood of a breach of the peace, but that is a question of fact which this Court will not go into. It is the Magistrate that has to be satisfied, not the Judicial Commissioner. It is further argued that even if the Magistrate is entitled to withdraw the attachment, his order is wrong because he has made over the possession in certain fractional shares to two parties. This is a novel point, which so far as I know has not yet been before any High Court. The applicant's contention would amount to this, that the Magistrate, being in possession of the subject of dispute, which is in most cases a landed estate, is bound simply to direct his Receiver to abandon the property without making over the possession or the books of account to anybody and leave the parties to scramble for the estate. I do not believe that this was the intention of the Legislature. I think it is open to the Magistrate under the proviso to make over possession of the property to any person that he thinks fit. He must, of course, exercise a judicial discretion in deciding to whom the possession is to be given, but a judicial discretion has been exercised in this case. I do not say that he is bound to make over the possession to anybody. There may be cases in which it is sufficient for him to make an order withdrawing the attachment and leave some party to take possession, but I do hold that it is also open to him to make over possession to any one according to his discretion. The application raises no other points. It is dismissed.

N. H.

*Application dismissed.***ALLAHABAD HIGH COURT.**

CRIMINAL REVISION No. 315 OF 1925.

July 10, 1925.

Present:—Mr. Justice Sulaiman.

SULTAN MUHAMMAD KHAN

AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 258, 349 (1) (a)—Joint trial of several accused—Accused, some, held guilty—Reference to Sub-Divisional Magistrate with regard to all accused, legality of.

Under sub-s. (1) (a) of s. 349 of the Cr. P. C. only the case of those accused who are in the opinion of the Magistrate guilty should be forwarded to the

District or Sub-Divisional Magistrate. Those accused in the case who in the opinion of the Magistrate are not guilty of the offence charged should be acquitted and an order referring their case to the Sub-Divisional Magistrate along with the case of those accused who are guilty is illegal and in contravention of the sub-section. [p. 926, col. 2.]

Criminal revision from an order of the Additional Sessions Judge, Aligarh, dated the 11th May 1925.

Mr. Saila Nath Mukerji, for the Applicants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is a revision from an order of the Additional Sessions Judge directing a re-trial. The application is made on behalf of Mahbub Hasan Khan and eight other accused persons. A complaint under s. 147 read with s. 395 of the Indian Penal Code was made by Abdul Aziz Khan against these accused in the Court of the Tahsildar of Kasganj, a Magistrate of second class powers. The evidence of the parties was produced before the Magistrate. In his order, dated the 29th of April 1925, the Trying Magistrate came to the following conclusion "In my opinion only Mahbub Hasan Khan is guilty and he voluntarily caused grievous hurt to Ibrahim Ali Khan and caused somewhat serious hurt to Abdul Aziz Khan and deserves more punishment than I have power to inflict." Under s. 258 (1) the Magistrate ought to have recorded an order of acquittal of all the accused persons except Mahbub Hasan Khan. He, however, made the following order "I submit the record under s. 349 of the Cr. P. C. to the Sub-Divisional Magistrate and direct the accused to present themselves in that Court on the 2nd May." It is obvious that this order was illegal and in contravention of s. 349 (1) (a) so far as the accused other than Mahbub Hasan Khan were concerned. Under that subsection only the case of those accused who were in the opinion of the Magistrate guilty could have been forwarded to the Sub-Divisional Magistrate. The Magistrate, however, did not record any formal order of acquittal of the other accused and sent all of them to the Sub-Divisional Magistrate.

When the case went to the Sub-Divisional Magistrate he after a perusal of the evidence came to a slightly different conclusion. In his opinion all the accused were guilty. He accordingly convicted all of them,

On appeal to the learned Additional Sessions Judge, the learned Judge has held that inasmuch as the Tahsildar was not authorised to send the case of any of the appellants except Mahbub Hasan Khan to the Sub-Divisional Magistrate the latter has acted with illegality and without jurisdiction in convicting them. As, however, he thought that the opinion of a more experienced officer like the Sub-Divisional Magistrate carried more weight he has ordered a trial *de novo* of all the accused.

So far as the case of Mahbub Hasan Khan is concerned the Trying Magistrate being of opinion that he was guilty had jurisdiction to refer it to the Sub-Divisional Magistrate and the latter acted legally in convicting him and passing a sentence on him. Mahbub Hasan Khan's appeal should, therefore, have been heard and disposed of on the merits. There seems to be no ground for ordering his re-trial. If, however, the learned Additional Sessions Judge on an examination of the record comes to the conclusion that there have been some irregularities which have prejudiced Mahbub Hasan Khan, he would be entitled to order his re-trial, otherwise his appeal should be disposed of.

As regards the other accused persons, I am of opinion that their further prosecution should be stopped. The learned Tahsildar, although perhaps less experienced than the Sub-Divisional Magistrate, had an opportunity of seeing the witnesses and marking their demeanour. Having heard them and seen them he recorded his opinion that the case against these other accused had not been established. On that expression of opinion these accused were certainly entitled to an order of acquittal which, however, the learned Tahsildar omitted to pass. The mere fact that a Sub-Divisional Magistrate on a perusal of the evidence on paper has come to a different conclusion seems no good ground for ordering a re-trial. The accused have already been put to considerable expenses and worry, and they have in their favour the opinion of the Tahsildar who heard all the evidence for the prosecution that could be brought against them and which would now be produced *de novo*. Under the circumstances I think the proper order is to quash the order of re-trial passed by the Additional Sessions Judge and to direct that the appeal of Mahbub Hasan Khan be restored to its original number

and disposed of according to law. The proceedings against the other accused persons are quashed and they are discharged.

Z. K.

Proceedings quashed.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 170 OF 1925.

March 26, 1925.

Present:—Justice Sir Henry Scott-Smith, Kt.

HAQ DAD AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 99, 325—Public servant acting without jurisdiction—Right of private defence—Assault on public servant—Grievous hurt.

Section 99 of the Penal Code has no application to a case where the initial proceeding and the power under which a public servant purports to act are altogether without jurisdiction and entirely *ultra vires*. [p. 928 col. 1.]

A Police Officer noticing one H. going about at night time armed with a long handled hatchet asked him to hand over the hatchet, but H. refused to give it up whereupon the Police Officer laid his hands on the hatchet in order to snatch it from H. The latter resented this and shouted out, on which certain persons came up to his assistance and assaulted the Police Officer causing grievous hurt to him. H. and his companions were tried and convicted of an offence under s. 325 of the Penal Code:

Held, (1) that the act of the Police Officer in trying to snatch away the hatchet from H. was wholly without jurisdiction and that, therefore, s. 99 of the Penal Code was not applicable to the case; [p. 928, col. 2.]

(2) that, however, the accused had no right to assault the Police Officer as they knew that he was not trying to commit a theft of the hatchet nor had they any reason to fear that the Police Officer would cause hurt to H. and that, therefore, they had been rightly convicted. [*ibid.*]

Criminal appeal from an order of the Sessions Judge Mianwali, dated the 12th January 1925.

Mr. Ram Lal, for the Appellants.

Mr. Des Raj Sawhney, Public Prosecutor, for the Respondent.

JUDGMENT.—This is an appeal from the order of the Sessions Judge, Mianwali, convicting Haq Dad under s. 325, Indian Penal Code and Sohan and Ali Khan under s. 323, Indian Penal Code, and sentencing the first named to three years' rigorous imprisonment and the latter to one year's rigorous imprisonment each. The hurts were said to have been caused, in the course of a fight with Fazal Shah, Sub-Inspector, in the following circumstances:—

Fazal Shah was in charge of the Punitive Police Post in the appellants' village and

was sitting on the *thara* outside his house talking to Allah Dad Khan and Budha Khan, *pathans*, when Haq Dad, appellant, passed along the lane in front of the Sub-Inspector's house, he was carrying a long-handled *kulhari* in his hand. The Sub-Inspector thought that Haq Dad was perhaps on his way to attack one Mamrez with whom he had enmity and called to him that he should not go about at night time armed with such a *kulhari* and asked him to hand over the *kulhari* to him. Haq Dad replied that the Sub-Inspector had no authority to take the *kulhari* from him and refused to give it up. Upon this the Sub-Inspector went up to Haq Dad and laid his hands on the *kulhari* in order to snatch it from him. Haq Dad resented this and shouted out to his *Pathan* associates who came up to his assistance and are said to have assaulted the Sub-Inspector. Out of six persons challenged by the Police the three appellants only were convicted, the Sessions Judge holding that each of them struck the Sub-Inspector one blow. The *chalan* was under s. 333 of the Indian Penal Code, but the learned Sessions Judge held that at the time of the occurrence the Sub-Inspector was not acting in the discharge of his duty as a public servant because he had no right to snatch away the *kulhari* from the hands of Haq Dad, it not being an arm the possession of which without a license was forbidden by law. At the same time the Sessions Judge held that under s. 99 of the Indian Penal Code the appellants had no right of private defence against the act of the Sub-Inspector when trying to snatch away the *kulhari*, as such act did not cause the apprehension of death or grievous hurt, the act being done by a public servant acting in good faith under colour of his office though that act might not be strictly justifiable by law. Mr. Rattan Lal in his Law of Crimes, 9th Edition, in his notes under s. 99 at page 185 states as follows :—

"This section has no application to a case where the initial proceeding, and the power under which any public servant purports to act are altogether without jurisdiction and entirely *ultra vires*. But the protection afforded under it to public servants is not lost to them by reason of any mistake on their part in the exercise of their proper functions. The section thus applies to cases where there is an excess of jurisdiction as distinct from a complete absence of jurisdiction, to cases where the official

has done wrongly what he might have done rightly, but not to cases where the act could not possibly have been done rightly."

These remarks of the author are supported by authority, one of which is *Queen-Empress v. Jogendra Nath Mukerjee* (1). Now, there can be no doubt that the act of the Sub-Inspector in trying to snatch away an axe from Haq Dad was wholly without jurisdiction, and, therefore, in my opinion, s. 99 is not applicable. At the same time I do not see how the appellants had any right to make an assault upon the Sub-Inspector. They knew perfectly well that he was not trying to commit a theft of the *kulhari*, and, therefore, they had no right to attack him in order to protect Haq Dad's property from being taken away by him. Nor had they any reason to fear that the Sub-Inspector would cause hurt to Haq Dad.

As regards the merits, I see no reason to differ from the learned Sessions Judge in his finding that the three appellants did each of them give one blow to the Sub-Inspector. The point that really requires consideration in the case is whether the sentences awarded are suitable. There can be no doubt that the appellants acted with undue violence, and that they had no justification for assaulting the Sub-Inspector. At the same time it must not be forgotten that the latter was in the wrong in doing an act or trying to do an act which was unlawful. The hurt caused to the Sub-Inspector by Haq Dad was technically grievous hurt. Under the circumstances I think that the sentences awarded are unduly severe. I accept the appeal and reduce the sentences as follows:—In the case of Haq Dad to nine months' rigorous imprisonment, and in the cases of Sohan and Ali Khan to four months' rigorous imprisonment each.

Z. K.

Appeal accepted in part.

(1) 24 C. 329; 1 C. W. N. 154; 12 Ind. Dec. (N.S.) 881.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 635
AND 636 OF 1923.

July 27, 1925.

Present:—Mr. Justice Das and
Mr. Justice Adami.

RAMDHANI SINGH AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

Musammatt KEWAL MANI BIBI

AND OTHERS—DEFENDANTS—RESPONDENTS.

Pleadings—Second appeal—Alternative case—Evidence Act (I of 1872), s. 92—Intention of parties, evidence as to, cannot be given—Non-existence of agreement can be proved—Bengal Tenancy Act (VIII of 1885), s. 29, application of.

If the defendant in a case pleads that a certain plot of land does not exist at all and that its inclusion in a *patta* and *kabuliyat* was a fraud on the registration law, and the Trial Court finds accordingly, but the lower Court of Appeal finds the plot in question as "real existing property and not fictitious or non-existent", the defendant cannot be allowed to contend in second appeal that even if the plot did exist there was no intention on the part of the parties to the instrument to deal with that plot. [p. 930, col. 2.]

Evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is no agreement at all is admissible. [p. 930, col. 2; p. 931, col. 1.]

Pym v. Campbell, (1856) 6 El. & Bl. 370; 25 L. J. Q. B. 277; 2 Jur. (n. s.) 641; 4 W. R. 528; 119 E. R. 903; 106 R. R. 632 and *Guddalur Ruthna v. Kunnattur Arumuga*, 7 M. H. C. R. 189, relied upon.

Under s. 92 of the Evidence Act, as between the parties to an instrument, oral evidence of intention is not admissible for the purpose, either of construing deeds or of proving the intention of the parties. [p. 931, col. 1.]

Balkishen Das v. Legge, 27 I. A. 58; 22 A. 149; 4 C. W. N. 153; 2 Bom. L. R. 523; 7 Sar. P. C. J. 601; 9 Ind. Dec. (n. s.) 1130 (P. C.), relied upon.

Section 92 merely prescribes a rule of evidence; it does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances. [ibid.]

Balkishen Das v. Legge, 27 I. A. 58; 22 A. 149; 4 C. W. N. 153; 2 Bom. L. R. 523; 7 Sar. P. C. J. 601; 9 Ind. Dec. (n. s.) 1130 (P. C.), relied upon.

Before invoking the aid of s. 29, Bengal Tenancy Act, the tenant must prove that he is an occupancy *rai* in regard to the rent claimed lands. [p. 931, col. 2.]

Appeal from a decision of the Additional District Judge, Patna, dated the 16th April 1923, reversing that of the Munsif, Bardh, dated the 6th March 1922.

Messrs. P. C. Manuk and S. Dayal, for the Appellants.

Messrs. Hasan Imam, Brijkishore Prasad and S. M. Mullick, for the Respondents.

JUDGMENT.

Das, J.—On the facts found by the learned Additional District Judge he was

right in passing the decrees which he did pass. Two questions have been argued before us by Mr. Manuk on behalf of the defendants-appellants; first, that the inclusion of 1 *cottah* of land in Patna City was a fraud on the registration law and that the registration obtained by its means was invalid; and, secondly, that the enhancement of rent in the leases which were also the basis of the suits constituted an infringement of s. 29 of the Bengal Tenancy Act and cannot be supported by a Court of Law.

I will first consider the point in regard to the registration. The written statement raises the following case: "In order only to get the registration made at Jhauganj, an imaginary plot of land in Mohalla Diwan in the City of Patna, was included in the *patta* and *kabuliyat*. These defendants did not take in settlement the land in Mohalla Diwan in the City of Patna, nor was any contract made with regard to the settlement thereof nor did the defendants ever get possession of the same. Hence the afore-said *kabuliyat* is illegal, void and inoperative, and the same cannot be binding on the defendants. The plaintiff's suit on the basis of *patta* and *kabuliyat* like this, is not tenable and is fit to be dismissed at once." The Court of first instance found that the plot of land in Mohalla Diwan in the City of Patna did not exist and in this view he came to the conclusion that the inclusion of this property was a fraud on the registration law. The lower Appellate Court has reversed the finding of fact of the Court of first instance on this point. The learned Judge says as follows:—"I have examined the evidence on the point and the case-law relating to the matter and am disposed to differ from the finding of the learned Munsif and to hold that the *kabuliyats* were valid, and were not fraudulent documents, and had been entered into with the knowledge and consent of both the parties and that the properties were real existing properties and not fictitious or non-existent. This appears to be clear from the depositions of the three consenting defendants themselves given before the Court below. The finding that the plot of land in Mohalla Diwan is "existing property and not fictitious or non-existent" is a finding of fact which is binding on us in second appeal.

This is not disputed by Mr. Manuk; but he contends that the learned Judge

should have considered the other point raised by him, namely, whether there was any intention on the part of the parties to deal with the plot of land in *Mohalla Diwan*. Now in my, opinion, the question was not raised in this form in the written statement. The whole point made in the written statement is that "an imaginary plot of land in *Mohalla Diwan* in the City of Patna was included in the *patta* and *kabuliyat*." There is no suggestion that the parties did not intend to deal with this property on the assumption that it did exist. Mr. Manuk relies on the judgment of the Court of first instance and contends that that Court expressly found that the parties did not intend to deal with this property; but I can find no support for this argument in the judgment of the learned Munsif. He no doubt refers to the contention on the part of the defendants that they never got possession of the *Diwan Mohalla* properties and that it was never intended that they should get possession of them and that these properties were included only to facilitate registration at Jhauganj. But the finding of the learned Munsif is that "these areas are only fictitious." That this was the only finding will appear from the cases to which he refers and discusses. In dealing with these cases which were obviously cited on behalf of the plaintiffs, he says as follows:—"In the first of these cases it transpired later that the executants' interest had become extinguished in the property mortgaged and without knowledge of this the parties entered into a *bona fide* mortgage of same. In the second case the existence of the property mortgaged was not denied. In the third it was actually found the mortgagor intended this small property should also be a security for the mortgage debt. Thus in none the question arose of the non-existence of the property" and he concludes as follows:—"In the present case it is plainly alleged in the written statement the property in *Diwan Mohalla* was a fictitious one. The *kabuliyats* in the recitals in them make no mention of them and hence it was incumbent on plaintiff to adduce some evidence of existence of those properties. In absence of such evidence the case is covered by the case of *Harendra Lal Roy Chowdhuri v. Hari Dasi Debi* (1)

(1) 23 Ind. Cas. 637; 19 C. L. J. 484; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N. 817; 16 Bom. L. R. 400; 12 A. L. J. 774; 1 L. W. 1050; 41 C. 972; 41 I. A. 110 (P. C.).

and the registration of Jhauganj is invalid and plaintiff cannot take advantage of these *kabuliyats*."

It will appear from the judgment of the learned Munsif that the only question which he intended to try and did try was whether the properties alleged to be fictitious by the defendants did exist. He found that they did not exist and he held that the inclusion of those properties was a fraud on the registration law.

That being so how are we entitled now in second appeal to go into the question of the intention of the parties? It has been contended on behalf of the respondents that having regard to s. 92 of the Evidence Act the Court is not entitled to go into the question of intention. I am unable to agree with this contention. The authorities establish that though evidence to vary the terms of an agreement in writing is not admissible, yet evidence to show that there is not an agreement at all is admissible. In *Pym v. Campbell* (2), Erle, J., said as follows: "The point made is that this is a written agreement, absolute on the face of it, and that evidence was admitted to show it was conditional; and if that had been so, it would have been wrong. But I am of opinion that the evidence showed that in fact there was never any agreement at all. The production of a paper purporting to be an agreement by a party, with his signature attached, affords a strong presumption that it is his written agreement; and, if in fact he did sign the paper *animo contrahendi*, the terms contained in it are conclusive and cannot be varied by parol evidence; but in the present case the defence begins one step earlier: the parties met and expressly stated to each other that though for convenience they would then sign the memorandum of the terms, yet they were not to sign it as an agreement until A was consulted: I grant the risk that such a defence may be set up without ground; and I agree that a Jury should, therefore, always look on such a defence with suspicion; but, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is that evidence to vary the terms of an agreement in writ-

(2) (1856) 6 El. & Bl. 370; 25 L. J. Q. B. 277; 2 Jur. (N. S.) 641; 4 W. R. 528; 119 E. R. 903; 106 R. R. 632.

ing is not admissible, but evidence to show that there is not an agreement at all is admissible." And Lord Campbell said: "I agree. No addition to, or variation from, the terms of a written contract can be made by parol: but in this case the defence was that there never was any agreement entered into." This case was followed in *Guddalur Ruthna v. Kunnattur Arumuga* (3). The last mentioned case was decided without reference to the Indian Evidence Act and probably before the Evidence Act came into operation. But the principle of that case was affirmed by the Judicial Committee in a judgment delivered by it on the 5th of December 1924. So far as I know that case has not been reported; but the judgment has been pronounced in Privy Council Appeals Nos. 21, 31 and 32 of 1923 [*Bajinath Singh v. Vally Mahomed Hajee Abba* (4)]. In delivering the judgment of the Board Sir Lawrence Jenkins said as follows:—"It is true, as was laid down in *Balkishen Das v. Legge* (5) that under s. 92 of the Indian Evidence Act, as between the parties to an instrument, oral evidence of intention is not admissible for the purpose, either of construing deeds or of proving the intention of the parties. But in the view their Lordships take of the circumstances of this case the section and the ruling have no application to it." The learned Judge then proceeded to say as follows:—"The preamble to the Evidence Act recites that 'it is expedient to consolidate, define and amend the Law of Evidence' and s. 92 merely prescribes a rule of evidence; it does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances." I am of opinion, therefore, that it was open to the Court to examine the surrounding circumstances with a view to enable it to decide whether the parties intended to arrive at any agreement in regard to the Diwan Mohalla property; but in the view which I take of this case the question is a question of fact and should have been raised by the defendants specifically. It should certainly have been

raised by them in the Courts below. The judgment of the learned Munsif is silent on this point and so is the judgment of the lower Appellate Court. I must, therefore, hold that the only question which was raised by the defendants in the Courts below and the only question discussed by the Courts below is whether these properties were fictitious properties or not. That being so, it is not open to us to enter into the question whether the parties intended to enter into an agreement with regard to these lands.

The next question relates to the applicability of s. 29 of the Bengal Tenancy Act. Now in order to understand the point it ought to be pointed out that the registered *kabuliyats* were executed in 1322. By these *kabuliyats* the defendants took leases of the lands comprised in the *kabuliyats* from 1323 to 1329 at a rent of Rs. 5 per *bigha*. It appears, however, that the defendants were actually in possession of the properties comprised in the leases ever since 1301 and that they were paying a rent of Rs. 3 per *bigha*. It is, therefore, contended on behalf of the defendants that there was an enhancement of rent by the fresh arrangement of 1322 and that the rent was enhanced so as to exceed by more than 2 annas in the rupee, the rent previously payable by the *raiyyat*.

Section 29, it will be noticed, only applies to the case of an occupancy *raiyyat* and before invoking the aid of s. 29, the tenant must prove that he is an occupancy *raiyyat* in regard to the rent claimed lands. Now these lands are admittedly *diara* lands and s. 180 provides that a *raiyyat* who holds land of the kind known as *char* or *diara* shall not acquire a right of occupancy until he has held the land in question for 12 continuous years; and the section further provides that until he acquires a right of occupancy in the land, he shall be able to pay such rent for his holding as may be agreed on between him and his landlord.

On the admitted facts, therefore, there is no room for the application of s. 29 of the Bengal Tenancy Act unless the defendants establish that they had held the lands in question for twelve continuous years. The learned Judge in the Court below accepted the contention of the plaintiffs that the defendants have not "been successful in proving continuous possession." Mr. Manuk in this Court contends

(3) 7 M. H. O. R. 189.

(4) 86 Ind. Cas. 332; 48 M. L. J. 339; 2 O. W. N. 279; 27 Bom. L. R. 787; 3 R. 106; 3 Pat. L. R. 227; L. R. 6 A. (P. C.) 57; (1925) A. I. R. (P. C.) 75 (P. C.).

(5) 27 I. A. 58; 22 A. 149; 4 O. W. N. 153; 2 Bom. L. R. 523; 7 Sar. P. O. J. 601; 9 Ind. Dec. (N. S.) 1130 (P. C.).

that the learned Judge should have considered the evidence with a view to find out whether the defendants have been in continuous possession of any portion of the land comprised in the lease. He says that it may be that he has not been in continuous possession for 12 years of the entire block of land comprised in his lease; but he contends that it is possible that he may have been in possession for 12 continuous years of some portion of the land and that inasmuch as the learned Additional District Judge has not dealt with this point we should remand the case to him to enable him to decide the point. The onus of establishing an exception under s. 180 of the Bengal Tenancy Act was upon the defendants and it was for them to make a specific point in regard to the applicability of s. 29 in the written statement; but they have not made such a case in the written statement. No doubt the Courts examined the contentions in regard to the applicability of s. 29; but a new point is made before us, namely, that although the defendants may have failed to prove that they were in possession for 12 continuous years of the entire block of land, they may succeed in proving that they were in possession for 12 continuous years of some portion of the land. I find that the learned Munsif in the course of his judgment says "The defendants themselves could not give verbally what area they were in possession of in which year": It is extremely unlikely that a remand would be productive of any good for the defendants have no evidence on the point and the papers of the landlords could not possibly identify the lands which have been in the possession of the defendants, the lands being subject to inundation and there being no Record of Rights in regard to them. Having regard to all these facts and especially having regard to the fact that the defendants have not made out a case under s. 29, I must decline to remand the cases to the lower Appellate Court to enable it to decide the point contended before us.

I must dismiss these appeals with costs.

Adami, J.—I agree.

S. D.

Appeals dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION No. 202 of 1924.
March 17, 1924.

Present:—Mr. Aston, A. J. C.

MULCHAND SOBHRAJ AND ANOTHER—
APPLICANTS

versus

RADHAKISHIN PARUMAL AND OTHERS
—OPONENTS.

Arbitration Act (IX of 1899), ss. 4, 19—Submission to arbitration—Signatures, necessity of—Bias of arbitrator, effect of—Reference at option of one party, validity of—Validity of contract, plea of, effect of.

Actual signatures of the parties to a submission to arbitration are immaterial provided that the agreement is in writing and there is evidence that its terms are assented to by both the parties. [p. 933, col. 2.]

Lyon Lord & Co. v. Firm of Champsi Umersi, 49 Ind. Cas. 135; 12 S. L. R. 55, *Baker v. Yorkshire Fire Assurance Co.*, (1892) 1 Q. B. 144; 61 L. J. Q. B. 838; 66 L. T. 161 and *Narsidas Nanji v. Dosa Kalian*, 8 Ind. Cas. 925; 4 S. L. R. 149, relied upon.

A submission is not invalid merely because an arbitrator or an umpire is to sit in judgment on his own acts, if parties with their eyes open chose to agree to a submission providing for a reference to such an arbitrator or umpire, unless it be shown that the arbitrator or umpire has made up his mind so as not to be open to change it upon argument. [p. 934, col. 2.]

Jackson v. Barry Ry., (1893) 1 Ch. 238; 2 R. 207; 68 L. T. 472, *Forwood v. Watney*, (1880) 49 L. J. Q. B. 447 and *Goverdhandas Vishindas Ratanchand v. Ramchand Manjimal*, 47 Ind. Cas. 783; 12 S. L. R. 41, relied upon.

An agreement to refer a dispute to arbitration providing for a reference at the option of one of the parties is still an agreement within the meaning of s. 4 of the Arbitration Act [*ibid.*]

Woodall v. Pearl Assurance Co., (1919) 1 K. B. 593; 88 L. J. K. B. 706; (1919) W. C. & Ins. Rep. 181; 120 L. T. 556; 34 Com. Cas. 237; 83 J. P. 125; 63 S. J. 352, relied upon.

Where it is contended that a clause in a contract providing for the submission of disputes arising out of the contract to arbitration is not enforceable on account of the plea of the defendant that the contract is void and impossible of performance, the true test to apply is whether what is alleged by the defendant is something which gives the go-by to the contract, that is to say, which arises and exists independently of the contract and avoids it by its own force, or whether what is alleged is some ground of defence arising upon the contract itself. In the former case alone the submission would be unenforceable. [p. 935, col. 2.]

Woodall v. Pearl Assurance Co., (1919) 1 K. B. 593; 88 L. J. K. B. 706; (1919) W. C. & Ins. Rep. 181; 120 L. T. 556; 24 Com. Cas. 237; 83 J. P. 125; 63 S. J. 352, *Stebbing v. Liverpool and London and Globe Insurance Co.*, (1917) 2 K. B. 433; 86 L. J. K. B. 1155; (1917) W. C. & Ins. Rep. 211; 117 L. T. 247; 34 T. L. R. 395, and *Jivraj Lakhamji v. Tahkandas Mohandas*, 58 Ind. Cas. 790; 14 S. L. R. 91 at p. 93, relied upon.

Jureidini v. National British & Irish Millers Insurance Co., (1915) A. C. 499; 84 L. J. K. B. 640; (1915) W. C. & Ins. Rep. 239; 112 L. T. 531; 59 S. J. 205; 31 T. L. R. 132, distinguished.

Application for stay of suit under s. 19 of the Indian Arbitration Act.

Mr. *Dipchand Chandumal*, for the Applicants.

Mr. *Assudamal Rewachand*, for the Opponents.

JUDGMENT.—This is an application filed by the applicants *Mulchand Sobhraj* and *Ramchand Mulchand* under s. 19 of the Indian Arbitration Act for the stay of suit No. 285 of 1924 filed by the opponent *Radhakishin Parumal* against the applicant on the ground that the suit is based on contracts for the sale of sugar which contained a clause that any dispute of whatever character relating to or arising out of the contract was to be referred to the arbitration of members of the New Sugar Merchants Association Karachi that the applicants have all along been ready and willing to refer the disputes to arbitration and have taken no steps in the suit.

Mr. *Kimatrai* opponents' Pleader has urged six objections against the application. He denies the existence of any submission clause binding the opponent. He contends that even if a submission clause exists, since applicant has repudiated the contract as void and impossible and has urged frustration of commercial adventure, he cannot take advantage of the submission clause. He further contends that the dispute should not be referred to arbitrators, because the President of the Sugar Merchants Association who has to appoint an umpire is biased, because the arbitration clause is vague and indefinite inasmuch as it provides for arbitration by two members of the Sugar Merchants Association while the members of the Sugar Merchants Association are firms and not individuals, because the arbitration clause only gives one of the parties the option to refer the dispute to arbitration. He lastly contends that the application should be refused on the ground that the acts of the Sugar Merchants Association are in question and the members of the Association should not sit in judgment on their own acts.

With regard to the first objection all that the opponent has sworn in his affidavit is that so far as he re-collects he has not signed any agreement to refer matters to arbitration. Against this *Mulchand Sobhraj* has produced the *soudagiri* book showing the opponents' signature; he has also produced a printed form which he swears is the printed form referred to in the con-

tract. It is also indicated in the opponents' plaint itself that the contract in suit was based on a printed contract for the plaintiff stated that he would rely on printed contracts in the possession of the defendants. I see no reason to doubt the statement in *Mulchand's* affidavit that the printed contract which he produced was the printed form referred to in the contract between the parties. The tendency of English Courts is to regard actual signatures as immaterial provided that the agreement is in writing and there is evidence that its terms are assented to by both parties: See *Lyon Lord & Co. v. Firm of Champsi Umersi* (1); see also *Baker v. Yorkshire Fire Assurance Co.* (2) approved in *Hickman v. Kent or Romney Marsh Sheep Breeders' Association* (3) and followed in *Narsidas Nanji v. Dosa Kalian* (4). In support of the third objection the opponent has produced the plaint and defence evidence recorded with exhibits and judgment in Suit No. 4241 of the Small Causes Court Karachi and also the plaint and written statement in Suit No. 286 of 1924 which is sought to be stayed.

According to the printed contract filed by *Mulchand* the contract was subject to the rules and regulations of the New Sugar Merchants Association at Karachi and such changes made and rules framed from time to time by the New Sugar Merchants Association.

Mr. *Assudomal* for the defendant in Suit No. 4241 of 1923 contended that since the Karachi Sugar Merchants Association resolved that no contracts should be made in the Bazar for July 1923 delivery and since the plaintiffs are members of the Association and had signed their assent to the resolution the contract was void. In the cross-examination of *Lunidaram Rochaldas* he elicited the fact that there was a standing rule of the Association that no contract could be made while two *raid*as were still unsettled, i. e., no contract for July delivery could be made in May that on the 31st May the rate of the day is fixed by the Association and after that a resolution made whether the next *raida*

(1) 49 Ind. Cas. 135; 12 S. L. R. 55.

(2) (1892) 1 Q. B. 144; 61 L. J. Q. B. 838; 66 L. T. 161.

(3) (1915) 1 Ch. 881; 84 L. J. Ch. 688; 113 L. T. 159; 59 S. J. 478.

(4) 8 Ind. Cas. 925; 4 S. L. R. 149.

should be opened or not. On 31st May 1923 it was resolved to forbid the July delivery *voida*.

The opponent in para. 12 of his affidavit dated 27th September 1924 alleged that both the President and the Secretary of the Sugar Merchants Association were summoned by the defendants in Suit No. 4241 of 1923 to give evidence in their behalf. Mr. Dipchand, however, for applicant has pointed out that it was not Kishindas the President who was summoned to give evidence but his partner Ghumanmal Tekchand and that it was not as alleged the Secretary of the Sugar Merchants Association who was summoned but the Vice President Jethalal Kalianji. The allegations as regards Kishindas the President, therefore, are not established. Mr. Dipchand further points out that in the case of *Jackson v. Barry Ry.* (5) in which a dispute arose between a Company and a contractor whether the interior of an embankment was to be made of stone or rocky mark, and the Engineer of the Company expressed the view that it should be of stone, and after the matter was referred to his arbitration, and on the day for which the first appointment had been made, he again wrote repeating the same opinion, it was held by the Court of Appeal that considering the position of the Engineer who as Engineer of the Company must necessarily have already expressed an opinion on the point in dispute his writing after the commencement of the arbitration a letter repeating the same opinion would not disqualify him from acting as arbitrator unless on the fair construction of the letter it appeared that he had made up his mind so as not to be open to change it upon argument. The facts in that case seem to me much stronger than in the present one for in that case it was the Engineer himself who was the arbitrator, in the present case it is merely the duty of the President of the Sugar Merchants Association to nominate an arbitrator. In that case the arbitrator himself had twice expressed in writing views adverse to the contentions of the contractor. In the present case all that the opponent can urge is that the President of the Sugar Merchants Association as such may be inclined to favour the enforcement of the resolutions of the Association even though one of the parties

to the contract was not a member of the Association. I do not think the facts established show that the President will appoint an umpire who has made up his mind so as not to be open to change it upon argument, or that the umpire will most certainly tilt the scales against the opponent as in *Goverdhandas Vishindas Ratanchand v. Ramchand Manjimal* (6). Since the opponent chose with his eyes open to agree to refer disputes to the arbitration of members of the New Sugar Merchants Association and since the submission clause formed part of the consideration for the contract see *Forwood v. Watney* (7), it does not appear to me to be open to the opponent now to contend that members of the New Sugar Merchants Association should not sit in judgment in questions affecting the validity and applicability of their own resolutions. If that was his view he ought not to have agreed to the submission clause for the contract which was subject to the rules and resolutions of the New Sugar Merchants Association expressly provided that disputes should be referred to members of the Association.

It is now urged by Mr. Kimatrai that firms are members of the New Sugar Merchants Association and not individuals but it seems to me clear that the intention of the parties to the submission clause was that disputes should be decided by persons who were partners in firms belonging to the New Sugar Merchants Association. There does not appear to me any force in this contention. Nor do I think there is any force in the contention that the agreement to refer merely provided for a reference at the option of one of the parties. The agreement was a written agreement to refer subject to a condition, i.e., the exercise of the option given to one of the parties. The fact that the agreement was subject to an option does not, in my opinion, prevent it from being an agreement within the meaning of s. 4 of the Indian Arbitration Act. In *Woodall v. Pearl Assurance Co.*, (8), the Court of Appeal held that a Company which had the option of requiring a reference to arbitration could rely on the arbitration clause as a defence to an action. This, no doubt, was a decision

(6) 47 Ind. Cas. 783; 12 S. L. R. 41.

(7) (1880) 49 L. J. Q. B. 447.

(8) (1919) 1 K. B. 593 at p. 611; 88 L. J. K. B. 706; (1919) W. C. & Ins. Rep. 181; 120 L. T. 556; 24 Com. Cas. 237; 83 J. P. 125; 63 S. J. 352.

(5) (1892) 1 Ch. 238; 2 R. 207; 68 L. T. 472.

under the English Arbitration Act but the definitions of "submission" in s. 1 of the Indian Act and in s. 27 of the English Act are the same.

With regard to the last objection urged by Mr. Kimatrai, viz., that since the applicant has repudiated the contract as void and impossible and has urged frustration of commercial adventure he cannot take advantage of the submission clause, the evidence shows that the applicant in para. 1 of his written statement in Suit No. 286 of 1924 drew attention to the fact that the contract was made subject to the rules and regulations of the New Sugar Merchants Association and that the plaintiff was bound by the rules which might be framed and changes that might be made from time to time by the Association. In para. 2 he referred to the fact that the Association about 31st May prohibited the merchants from doing any business in white Java sugar for the July *vaida* and prohibited the giving or taking delivery in respect of sugar of outstanding contracts of July *vaida*, and contended that all the dealings in respect of the July *vaida* were suspended, the contract having been declared cancelled. In para. 2 (b) he contended that in view of the contract between himself and the opponent and the prohibition to deal in July *vaida* sugar he could not pay for and take delivery of the sugar being exempted from performing his part of the contract which became impossible. In para. 2 (c) he alleged that the contract being in contravention of the rules of the New Sugar Merchants Association and without their sanction was void. In para. 2 (d) he denied liability to pay damages and contended without prejudice that at most plaintiff could only claim damages at the rate prevailing on 31st May when the Association prohibited business for the July *vaida* and the plaintiff came to know that the defendant would not perform his part of the contract. In para. 3 (b) he contended that the contract was void on account of frustration of commercial adventure and on account of change of circumstances. In other words as was pointed out by Dake, L. J., in the Court of Appeal in the case of *Woodall v. Pearl Assurance Co.* (8), the defendant founded himself upon the contract and not upon a repudiation of the existence of the contract "as was pointed out by Lord Reading, C. J. in *Stebbing v. Liverpool & London & Globe Insurance Co.*,

(9), the material question upon this matter of repudiation is whether what is alleged by the defendants is something which gives the go-by to the contract, that is to say, which arises outside and exists independently of the contract and avoids it by its own force, or whether what is alleged is some ground of defence arising upon the contract itself. In the present case the ground upon which it is said that the plaintiff has no claim is spelt out of the language of the contract itself. Taking this view it seems to me that *Jureidini v. National British and Irish Millers Insurance Co.* (10) which depended entirely upon the repudiation of the contract by the defendants has no application". The distinction between those cases where the defendant alleges circumstances existing independently of the contract and avoiding it by their own force and cases where the defendant alleges a ground of defence arising upon the contract itself was emphasized by Raymond, A. J. C., in *Jivraj Lakhamji v. Tahkandas Mohandas* (11). If the test referred to in the above case and in *Woodoll v. Pearl Assurance Co.* (8) is applied to the present case it is abundantly clear that the present case belongs to the latter group of cases in which the defendant seeks to avoid the contract by alleging a ground of defence arising upon the contract itself. For there was nothing in the contract itself to offend against public policy or morality or any other extraneous circumstance which would render the contract inherently void in itself or impossible of performance. What the defendant relied on was that the contract declared that it was made subject to the rules and regulations of the New Sugar Merchants Association and such rules and changes as might be enacted thereafter. The New Sugar Merchants Association on the 31st May passed a resolution prohibiting contract for the July *vaida* and prohibiting the giving and taking of delivery in contract already made for the July *vaida*. Such prohibition of course could have no effect whatever but for the clause in the contract itself. So it is clear that the defendant founded himself upon the contract and not on a repudiation of the existence of

(9) (1917) 2 K. B. 433; 86 L. J. K. B. 1155; (1917) W. C. & Ins. Rep. 241; 117 L. T. 247; 33 T. L. R. 395.

(10) (1915) A. C. 499; 84 L. J. K. B. 610; (1915) W. C. & Ins. Rep. 239; 112 L. T. 239; 29 S. J. 205; 31 T. L. R. 132.

(11) 58 Ind. Cas. 790; 14 S. L. R. 91 at p. 93.

the contract. I am of opinion, therefore, that this objection to the application also fails.

The application is accordingly granted with costs.

Z. K.

Application granted.

P. B. A.

ODDH JUDICIAL COMMIS- SIONER'S COURT.

FIRST CIVIL MISCELLANEOUS APPEAL No. 28
OF 1925.

August 31, 1925.

*Present:—*Mr. Simpson, A. J. C.

**BANKATESHWAR RAWAN
BAHADURPAL SINGH—DEFENDANT—
APPELLANT**

versus

**FIRM DINA NATH BALGOBIND—
PLAINTIFF—RESPONDENT.**

*Civil Procedure Code (Act V of 1908), O. XXXIV,
r. 3, cl. (2)—Decree for foreclosure—Discretion to extend
time—Good cause.*

Under the proviso of O. XXXIV, r. 3, cl. (2), C. P. C., it is only upon good cause shown that the Court may postpone the day fixed for the payment of money under the foreclosure decree. But a very wide interpretation is to be given to those words. The fact that the judgment-debtor was not able to raise money, but could do so if time was given, is a good cause. [p. 936, col. 2; p. 937, col. 1.]

Jokhan Singh v. Debi Singh, 50 Ind. Cas. 201; 6 O. L. J. 94, referred to.

Judgment-debtors in decrees for foreclosure are always treated with indulgence. A mortgage is a transaction in which money is lent and immoveable property is pledged as security for re-payment. The Courts have always lent in the direction of enforcing the original contract, that is to say, the re-payment of the money, rather than the penalty, that is, the foreclosure. [p. 936, col. 2.]

Miscellaneous appeal from an order of the Subordinate Judge, Partabgarh, in Regular Suit No. 5 of 1924, dated the 29th day of November 1924.

Mr. M. Wasim, for the Appellant.

Mr. Radhe Krishna, for the Respondent.

JUDGMENT.—This is the first miscellaneous appeal. The order appealed from consists of the single word "rejected." What was rejected was an application under O. XXXIV, r. 3 for extension of time for depositing money due under a decree absolute for foreclosure. The absolute decree was passed on 13th May 1924. The amount was Rs. 7,000 mortgage money, together with Rs. 545 costs with future interest on Rs. 7,000 from the date of institution, that is 10th January 1924, to the date of

realization, that is 13th November 1924. The decree was in the usual form, and provided that in default of deposit of the money, the mortgaged property should be foreclosed. The decree-holder put in his application without delay on 15th November 1924. No money had been deposited but the mortgagee, the present appellant, had already on 30th October 1924 put in an application for three months' extension of time up to 13th February 1925. This application came up for orders with the decree-holder's application on the 29th November 1924, and it was dismissed, as I have said, by the single word "rejected."

Now judgment-debtors in decrees for foreclosure are always treated with indulgence. A mortgage is a transaction in which money is lent and immoveable property is pledged as security for re-payment. The Courts have always lent in the direction of enforcing the original contract, that is to say, the re-payment of the money, rather than the penalty, that is the foreclosure. In Fisher's Work on Mortgages, 6th Edition at page 979, para. 1955 it is said:

"The enforcement of the strict terms of that part of the judgment in a foreclosure suit which directs absolute foreclosure upon non-payment of the redemption money on a certain day, is in the discretion of the Court, which may relieve against it either by a postponement of that day, or by an actual opening of the foreclosure, after the day has been suffered to pass without payment."

He goes on to explain in the following paragraph that, "It is only in a foreclosure action, as a general rule, and not in an action for redemption, that this indulgence is granted, because, in the latter case, the mortgagor comes to the Court for relief professing that his money is ready; but, in a foreclosure suit, he redeems by a compulsion. So the mortgagor's suit for redemption will be dismissed after the day appointed for payment has passed, though he has subsequently tendered the principal and interest due to the day of the tender."

He adds that a third and even a fourth extension of time have been given. No doubt under the proviso of O. XXXIV, r. 3, cl. (2), it is only upon good cause shown that the Court may postpone the day fixed. But a very wide interpretation

is given to these words. In *Jokhan Singh v. Debi Singh* (1), it was said:

"Good cause is required. But good cause is present. The good cause is that the mortgagees lose nothing by the arrangement according to the terms of the decree."

The Court was referring to O. XXXIV, r. 8. But that makes no difference. An order for foreclosure is if anything a better case for indulgence than an order for sale. In the present case the cause given was that the mortgagor could not raise the money at that time, but that he could do so if he was given three months. That was enough to allege for a first postponement.

The order appealed against is clearly wrong, because if the learned Subordinate Judge considered that there was no good cause for enlarging the time, he ought to have said so. There is nothing to show that he applied his mind to the question at all.

For these reasons, I allow the appeal, and set aside the order dismissing the application. But the appellant has had many months more than the three months which he asked for in October 1924. He is entitled now only to a very short postponement. I allow him one month from to-day's date within which he must pay the entire sum due under the decree, otherwise the foreclosure will take effect. I make no order as to costs.

N. H.

Appeal allowed.

(1) 50 Ind. Cas. 201; 6 O. L. J. 94.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1405 OF 1921.

February 26, 1925.

Present:—Mr. Justice LeRossignol and Mr. Justice Fforde.

BELI RAM & BROS.—VENDEES—
DEFENDANTS—APPELLANTS

versus

RAM LAL—DECREE-HOLDER—PLAINTIFF AND
MUHAMMAD HUSSAIN AND OTHERS—

DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIX, r. 1—Injunction restraining transfer of property—Sale in defiance of injunction, validity of—Vendee taking bona fide without notice.

A temporary injunction restraining a party to a suit from making a transfer of certain property has not the effect of avoiding a sale of the property carried out in

defiance of the restraining order where the transferee is a *bona fide* purchaser for valuable consideration without notice of any fraud or collusion on the part of the vendor. [p. 938, cols. 1 & 2.]

Second appeal from a decree of the District Judge, Lahore, dated the 18th April 1921, reversing that of the Subordinate Judge, First Class, Lahore, dated the 21st June 1920.

Messrs. *Badri Das*, *M. N. Mukerji* and *Kidar Nath*, for the Appellants.

Lala Shamair Chand, for the Respondents.

JUDGMENT.

Fforde, J.—On the 30th of October 1918 Ram Lal, the plaintiff in the present suit obtained a decree for Rs. 2,057-6-0 against Muhammad Hussain and his wife *Musammam* Moti Begam, who are the defendants Nos. 2 and 3 in the present suit. During the pendency of the previous suit, namely, on the 2nd of February, 1915, the Court issued a temporary injunction restraining Muhammad Hussain and *Musammam* Moti Begam from transferring a certain house situate on the Railway Road.

On the 28th of October 1918 the house in question was sold by *Musammam* Talia Begam (mother of *Musammam* Moti Begam), who is defendant No. 4 in the present suit to Messrs. Beli Ram and Brothers, Druggists of Lahore, the first named defendants in the present suit, for Rs. 25,000, the sale-deed being registered on the 4th of November 1919. This deed was signed by *Musammam* Moti Begam as a witness.

The plaintiff brought the present suit for a declaration that the house in question is still the property of Muhammad Hussain and *Musammam* Moti Begam, and that it is liable to attachment and sale in execution of the decree of the 30th of October 1918. He prays that the sale effected by *Musammam* Talia Begam in favour of Messrs. Beli Ram and Brothers be declared null and void as against him, on the ground that it was a collusive and fictitious transaction carried out with a view to prevent the realisation of plaintiff's decree.

The defendants Beli Ram and Brothers contend that they are *bona fide* purchasers of the house for value and without notice of the injunction or of any fraud or collusion on the part of the vendor to defeat creditors.

It appears that the site of the house in question was originally bought by *Musammam* Moti Begam with the proceeds of

dower money given to her by her husband. The purchase was effected in the name of her mother *Musammatt Talia Begam* in order to safeguard the property from the creditors of *Muhammad Hussain* and his wife.

In order to provide money to build the house now in dispute the site was mortgaged by a number of mortgage-deeds executed by *Musammatt Talia Begam*. It is recited in one of these deeds that *Musammatt Moti Begam* is the owner of half the house. Two of these deeds were executed by both *Musammatt Talia Begam* and *Musammatt Moti Begam*.

The Trial Court has held that in view of *Musammatt Moti Begam's* conduct in attesting the deed of conveyance to Messrs. *Beli Ram and Brothers* she is estopped from disputing the latter's title to the premises, and that as the judgment-creditor can have no better right than *Musammatt Moti Begam* to contest this sale, he is also, estopped. In my opinion the conclusion of the first Court in this respect is sound.

The learned District Judge was of opinion that the sale to Messrs. *Beli Ram and Brothers* was invalid owing to the injunction prohibiting *Muhammad Hussain* and *Musammatt Moti Begam* from transferring the property. In my opinion this view as regards the effect of the temporary injunction is incorrect. Apart from the fact that the injunction was not directed against *Musammatt Talia Begam*, the assignor of the premises, such an injunction has not the effect of avoiding a sale carried out in defiance of the restraining order. The learned District Judge has treated the order for an injunction as though it were an order attaching the property. It has been held in *Delhi and London Bank, Ltd. v. Ram Narain* (1) that where property has been attached by order of the Court, any transfer of the property in face of such an attachment is void if the attachment has been made by "actual seizure or by written order duly intimated or made known." But a temporary injunction has no such effect. The plea of the defendants, Messrs. *Beli Ram and Brothers* that they are *bona fide* purchasers for value does not appear to have been challenged. There is no finding by the learned District Judge that there was anything collusive or fictitious as regards the sale to them and accordingly we must take

it that they were *bona fide* purchasers for valuable consideration without notice of any fraud or collusion on the part of the vendor.

For the reasons I have given I would accept the appeal, set aside the decree of the lower Appellate Court and restore the decree of the first Court. Costs in the Court below and in this Court to be paid by the plaintiff. The plaintiff's costs in the first Court to be paid by defendants *Muhammad Hussain* and *Musammatt Moti Begam*.

LeRossignol, J.—I agree.

Z. K.

Appeal accepted.

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL No. 1300
OF 1924.

July 27, 1925.

Present:—Mr. Justice Boys and
Mr. Justice Banerji.

Lala SHEO PRASAD—DECREE-HOLDER—
APPELLANT

versus

Musammatt NARAINIBAI—OBJECTOR—
RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Execution of decree—Application asking for attachment and sale of property outside jurisdiction of Court—Good faith—Extension of limitation—"For execution", "step-in-aid of execution", meaning of.

The words "for execution" and "step-in-aid of execution" in cl. (5) of Art. 182 of Sch. I to the Limitation Act mean "for the purpose of obtaining execution" and "step taken for the purpose of obtaining execution" respectively. [p. 940, cols. 1 & 2.]

The *bona fides* or *mala fides* of an earlier application for execution is an important ingredient in determining whether that application is effective for the purpose of saving limitation under cl. (5) of Art. 182 of Sch. I to the Limitation Act for a later application, though the *bona fides* or *mala fides* of the later application cannot be judged at the time when it is presented from anything that has gone before and, therefore, cannot at the time of presentation be entered into. [p. 943, col. 1.]

An application for execution which asks the Court for a relief which the Court cannot grant, for instance, the attachment and sale of property outside the jurisdiction of the Court, is not an application in accordance with law within the meaning of cl. (5) of Art. 182 of Sch. I to the Limitation Act and does not operate to extend limitation under that clause. [p. 944, col. 2.]

[Case-law considered.]

Execution second appeal from a decree of the Subordinate Judge, Budaun, dated the 8th March 1924.

Mr. S. A. Haider, for the Appellant.

Mr. P. L. Banerji, for the Respondent.

(1) 9 A. 497; A. W. N. (1887) 107; 5 Ind. Dec. (N. S.) 769.

JUDGMENT.—Lala Sheo Prasad, appellant here obtained a simple money decree against Isri Prasad, husband of Musammatt Narainibai respondent here in the Court of the Munsif of East Budaun on the 9th of March 1915. On the 12th of November 1918 he applied for execution. On the 23rd of January 1920 this application was struck off with the consent of the decree-holder. On the 4th of March 1921 he applied again for execution to the Munsif of East Budaun. The relief asked for in that application was that certain property be attached and brought to sale. There was a further reference to the heirs of the deceased judgment-debtor but it is admitted now on behalf of the respondent that there had been a previous application to bring the heirs on the record and that the reference to these heirs in the application of the 4th of March 1921 can have no bearing on the matter which we have to decide. This matter need not, therefore, be further referred to and the application of the 4th of March 1921 will be considered as being simply one for the attachment and sale of certain property. On the 19th of April 1921, if not before, the attention of the decree-holder was drawn to the fact that all the property for attachment and sale of which he prayed was outside the jurisdiction of the Munsif of East Budaun and he was ordered to explain how the Court had any power to proceed against it. Pending that explanation being received the application was to remain pending. On the 29th of April 1921 as no explanation had been given by the decree-holder, the application was dismissed and on the same date he took back all the process-fees that he had deposited. A further application was filed by the decree-holder for execution on the 12th of January 1923. This time the property detailed was within the jurisdiction of the Munsif of East Budaun who had passed the decree. The Munsif dismissed the application holding that it was barred by limitation, limitation not being saved by the previous application of the 4th of March 1921, in that that application was not in accordance with law, as the property was outside the jurisdiction of the Court and no application had been made, even after opportunity had been given, to transfer the decree to the Court in whose jurisdiction the property was situate. In appeal the Subordinate Judge held that the application was made to the proper Court and con-

curred with the Munsif that it was not in accordance with law and, therefore, could not save limitation.

It is not suggested that during the twelve days prior to the dismissal of the previous application on January 23rd, 1920 any act was done by the decree-holder which would bring his present application of January 12th, 1923 within the period of limitation. The sole question, therefore, is whether the proceedings on the application of March 4th, 1921 constituted an "application in accordance with law to the proper Court for execution, or to take some step-in-aid of execution".

The memorandum of appeal to this Court contains two grounds:—

(1) that the application of the 4th of March 1921 was a "step-in-aid of execution," and

(2) that the application was made to a proper Court.

We have noted that the Subordinate Judge held that the application was made to a proper Court and this ground was, therefore, superfluous. As to the second ground it may be remarked that the application is more correctly to be described as an application for execution rather than as a step-in-aid of execution.

For the appellant it has again been argued here (1) that the application was made to a proper Court; (2) that the fact that the property specified as liable to attachment was outside the jurisdiction of the Court did not render the application one not "in accordance with law".

A third point taken that an alleged request in the application that the heirs be brought upon the record would in any case prevent the application being wholly one not in accordance with law was, as we have noted, abandoned in this Court as not being justified by the circumstances of the case. We have further pointed out that it was conceded by the lower Appellate Court and we may add that it has not been disputed here that the application was made to a proper Court. There is, therefore, only one question remaining for determination, namely, do the facts that *all* the property specified was outside the jurisdiction of the Court and that there was no prayer at any time before the application was struck off (though the Court allowed time for amendment) to transfer the decree for execution to the Court in whose jurisdiction the pro-

perty was situated render the application of the 4th of March 1921 one "not in accordance with law."

What is the meaning of this phrase? At an early stage of the case Counsel for the appellant was asked whether, if it were to be held in the circumstances that the application was not made with any *bona fide* intention of proceeding to execution but merely with the intention of saving limitation, it could rightly be held to be "an application for execution" or "a step-in-aid of execution". Counsel very properly and frankly admitted that it was a very common practice for decree-holders to put in a colourable application asking for execution which they did not mean seriously to prosecute, but which they allowed to be dismissed, merely with the intention of relying upon the fact that they had made such an application in order to obtain a further period of three years before execution of the decree could be held to be barred by limitation. He urged that the test of whether the application was made in good faith with a real intention to proceed to execution was never applied.

It may be true to say that this aspect of such proceedings has been to a great extent lost sight of, but it is not accurate to say that the test has never been applied.

On general principles it would seem clear that the Legislature when it used the phrases "application for execution" and "step-in-aid of execution" had in mind a *bona fide* intention on the part of the decree-holder to proceed with his right to have execution. It does not seem possible that the Legislature should have ever contemplated an indefinite period being added to the life of a decree by permitting a decree-holder to take colourable steps in a very thinly disguised pretence of a desire to obtain execution when he really did not want execution at all, but only wanted to secure a further period of limitation during which the amount of his decree might go on increasing. It would, therefore, seem on the face of it a proper interpretation of the words "for execution" and "step-in-aid of execution" that the decree-holder must really be desiring execution and that the words cannot be read as "an application made with the sole object of extending the period of limitation" and "a step taken with the sole object of extending limitation." The words "for execution" mean "for the purpose of obtaining execution"

and the words "step-in-aid of execution" mean "step taken for the purpose of obtaining execution." This which appeared upon a consideration of Art. 182 to be a natural and proper interpretation re-search has shown to have the support of weighty judicial authority, though the decisions would seem to have been to some extent lost sight of, or, if we may say so misinterpreted.

In *Jahar v. Kamini Debi* (1) while Prinsep and Hill, JJ, held that the application which was filed to save limitation was a good application in accordance with law, reliance was further placed on the fact that even if the alleged defect on account of which it was urged that the application failed in effect was a real defect, the prosecution of the proceedings had been '*bona fide*' and reference was made to the Privy Council decision in *Hira Lal v. Badri Das* (2). To this Privy Council decision we shall refer later.

In *Gopal Chunder Manna v. Gosain Das Kalay* (3), the application was held to be a valid application. There was no suggestion that the applicant did not really desire to press the execution proceedings; in other words, there was no suggestion of a mere desire to save limitation.

Banerji, J., in his order referring the case to a Full Bench held "It is not every informality that would vitiate an application and take it out of that clause. Were it otherwise, *bona fide* applications for execution would fail to save limitation owing to trivial defects of form, a result which I do not think the Legislature could have intended." Maclean, C. J., in delivering the judgment of a Full Bench of five Judges in which all concurred, said "I am in entire agreement with the opinion he (Mr. Justice Banerji) has expressed upon the question of whether the application for execution of the 7th July 1891 was or was not one according to law. I concur both in the reasoning and in the conclusion expressed by Mr. Justice Banerji." Here we find again a clear reference to the importance to be attached to the question whether the application was a *bona fide* effort to proceed with execution.

(1) 28 C. 238; 5 C. W. N. 150.

(2) 2 A. 792; 6 C. L. R. 561; 7 I. A. 167; 3 Shome L. R. 211; 4 Ind. Jur. 426; 4 Sar. P. C. J. 157; 3 Suth. P. C. J. 761; 1 Ind. Dec. (N. S.) 1090 (P. C.).

(3) 25 C. 594; 2 C. W. N. 556; 13 Ind. Dec. (N. S.) 392.

In *Adhar Chandra Dass v. Lal Mohun Das* (4), Banerji, J., in rejecting various cases that had been referred to as supporting the argument that the application was not in accordance with law said "None of those cases is in point; and I do not think we should be doing right in straining the law and in holding that an application made *bona fide* with the object of obtaining satisfaction of a decree should be held to be not in accordance with law, merely because the Court in which the application was made thought fit, for some reason, not to allow the same." Stress was here again laid on the aspect of *bona fides*.

In *Mangal Sen v. Baldeo Prasad* (5) though there was no detail of the property given in the application, the decree-holder further stated in his application that he would file a list later, but "at present for the purposes of saving limitation, this application is made owing to the defendant having become insolvent." The application was registered but no list was filed and no further steps were taken and a month later the application was struck off. Mahmood, J., held that by the very statement of the decree-holder and the fact that he took no steps to make the application effective, the application was clearly shown to be nominal and fictitious, and was, therefore, not in accordance with law.

In *Chattor v. Newal Singh* (6), the application asked for something which "the Court was not competent to do" Straight and Tyrrell, JJ., held that the application must be for "something which by law the Court is competent to do" and not for "something which either to the decree-holder's direct knowledge in fact, or from his presumed knowledge of the law, he must have known the Court was incompetent to do." Here again is a strong indication that the application must be made with the *bona fide* intention of getting execution.

In *Mahtab Kuar v. Sham Sunder Lal* (7), Mahmood, J., held that if he had not been dismissing the application on another ground he would further have held that it did not amount to a step-in-aid of execution because it was not made *bona fide* to obtain execution. The decree-holder had failed to

pay process-fees and when called upon to do so had declared his intention of not prosecuting the application.

We now come to three decisions of their Lordships of the Privy Council.

In *Mungal Pershad Dichit v. Girja Kant Lahiri* (8) when holding that an application was effective their Lordships of the Privy Council remarked "nor was there any finding of either of the Courts below that the several proceedings were not *bona fide* for the purpose of enforcing the decree or of keeping it in force." And they gave reasons why it could not be held that the application of the decree-holder to strike off his application could not be held to be other than *bona fide*.

In *Hira Lal v. Badri Das* (2) which came before their Lordships in 1880, the decree-holder had been prosecuting execution in the Court of a Subordinate Judge who was believed by both the parties and moreover by the Subordinate Judge himself to have jurisdiction; though subsequently he was held not to have jurisdiction. Their Lordships of the Privy Council held that the principle of s. 14 of Act XIV of 1859 (now s. 14 of Act IX of 1908) based on *bona fides* must be applied to s. 20 of Act XIV 1859. (Now Art. 182 of Sch. I of Act IX of 1908), and, applying that principle, that *bona fide* proceedings in the wrong Court gave a new starting point of limitation. They referred to *Roy Dhunput Singh v. Madhomotee Debia* (9) and said "their Lordships are of opinion that a proceeding taken *bona fide* and with due diligence before a party whom the party *bona fide* believes, though erroneously, to have jurisdiction, specially when the Judge himself also supposes that he has jurisdiction, and deals with the case accordingly, is a proceeding to enforce the decree within the meaning of s. 20." It should be noted that the principle was applied not merely to exclude the time mistakenly occupied but to give a new starting point. This is clear from the passage quoted and also from the reliance placed on *Roy Dhunput Singh v. Madhomotee Debia* (9). It is also clear from the fact that an examination of the dates quoted by their Lordships shows that if merely the time mistakenly occupied was to be excluded, the later

(4) 24 C. 778; 1 C. W. N. 676; 12 Ind. Dec. (N. S.) 1188.

(5) A. W. N. (1892) 70.

(6) 12 A. 64; A. W. N. (1889) 200; 6 Ind. Dec. (N. S.) 790.

(7) A. W. N. (1888, 272,

(8) 8 C. 51; 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32 (P. C.).

(9) 11 B. L. R. 23; 18 W. R. 76; 3 Sar. P. C. J. 131 (P. C.).

application would still have been long after the period of limitation had expired.

In *Roy Dhunput Singh v. Madhomotee Debia* (9), the application failed owing to a *bona fide* mistake by the decree-holder as to an attachment that he thought he had made of money standing to the credit of the judgment-debtor while the attachment had in fact been made in another suit. The Privy Council held that the application having been made *bona fide* the period of limitation began to run from the date of the disposal of the application by the Court. In delivering their judgment at page 31* their Lordships said "it is said that this proceeding cannot be held to be one to keep the judgment in force, because it was a petition to obtain execution of a sum of money which it was not possible that the execution could reach and that that must have been so to the knowledge of the decree-holder. It seems to their Lordships that these circumstances really affect only the *bona fides* of the proceeding. If their Lordships could infer from these facts that the petition was a colourable one, not really with a view to obtain the money; if they could come to that conclusion in point of fact, the proceeding would not be one contemplated by the Statute; but their Lordships cannot come to that conclusion". They, therefore, came to the conclusion that the proceeding, although abortive, was a proceeding within the meaning of s. 20 of Act XIV of 1859 (now Art. 182 of Schedule I of Act IX of 1908).

The above cases suffice to show that the application of the test of *bona fide* to determine whether an application is really one for execution is not novel.

It is only necessary to note that though there are differences between the contents of s. 20 of Act XIV of 1859 and of Art. 182 of Sch I of the present Act IX of 1908 there is no difference that is material to the matter we are considering. The words in s. 20 were "no process of execution"; the words in Art. 182 are "no application for execution, or to take some step-in-aid of execution". In neither section is there any specific mention of *bona fides*. If their Lordships held that *bona fides* was necessary to make "a process for execution" effective, it follows that the same interpretation should be put on the words application for execution or step-in-aid of execution."

Counsel for the appellant stated that since 1871 the *bona fides* or *mala fides* of the application has been immaterial. He did not develop this proposition beyond relying on a passage that he quoted from a commentary. It is true that the author makes that statement but we have not been able to find any real support for it in the authorities quoted by him.

The idea, in so far as it exists, would appear to have its origin in the decision of the Full Bench, *Eshan Chunder Bose v. Prannath Nag* (10). In that case Jackson and McDonell, JJ., in their referring order, wanted to maintain the incorporation of the principle of *bona fides* to stop a succession of colourable applications.

The idea underlying both the referring judgment and that of the Full Bench was that the question was whether the later application could be refused being held to be colourable merely because the previous application had been colourable, i.e., *mala fide* as indicated by the fact that the decree-holder had allowed it to go by default.

Clearly the Full Bench was right in holding that the later application could not be refused merely for that reason. The decree-holder was entitled to make an application and until he defaulted in prosecuting it (when it would for that reason be struck off) it could not be known whether that latest application was being made with a *bona fide* intention to proceed or not. The later application might well be being made with a *bona fide* intention to proceed though the previous one was not, and the later could not, therefore, be treated as *mala fide* merely because the earlier was.

But the proceedings on the earlier application having *ex hypothesi* been concluded, it would be possible to determine whether the facts showed it to have been *mala fide*, and, if it was, then, though it could not be held to show that the later application was also *mala fide* it could be held not to be an application "for execution," i.e., "intended to obtain execution" and, therefore, ineffective to save limitation.

The two aspects are quite distinct. The former was clearly before the Full Bench, the latter was not; and on the principle stated in *Quinn v. Leathem* (11) particular phrases used by Couch, C. J. should not

(10) 22 W. R. 512; 14 B. L. R. 143 (F. B.).

(11) (1901) A. C. 495 at p. 506; 70 L. J. P. C. 76; 65 J. P. 708; 50 W. R. 139; 85 L. T. 289; 17 T. L. R. 749.

be treated as governing a question not directly considered.

Jackson, J., when reluctantly concurring, remarked that inasmuch as the Legislature must be supposed to have been aware of the earlier decisions incorporating the rule of *bona fides* into s. 20 of Act XIV of 1859 and as it, "as I supposed designedly omitted to incorporate in the Act of" (of 1871) "the principle of those decisions, I think we ought now to abstain from qualifying the precise terms of the Act." It would seem, however, that the Legislature would presumably have only legislated if it disagreed with the principle already strongly affirmed judicially.

We think that it is clear from the cases later in date that we have quoted that the principle has been frequently recognised that the *bona fides* or *mala fides* of the earlier application is an important ingredient in determining whether that application is effective to save limitation for the later application; though the *bona fides* or *mala fides* of the later application cannot be judged at the time that it is presented from anything that has gone before and, therefore, cannot at the time of presentation be entered into.

To examine now the circumstances of this case, the decree-holder had obtained a decree as long ago as March 9th, 1915. He then made two applications for execution both of which he allowed to be struck off for non-prosecution (*baadam pairawi*). Next he made an application on November 12th, 1918 which he allowed to be struck off on January 23rd, 1920. His next application was on March 4th 1921, and this is the crucial application in the case. It contained a prayer that certain property be attached and brought to sale, but none of that property was within the jurisdiction of the Court passing the decree and to which application was made. This was drawn to his attention and he was given an opportunity to amend his application. All that he had to do was to apply for the transfer of the decree. This he failed to do and it was not till a period of nearly two months had elapsed that his application was struck off, and on the same day he withdrew all the process fees that he had deposited. The property in regard to which he had applied was not situated in any other Province or at any great distance; it was situated in the jurisdiction of the adjoining Munsif, i. e., in the juris-

diction of the Munsif of West Budaun, and if the decree-holder had been serious in an attempt to obtain execution there would have been no difficulty in applying for a transfer to the Munsif of West Budaun and prosecuting the execution in that Court. Further we note that when he made the present application in regard to which the question of limitation has to be considered he applied in regard to property within the jurisdiction of the Munsif of East Budaun. It would appear, therefore, that there was property within that Munsif's jurisdiction. Finally we note that after his application of March 4th, 1921 which was struck off on the 29th April 1921 he made no further attempt to obtain execution until he filed the present application on January 12th, 1923, nearly two years later. Under these circumstances it is impossible to hold that the application of March 4th, 1921 was a *bona fide* application with the intention of obtaining execution. It was merely a colourable application intended to save limitation and with that intention only. Such applications made only with the intention of keeping the decree alive have, it may further be noted, since 1877 been dropped out of the appropriate Article of the Limitation Acts.

We have been asked to remand the case. We see no reason to do so as we have the whole history of the case before us. Counsel for the appellant who has displayed great industry on behalf of his client has had more than a month since the question was raised at the first hearing before us, in which to consider this matter of the good or bad faith of the earlier application, and it is certainly no fault of his if he has been unable in the circumstances of the case to take up any other position than that decree-holders habitually file colourable applications merely to save limitation and allow the debt to accumulate and the question of their *bona fides* is never challenged. As we have shown it cannot be challenged at the time of presentation and if the application is not prosecuted it is struck off, but it can be and should be challenged when the application comes to be used to save limitation. Further we may note that a remand could not in any event avail the appellant for as we shall proceed to show, the appeal must fail on a second ground also.

This being our view of the law and of

the facts we hold that the application of March 4th, 1921 was not an application "for execution" or "a step-in-aid of execution" and that the application of January 12th, 1923, was barred by limitation and the appeal must be dismissed.

As to the second point we hold that the application of the 4th March 1921 was not in accordance with law in that it asks the Court to do something which it was not competent to do. On behalf of the appellant we have been referred to *Ramasami Ayyangar v. Seshayyengar* (12), *Ramanandan Chetti v. Periatambi Shervai* (13), *Rama v. Varada* (14), *Samia Pillai v. Chockalinga Chettiar* (15), *Mangal Khan v. Salim Ullah Khan* (16), *Aptapuddin Ahmad v. Jogendra Narain Tewari* (17), *Nathubhai Kusandas v. Pranjivan Lalchand* (18) and *Bando Krishna Kanbargi v. Narsinha Konher Deshpande* (19). We will very briefly consider these cases.

In *Mangal Khan v. Salim Ullah Khan* (16), the applicant filed no succession certificate and it was held that that did not render the application one not in accordance with law. There is nothing in that case to show that the decree-holder was given any time to file the certificate as he should have been and that he neglected to file it. The case is clearly analogous to the case in *Nathubhai Kasandas v. Pranjivan Lalchand* (18) quoted by the appellant but which is really against his contention. In both cases the Court was competent to order that the execution should begin on the decree-holder making good the defect within a certain time. In the present case the Court could not order execution at all; it could not do at all what it was asked to do, i. e., to attach and sell.

The same remarks apply to *Ramasami Ayyangar v. Seshayyengar* (12). In the case of *Rama v. Varada* (14), there was a purely formal defect and in *Samia Pillai v. Chockalinga Chettiar* (15) a bona fide mistake. In view of the rulings of this Court to which we shall next refer none of the above cases nor the case of *Ramanandan Chetti v. Periatambi Shervai* (13)

which to some extent helps the appellant need be further considered.

For the respondent we have been referred to *Chattar v. Newal Singh* (6), *Munawar Husain v. Jani Bijai Shankar* (20), *Langtu Pande v. Baijnath Saran Pande* (21) and *Jamilunnissa Bibi v. Mathura Parshad* (22). These cases clearly establish the proposition that whereas in this case the Court could not give the relief asked for, i. e., attachment and sale of property outside its jurisdiction, the application is not in accordance with law and at any rate in this Court must far outweigh any such slight inference as may possibly be drawn from the Madras cases quoted for the appellant. We, therefore, hold that the application was further not in accordance with law because it was made to a Court which was not competent to grant the relief asked for.

The result is that the appeal is dismissed with costs.

Z. K.

Appeal dismissed.

(20) 27 A. 619; 2 A. L. J. 376; A. W. N. (1905) 132.

(21) 28 A. 387; A. W. N. (1906) 54; 3 A. L. J. 143.

(22) 63 Ind. Cas. 362; 19 A. L. J. 509; 43 A. 550.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 226
OF 1924.

February 27, 1925.

Present:—Justice Sir Ewart Greaves, Kt.,
and Mr. Justice Mukerjee.

BHARAT CHANDRA CHAKRAVERTY
—DEFENDANT—APPELLANT

versus

Rai KIRON CHANDRA Rai Bahadur
AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XX, rr. 16, 17, O. XXVI, r. 11—Principal and agent—Accounts, suit for—Surcharging and falsifying, when allowed—Delivery of written accounts, whether discharges agent—Papers delivered to principal—Procedure—Commissioner, duties of—Duty of Court.

A suit by a principal for accounts on the allegation that the defendant, his agent, has not rendered any account, has an entirely different scope from that of a suit in which a principal alleges that the defendant, his agent, has rendered accounts and prays to have them re-opened or to have liberty to surcharge and falsify them on the ground of fraud or material error. It is only in the case of settled accounts that liberty has to be obtained by a plaintiff to surcharge and falsify. [p. 945, col. 2.]

An agent cannot discharge himself from the duty of accounting, by merely delivering to his employer a set of written accounts without attending to explain them and producing vouchers by which items of disbursement are supported. [p. 946, col. 1.]

(12) 6 M. 181; 2 Ind. Dec. (N. S.) 405.

(13) 6 M. 250; 2 Ind. Dec. (N. S.) 453.

(14) 16 M. 142; 5 Ind. Dec. (N. S.) 807.

(15) 17 M. 76; 4 M. L. J. 8; 6 Ind. Dec. (N. S.) 52.

(16) 16 A. 26; A. W. N. (1893) 197; 8 Ind. Dec. (N. S.)

18.

(17) 55 Ind. Cas. 231; 31 C. L. J. 389.

(18) 5 Ind. Cas. 601; 34 B. 189; 12 Bom. L. R. 13.

(19) 17 Ind. Cas. 210; 37 B. 42; 14 Bom. L. R. 861.

Before an order can be made for the appointment of a Commissioner to examine accounts, the examination and adjustment of accounts or the taking of accounts must be considered necessary. [p. 947, cols. 1 & 2.]

The determination of the *factum* of the liability of an agent to account is a matter which falls entirely within the province of the Court and cannot be delegated to a Commissioner appointed for the purpose of taking accounts. [p. 947, col. 1.]

Where in a suit for accounts it is found that the defendant has delivered to the plaintiff all the papers containing the account, it lies upon the plaintiff to point out entries in the account which he alleges to be erroneous or in respect of transactions not shown in the accounts and to state what moneys have been received and not credited and the Court will have to deal with the questions thus raised between the parties treating each item separately. In such a case it is the duty of the plaintiff to produce the accounts together with a succinct statement of what they contain and what the balance is, whether in favour of the plaintiff or against him. The Court will then decide as to each particular item or series of items, giving the defendant an opportunity of explaining, supporting or accounting for the said items. If on dealing with the questions so raised it is found that the defendant is liable a preliminary decree should then be passed directing a Commissioner to be appointed to examine and adjust the accounts on the basis of the findings of the Court on the questions decided as aforesaid and special directions should be given to the Commissioner as to the scope and limits of the investigation to be held by him so as to determine the extent of the defendant's liability. [p. 948, col. 2; p. 949, col. 1.]

It is only to prevent a waste of public time that resort is to be had to the appointment of a Commissioner, but when it is found necessary to have recourse to the provisions of r. 16 of O. XX of the C. P. C. the Court should follow the directions contained in r. 17 of the Order and furnish the Commissioner with such part of the proceedings and such detailed instructions as appear necessary. [p. 949, col. 1.]

. Appeal against a decree of the Officiating Subordinate Judge, First Court, Faridpur, dated the 25th September 1923, reversing that of the Munsif of that place, dated the 30th June 1922.

Babu Benode Lal Mukherjee, for the Appellant.

Babus Broja Lal Chuckerburty and Surendra Nath Bose, II, for Babu Surendra Chandra Sen, for the Respondents.

JUDGMENT.

Mukerjee, J.—This appeal arises out of a suit for accounts brought by the plaintiffs against the defendant who worked as their *Tahsildar*. The Court of first instance dismissed the suit. The lower Appellate Court has reversed the decision and passed a preliminary decree for accounts for the period in suit to be taken by a Commissioner to be appointed for the purpose. The defendant has thereupon preferred this appeal.

The appellant's contention substantially

is to the effect that upon the finding of the Court of Appeal below the plaintiffs' suit should have been dismissed. It is also urged that in view of the finding that the defendant has submitted all the papers which it was his duty to prepare and submit, the plaintiffs are not entitled to any decree in the absence of circumstances justifying the granting of liberty to the plaintiffs to surcharge and falsify. This last mentioned argument, however, is based upon a misconception, for it is not pretended that the accounts were ever settled between the parties in the present case. It is only in the case of settled accounts that liberty has to be obtained by a plaintiff to surcharge and falsify. A suit by a principal for accounts on the allegation that the defendant, his agent has not rendered any account, has manifestly an entirely different scope from that of a suit in which a principal alleges that the defendant, his agent has rendered accounts and prays to have them re-opened or to have liberty to surcharge and falsify them, on the ground of fraud or material error. The distinction has been clearly pointed out in the case of *Prasanna Kumar Mookerjee v. Burn & Co.* (1).

As regards the main contention of the appellant the matter stands thus. The plaintiffs' case was that the defendant worked as their *Tahsildar* up to *Poush* 1326 B. S. and had rendered accounts up to 1323, B. S. that although he submitted certain papers relating to the period from 1324 to the date of his dismissal, these papers were not explained by him and that certain other papers which he should have prepared were not submitted by him, and they claimed the papers mentioned in *Schedule kha* to the plaint as being due from the defendant. The plaintiffs also alleged that two boats which were in the defendant's charge had not been returned by him, for which they claimed the value along with other sums for which the defendant might be found liable on examination of the accounts. The defence was that the accounts had already been rendered up to the year 1325 B. S. That the defendant had been dismissed before the close of the year 1326 B. S. and so he could not be liable for the *nikashi* papers for that year, but that he had nevertheless submitted all the papers for the said year that he was in the ordinary course required to prepare. The

(1) 7 Ind. Cas. 270; 13 C. L. J. 165 at p. 175.

learned Subordinate Judge has distinctly found in his judgment that the defendant has submitted all the papers that it was his duty to prepare and submit, and that the plaintiffs, therefore, were not entitled to a decree for the papers mentioned in Schedule *kha* to the plaint. The learned Subordinate Judge has held, however, that mere submission of papers did not absolve the defendant from liability but that he is bound to explain them which he never did. He, therefore, made a decree which runs in these words "There be a preliminary decree for accounts for the period in suit and a Commissioner be appointed by the Trial Court for examination of the account papers submitted by the defendant but not explained by him. The defendant shall explain the papers to the Commissioner who will, after examining the same, ascertain what sums if any are payable by the defendant to the plaintiffs or *vice versa*. The lower Court will consider the plaintiffs' claim to the two boats referred to in the judgment. The appellant challenges the propriety of the decree on the ground that as the defendant has submitted all the papers there is no further liability of the defendant to account and it is disputed on his behalf that there is a liability on him to explain the accounts submitted by him. In support of this contention reliance is placed upon the decision of this Court in the case of *Upendra Kishore v. Ram Tara Debya* (2) and *Debendra Narayan Singh v. Narendra Narayan Singh* (3). These decisions were relied on by the learned Munsif in dismissing the plaintiffs' suit. There is, however, abundant authority for the proposition that an agent will not discharge himself from the duty of accounting, by merely delivering to his employer a set of written accounts without attending to explain them, and producing vouchers by which the items of disbursements are supported [See *Annoda Persad Roy v. Dwarkanath Gangopadhyaya* (4), *Shib Chandra Roy v. Chandra Narain Mukerjee* (5) and *Madhusudan Sen v. Rakhal Chandra Das Basak* (6).] The two cases cited on behalf of the appellant do not lay down any contrary proposition. In the first of these

cases the suit was for accounts against the defendant who had acted as the plaintiff's guardian during the plaintiff's minority and the plaintiff alleged that all the account papers were with the defendant. It was found as a fact that this allegation was wholly and deliberately false and that the account papers were with the plaintiff himself. It was held in that case that the plaintiff by falsely stating that the defendant had the accounts and by declining even in the final stage of the case to produce them had put himself out of Court and his suit should have been dismissed. In the other case the plaintiffs having all the account papers with them withheld them and it was held that every presumption should have been made against them as laid down in illustration (g) of s. 114 of the Indian Evidence Act, even to the extent of dismissing the plaintiffs' suit. In the present case the plaintiffs have produced some of the papers and expressed their willingness to produce some others and if they do not produce the rest which have been found to have been submitted by the defendant and offer no explanation for such non-production, the Court will be justified in making a presumption against them and the length to, which that presumption will go will depend upon the circumstances. The defendant, therefore, is not absolved from liability to account merely because he has submitted the papers. But the plaintiffs are not entitled to the decree which they have obtained merely because the defendant has not explained the papers. Upon the findings they have got all the accounts in their possession. They alleged in the plaint that the defendant had misappropriated large sums of money, and had made many false or incorrect entries in the accounts and had allowed a certain sum recoverable as a rent to be barred by limitation and they tentatively claimed Rs. 1,154-5-3 as being due from the defendant. They alleged further that the defendant had not submitted the papers mentioned in Schedule *kha* and had not explained the papers mentioned in Schedule *kha*. It was not stated, however, whether the plaintiffs had called upon the defendant to explain the accounts. The defendant, on the other hand, stated that nothing was due from him and that he had submitted all the papers and had also explained the accounts. The learned Munsif held that the plaintiffs did not produce all the papers which they had in their possession and

(2) 4 Ind. Cas. 542; 13 C. W. N. 696.

(3) 54 Ind. Cas. 636; 24 C. W. N. 110; 30 C. L. J. 417.

(4) 6 C. 754; 8 C. L. R. 321; 3 Ind. Dec. (N. S.) 489.

(5) 32 C. 719 at p. 724; 1 C. L. J. 232.

(6) 30 Ind. Cas. 697; 19 C. W. N. 1070 at p. 1075; 22 C. L. J. 552; 43 C. 248.

failed to prove the items mentioned in the plaint as having been wrongly or falsely entered or misappropriated by the defendant. The learned Subordinate Judge has found as I have already stated that no papers are due but that the accounts have not been explained and without finding whether any item requires explanation or has been wrongly or falsely entered has made a decree in favour of the plaintiffs. The decree passed under such circumstances can scarcely be justified.

On the finding that all the papers have been submitted, the plaintiffs were bound to call upon the defendant to explain the accounts which apparently they never did; and if the defendant had expressed his willingness to explain the accounts if called, upon to do so and averred that he had never been so called upon, we would have been bound to dismiss the plaintiffs' suit as being one without a cause of action. This, however, the defendant has not pleaded. Moreover the defendant appears to have sent the papers to the plaintiffs' Sadar Cutchery and then left, after which he was dismissed. It is, therefore, not very clear whether the plaintiffs were aware of the submission of the papers so as to necessitate their examining the accounts and calling upon the defendant to explain. The submission of the papers was neither regular nor formal, and the circumstances are not such as would justify us in holding that the plaintiffs should be non-suited for want of a cause of action.

At the same time we think that the decree has been too readily passed and the order for examination of the accounts has been made without proper findings or materials. If a decree were justified in the present case it will be open to any principal who has got all the accounts of his agent in his possession, to employ the machinery of the Courts for examining his accounts on the off-chance of making his agent liable for any sum which on such examination may be found due from him. Such indiscriminate issue of commissions by Courts for examining accounts has been condemned by this Court on more occasions than one, and is, indeed, contrary to the spirit of O. XX, r. 16 of the C. P. C. as authorizing a Commissioner to determine not merely the *quantum*, but the *factum* of liability of an agent, a matter which falls entirely within the province of the Court. The words of that rule as also of r. 11 of O. XXVI clearly indicate that before

an order can be made for appointment of a Commissioner the examination or adjustment of accounts or the taking of accounts must be considered necessary. In the case of *Chand Ram v. Brojo Gobind Doss* (7) which was a suit for an account of money received and disbursed, the plaintiff filed his *khata* books and did not allege that they had been falsified and the Court deputed an *amin* under s. 181 of Act VIII of 1859 to investigate the accounts, it was held that the plaintiff should have made up the accounts himself without troubling the Court in the matter and should have fixed the amount due to him from the defendant instead of stating a sum on guess. It was observed that it was surprising that it never struck the Judge as an unusual proceeding on the part of the plaintiff that being provided with account books the entries in which were disputed by him he should have asked the Court to balance the account for him instead of making up the total himself. In the present case the plaintiffs gave certain items in their plaint but the finding of the learned Munsif to which I have already referred was that none of them had been proved to be false or wrong, and that finding has not been reversed by the learned Subordinate Judge. The position in the present case, therefore, is very much the same as in the case to which I have referred. In the present case the Commissioner has been appointed to take the accounts which is entirely different from a reference made of the cause in a suit for accounts to a Commissioner. Where in a suit for account it was ordered by consent of parties that the case should be referred to a Commissioner to take accounts, who in taking them was to decide upon all questions of fact, whether as to delivery of certain merchandise delivered or otherwise with full powers for the purpose of the investigation and that if questions of law should arise and could not be settled or disposed of before the Commissioner, they were to be submitted to the Court their Lordships of the Privy Council were of opinion that such a reference was different from the ordinary reference to a Commissioner to examine accounts under the C. P. C., and expressed a doubt whether it was competent for the Court to re-open the question of account against a clear finding upon a question of fact relating to the account made by the Com-

missioner upon the evidence properly before him. *Watson v. Aga Mehdee Sherazee* (8). In the case of *Toncourti Debi v. Satya Dyal Banerjee* (9), where the accounts in a suit had been referred to a Commissioner appointed under s. 394 of the C. P. C., with powers under s. 398, Sir Comar Petheram, C. J., in delivering the judgment of the Court on the 2nd August 1889 observed as follows. :—

"It is perfectly clear that the object of this order was to refer to the Commissioner the examination of the accounts for the purpose of enabling the Court to see what the accounts were, and the duty of the Commissioner was to make out an account in the way an accountant should make out an account, showing to the Court exactly what was the account the books showed and nothing else. The business of the Commissioner was practically to place himself in the position of an assistant to the Court so as to give the Court all the information which the accounts gave so as to enable the Court to decide; and it is obvious that what was intended was that he should take the *Bengali* accounts which were filed in 1878 and should, by comparing them with the books, show whether they actually represented what the books showed. That was his duty and, if that had been done, then this Court would have been in a position when the matter came before it, to deal with the matter, because the Court would then have known what the books of the parties showed and would have been in a position to deal with them in a satisfactory way. It is true that under the sections which are mentioned here the Commissioner was entitled to take evidence for certain purposes and the purposes for which a Commissioner is entitled to take evidence are perfectly clear. Where the accounts are ambiguous or where they do not disclose the facts, it is the duty of the Commissioner to take evidence on that point so as to report to the Court what the meaning of a particular series of entries in those books is for the purpose of enabling the Court to give judgment upon them." It was held in that case that it was not clear that the parties had consented to refer the accounts to the Commissioner as an arbitrator and, therefore, the report of the Commissioner was to be treated as non-existent.

In the present case the scope of the Commissioner's enquiry does not appear to have been defined and the proceedings that were held before him after the decree was passed amply support that view.

The principles governing a suit of this nature are clearly laid down in a series of decisions amongst which reference may be made to the case of *Syed Shah Abai Ahmad v. Bibee Nusibun* (10). *Annada Prosad Roy v. Dwaraka Nath Gangopadhyo* (4) to which I have already referred *Degamber Mozumdar v. Kaly Nath Roy* (11), *Huri Nath Rai v. Krishna Kumar Bakshi* (12) and *Thirukumaresan Chetti v. Subbaraya Chetti* (13). Applying these principles to the present case which is somewhat out of the ordinary in that it has been found that no account papers are due to the plaintiffs, and where it is not alleged that the defendant has called upon to explain the accounts and has been neglected, failed or refused to do so, it follows that it lies upon the plaintiffs to point out entries in the accounts which they allege to be erroneous, or in respect of transactions not shown in the accounts to state what monies have been received and not credited and the Judge will have to deal with the questions thus raised between the parties treating each item separately. In such a case as observed in the case of *Upendra Kishore v. Ram Tara Debya* (2), it is the plaintiff's duty to produce the accounts in Court together with a succinct statement of what they contain and what the balance is whether in his favour or against him. This the plaintiffs have done to some extent in their plaint but they should be allowed a further opportunity of examining the accounts and putting before the Court the items they object to or challenge and then the Court will decide as to each particular item or series of items giving the defendant an opportunity of explaining, supporting or accounting for the said items. If on dealing with the questions so raised it is found that the defendant is liable then a preliminary decree should be passed directing the Commissioner to be appointed for the purpose to examine and adjust the accounts on the basis of the findings of the Court on the

(10) 24 W. R. 70.

(11) 7 C. 654; 9 C. L. R. 265; 3 Ind. Dec. (N. S.) 970.

(12) 14 C. 147; 13 I. A. 123; 10 Ind. Jur. 475; 4 Sar. P. C. J. 751; 7 Ind. Dec. (N. S.) 98 (P. C.).

(13) 20 M. 313; 7 Ind. Dec. (N. S.) 222.

(8) 1 I. A. 346; 3 Sar. P. C. J. 384 (P. C.).

(9) Appeal from Original Decree No. 323 of 1875.

questions decided as aforesaid and special directions should be given to the Commissioner as to the scope and limits of the investigation to be held by him so as to determine the extent of the defendant's liability.

A preliminary decree such as has been passed in the present case without any directions as to the scope of the examination such as the circumstances of the case require, is bound to operate to the prejudice and harassment of the defendant to which he should not be subjected in view of the finding that the account papers are not due from him and the fact that he has not been called upon to explain them. It is also open to this further objection that it delegates to the Commissioner the functions which legitimately appertain to the Court. It is only to prevent waste of public time that resort is to be had to the appointment of a Commissioner but when it is found necessary to have recourse to the provisions of O. XX, r. 16 the Judge should follow the directions contained in O. XX, r. 17 and furnish the Commissioner with such part of the proceedings and such detailed instructions as appear necessary.

We think, therefore, that the decree passed by the learned Subordinate Judge should be set aside and the appeal dealt with by him in the light of the directions given above.

Costs will abide the result.

Greaves, J.—I agree.

Z. K.

*Appeal allowed;
Case remanded.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 27 OF 1924.

October 16, 1924.

Present:—Mr. Kinkhede, A. J. C.

CHANDAN SINGH—APPLICANT—

versus

LAXMAN AND ANOTHER—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), s. 115, O. XXXIII, r. 1—Permission to sue in *forma pauperis*—Application rejected—Erroneous view of law—Revision, whether lies—"Sufficient means", scope of—Occupancy holding, whether 'property'.

If a Court refuses to allow a person to sue as a pauper on an erroneous view of law, the order is liable to be set aside in revision under s. 115 of the O. P. C., as by reason of such a view its decision is

vitiated on the ground of illegality which led it to refuse to exercise the jurisdiction vested in it by law. [p. 949, col. 2.]

Ganesh Prasad v. Rewa Bai, 41 Ind. Cas. 883; 13 N. L. R. 116 and *Achalsingh v. D. B. Seth Jiwandas*, 75 Ind. Cas. 993; 19 N. L. R. 165; (1924) A. I. R. (N.) 44, followed.

In order that permission to sue in *forma pauperis* should be granted, the law requires that the intending suitor should establish the negation of the actuality of possession of means by him and not of the chance of a contingency, much less of an expectancy, on his part, of getting in future some means sufficient to enable him to pay the prescribed fee for his plaint. [p. 950, col. 2.]

An occupancy holding of a person seeking permission to sue in *forma pauperis* cannot, therefore, be taken as sufficient means within the meaning of O. XXXIII, r. 1, C. P. C., as the right of occupancy is in the nature of a purely personal right and cannot be transferred or even surrendered for value without restrictions. [p. 950, col. 1.]

The price or compensation which an occupancy tenant, who has made an agreement with the landlord for surrendering his holding, but has not actually executed the surrender deed, expects to get for surrendering or dawning his lesser interest into the greater interest of the landlord, cannot be considered to be "means possessed" by him for the purposes of O. XXXIII, r. 1, C. P. C. It is more 'in the nature of an expectant claim' under an 'inchoate' right than 'property' or 'means' of which a person may be said to be possessed. [p. 950, col. 2.]

Revision against an order of the First Sub-Judge, Second Class, Nagpur, in M. C. No. 45 of 1923, dated the 30th November 1923.

Mr. G. R. Deo, for the Applicant.

Mr. W. R. Puranik, for the Non-Applicants.

ORDER.—I am of opinion that this revision must succeed. The Munsif's view that the applicant who is an occupancy tenant, and expects to make Rs. 1,000 if the landlord were to accept a surrender of his occupancy land, cannot be considered to be a pauper is, on the face of it, erroneous and against law and liable to be set aside in revision under s. 115, C. P. C., because, by reason of such a view his decision is vitiated on the ground of illegality, which led him to refuse to exercise the jurisdiction vested in him by law: compare *Ganesh Prasad v. Rewa Bai* (1) and *Achalsingh v. Seth Jiwandas* (2).

That the devolution of an untransferable right of occupancy does not create a liability to pay the debts of the deceased holder of such a right, or that the crops grown by the heir are not assets of the deceased which can be followed for satisfaction of the debts due by the deceased, is a view

(1) 41 Ind. Cas. 883; 13 N. L. R. 116.

(2) 75 Ind. Cas. 993; 19 N. L. R. 165; (1924) A. I. R. (N.) 44.

which has long prevailed in this Court: see *Nathmal v. Mattoo* (3).

For the purposes of the Provincial Insolvency Act also the law does not recognize occupancy tenant-right as 'property'. That the new Tenancy Act of 1920 contains an express prohibition against the appointment of a Receiver of the occupancy land or even of the crops thereof and does not permit attachment and sale of an occupancy holding, is too well-known to the litigant public. For purposes of s. 60 of the C. P. C., the interest which a judgment-debtor possesses in his occupancy land is not considered attachable and saleable on the ground that he has no disposing power over it. It is an undeniable fact that under law, a tenancy is personal and heritable within certain limits and is subject to many restrictions as to its alienation.

The right of occupancy can thus be in the nature of a purely personal right and cannot, therefore, be freely transferred without restriction. Nor is it saleable by auction at a compulsory sale under the orders of the Court. The nearest approach to such a right is the right of a Hindu widow to reside in her husband's family house. Such a right cannot be attached in execution as it is not saleable property: *Salakshi v. Lakshmayee* (4). Similarly inasmuch as a mere agreement to sell does not create any interest in immovable property, the price that may be payable does not become a 'debt' until the conveyance is executed and consequently it is not liable to be attached before the execution of the conveyance, in execution of a decree against the intending purchaser: *Ahmad-ud-din Khan v. Majlis Rai* (5). Once the sale is complete the amount representing the price may be attached in the hands of the purchaser, and it does not make any difference that the whole is payable in one sum or by instalments or in the shape of periodical payments: compare *Har Shanker Prasad Singh v. Baijnath Das* (6). Consequently merely because an occupancy tenant's interest which is otherwise not saleable or at any rate is subject to a restriction as to alienation, may, by agreement with the landlord, be convertible into cash, it does not follow that the amount likely to be

fetched becomes 'property' or debt over which he might be said to have a disposing power, in the sense that the landlord can be served with a notice of attachment prohibiting him from paying it to the tenant, until the surrender deed is executed.

Just as the interest in the pre-empted property of a successful pre-emptor who has not yet paid the pre-emptive price fixed by the decree is a merely contingent interest which cannot be attached, similarly, the price or compensation which an occupancy tenant, who has made an agreement with the landlord for surrendering his holding but has not actually executed the surrender deed, expects to get, for surrendering or drowning his lesser interest into the greater interest of the landlord cannot be considered to be "means possessed" by him for the purposes of O. XXXIII, r. 1, C. P. C. It is more 'in the nature of an expectant claim' under an 'inchoate' right than 'property' or 'means' of which a person may be said to be possessed: compare *Syud Tuffuzool Hossein Khan v. Rughoonath Pershad* (7).

Where a fee is not prescribed, the pauper must be entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject-matter of the suit, but where a fee is prescribed all that the law enjoins a Court to see is whether the intending suitor is not possessed of sufficient means to enable him to pay the fee prescribed, for otherwise he cannot be allowed to sue as a pauper. What the law, therefore, wants the intending suitor to establish is the negation of the actuality of possession of means by him if he is seeking permission to sue in *forma pauperis*, and not of the chance of eventuality, or of a mere possibility or contingency, much less of an expectancy on his part, of getting in future some means sufficient to enable him to pay the prescribed fee for his plaint.

If a person is possessed of property but his ownership, i. e., the bundle of rights he has in that property, is such as has no present market value, under the law in force for the time being, or gives him no absolute control or power of disposal over it, or his liberty in the matter of enjoyment or exercise of an absolute, free and untrammelled right of transferring or conveying a valid title thereto, in favour of any person

(3) 21 Ind. Cas. 272; 9 N. L. R. 137.

(4) 31 M. 500; 4 M. L. T. 485.

(5) 3 A. 12; 2 Ind. Dec. (N. S.) 2.

(6) 23 A. 164; A. W. N. (1901) 50.

(7) 14 M. I. A. 40; 7 B. L. R. 186; 2 Suth. P. O. J. 434; 2 Sar. P. C. J. 656; 20 E. R. 701.

in the world he liked,—a right incidental to all ownership—is, by any Statute, taken away, or fettered, or made to depend upon the option, or consent or concurrence of third persons who are not bound or under any legal obligation to convey, or to accept a conveyance from him, at his request, no intending purchaser will go in for the acquisition of such a right, and part with his own money in obtaining a transfer of a precarious ownership like this. According to Blackstone 'the sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe', is 'property'.

Austin enumerates the following amongst the five applications of the term 'property':—

"A right indefinite in user, —unrestricted in point of disposition—and unlimited in point of duration".

I may, therefore, say that an ownership of property devoid of the right of free transfer, is for all intents and purposes, only a nominal ownership, because it is not capable of immediate conversion into what may be termed the where-withal or sinews of war to enable the pauper to fight out the battle with his opponent in a Civil Court.

To insist upon an applicant who possesses an unsaleable tenant right to establish as a condition precedent to his getting the permission to sue in *forma pauperis* that there is nobody, amongst his possible heirs, who is willing to take a transfer, or not even the landlord to take a surrender of his tenant right, and pay him its money equivalent in the King's coin, or make a present to him, or to accommodate him with a loan, of the amount required for payment of Court-fee is to practically deny justice to a poor litigant at the very threshold of the temple of justice he seeks to enter under the special provision in the C. P. C. which the Sovereign power has thought fit to make, for the benefit of persons too poor to pay the Court-fee, in order that they may be enabled to bring and prosecute their claims without payment of Court-fee: compare *Jotindro Nath Chowdhry v. Dwarka Nath Dey* (8). It would be defeating the very object of the Legislature in enacting O. XXXIII, r. 1, C. P. C., which vests jurisdiction in a Court to accommodate

a poor suitor by granting him temporary exemption from payment of the duty which it is the privilege of the Crown to levy *in advance* on every litigation which a subject might choose to commence in Courts established under its authority for administering justice according to law. The application has, in my opinion, been improperly rejected by the Munsif.

The omission to mention the value of the occupancy tenant right in the Schedule cannot also under these circumstances be treated as a defect which renders the petition liable to rejection under r. 5 (a) of O. XXXIII, C. P. C., as held by the Munsif.

For all these reasons I allow the application and remand the case for disposal according to law with advertence to the above remarks. The non-applicants shall pay the costs of these proceedings in revision to the applicant and bear his own. Costs in lower Court will abide the event. Pleader's fee Rs. 25.

N. H.

Application allowed.

ODDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 220 OF 1924.

September 4, 1925.

Present:—Mr. Simpson, A. J. C.

Saiyid SAJJAD HUSAIN—PLAINTIFF—
APPELLANT
versus

MUL CHAND—DEFENDANT—RESPONDENT.

Defamation—Report of crime to Police—Honest belief in truth of report—Suit for damages—Qualified privilege—"Honest belief" whether same thing as "reasonable and probable cause".

A report of a crime to the Police carries with it a qualified privilege with regard to defamation. That qualified privilege amounts to this, that it is sufficient that if the defendant had an honest belief that what he said was true. An honest belief does not, however, come to the same thing as reasonable and probable cause.

Majju v. Lachman Prasad, 84 Ind. Cas. 702; 46 A. 671; 22 A. L. J. 597; (1924) A. I. R. (A.) 535; L. R. 5 A. 478 Civ., referred to.

Therefore, where there is theft in the house of the defendant, and he makes a report that the plaintiff was concerned in it, in the honest belief that the plaintiff was so concerned, the plaintiff's suit for recovery of damages for defamation is not maintainable.

Second appeal from a decree of the Third Additional District Judge, Lucknow, dated the 23rd February 1924, reversing that of

(8) 20 C. 111 at p. 115; 10 Ind. Dec. (N. S.) 75.

the Sub-Judge, Kheri, dated the 22nd December 1922.

Mr. Ram Prasad Varma, for the Appellant.

Mr. K. P. Misra for Mr. G. N. Misra, for the Respondent.

JUDGMENT.—The appellant is the plaintiff. The suit was one for the recovery of Rs. 1,500 as damages for defamation. The learned Subordinate Judge decreed the claim for Rs. 50 with full costs of the suit against the defendant. The defendant appealed and the learned District Judge allowed the appeal and dismissed the plaintiff's suit with costs in both Courts. The plaintiff comes here on second appeal.

On the facts found by the lower Court it is impossible to disturb the decree. The facts found are that there was theft in the house of the defendant, and that he made a report that the plaintiff was concerned in it in the honest belief that the plaintiff was so concerned. A report of a crime to the Police carries with it a qualified privilege with regard to defamation. That qualified privilege amounts to this, that it is sufficient that if the defendant had an honest belief that what he said was true, as was held in a recent case by a Full Bench of the High Court *Majju v. Lachman Prasad* (1). No doubt the judgment goes on to say that an honest belief and reasonable and probable cause come to the same thing. With very great respect I cannot accept this proposition. "This writ down so in heaven but not earth". Here human nature is a compound thing, by no means entirely made up of reason. Many honest beliefs exist without either reasonable or probable cause.

There is no ground for interfering with the decree. The appeal is dismissed with costs.

S. D.

Appeal dismissed.

(1) 84 Ind. Cas. 702; 46 A. 671; 22 A. L. J. 497; (1924) A. I. R. (A.) 535; L. R. 5 A. 478 Civ.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 286 OF 1922.

February 24, 1925.

Present:—Mr. Justice Odgers.

D. B. PACHAIAPPA CHETTI AND OTHERS
—APPELLANTS

versus

C. VENKATACHARIAR AND OTHERS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI,

rr. 95, 97, 103—Decree-holder purchaser—Application under r. 95—Obstruction—Order referring applicant to suit—Claimant obstructor party to suit—Order, whether appealable—Separate suit, maintainability of.

In execution of a decree on a mortgage, the plaintiff purchased the property himself, but was obstructed by a prior purchaser (a party to the suit) in execution of a money-decree obtained against the mortgagor. Two years thereafter, he again applied for delivery under O. XXI, r. 95, C. P. C., but the Court "referred to him to suit" under the mistaken impression that the petition was under r. 97. The decree-holder without appealing filed a suit:

Held, (1) that the matter arose under s. 47, C. P. C., and, therefore, the plaintiff ought to have appealed and a separate suit did not lie; [p. 954, col. 1.]

(2) that the suit having been misconceived *ab initio*, the plaintiff was not entitled to ask in second appeal that the suit should be converted into an execution proceeding. [p. 955, col. 1.]

Where claim proceedings under O. XXI, C. P. C., fall also under s. 47, r. 103 of O. XXI does not prevent an appeal against an order therein as it falls under s. 47 of the Code. But the two remedies are not concurrent, so as to entitle a party to proceed at his option either by a suit or by way of appeal; the procedure under s. 47 and that under O. XXI, r. 103 are not cumulative. [p. 954, col. 1.]

Under s. 47 (2), C. P. C., the Court is at liberty to treat a proceeding under the section as a suit or a suit as a proceeding but subject only to any objection as to limitation or jurisdiction. [p. 955, col. 1.]

Second appeal against a decree of the District Court, Salem, dated the 18th April 1921, in Appeal Suit No. 52 of 1916, preferred against that of the Court of the Temporary Subordinate Judge, Salem, dated the 11th October 1915, in O. S. No. 12 of 1915, (O. S. No. 2 of 1913, on the file of the District Court, Salem).

Messrs. A. Krishnaswami Iyer and B. Somayya, for the Appellants.

Messrs. K. Krishnaswamy Iyer and K. V. Sesha Iyengar, for the Respondents.

JUDGMENT.—This was a suit to establish the plaintiffs' right to the suit property and to recover the same from defendants Nos. 1 to 5, if necessary after division, and for mesne profits. The Temporary Subordinate Judge of Salem decreed the suit in favour of the plaintiffs holding that they were entitled to a two-third share in the lease-hold right in the plaint village with mesne profits. On appeal to the District Judge of Salem, he found that the suit was not maintainable in law and dismissed it. The property originally belonged to the 6th defendant and his sons. It was mortgaged under two mortgage deeds, Exs. A and B, to the plaintiffs' father. We are only concerned with the first of these mortgages dated 11th July 1898. The plaintiffs sued on the mortgages, got a decree on 28th August 1907, executed it

and purchased the property in Court sale on 28th January 1909. They tried to take possession on 21st May 1910, Ex. C-4 and the 1st defendant and others obstructed. These latter had bought the property on 9th December 1908 in execution of a money decree obtained by them on 10th April 1901 in O. S. No. 698 of 1898 on the file of the Tirupattur Munsif's Court. When the 1st defendant in 1908 proceeded to execute his decree, the plaintiffs' father, on 26th October 1908, put in a claim petition to the Executing Court that the Court sale should be subject to his mortgages. The claim was dismissed on 6th November 1908 and the 1st defendant bought the property in Court sale on 9th December 1908.

The first point taken before me on appeal from the District Judge is with reference to the order made on Ex. C-5. Exhibit C-5 is a petition dated 25th September 1912 by the plaintiffs under r. 95, O. XXI, C. P. C., and they pray that the 1st plaintiff having now become a major the said property may be delivered to the 1st plaintiff on behalf of all the plaintiffs. The order of the learned District Judge on this petition dated 24th October 1912 was: "Refer him to suit". This is obviously a reference to O. XXI, r. 103 where a party not being a judgment-debtor against whom an order is made under r. 98, r. 99 or r. 101 may bring a suit. This portion of the O. XXI, C. P. C., begins with r. 97 and is headed "Resistance to delivery of possession to decree-holder or purchaser", whereas r. 95 is in a different part of the order headed "sale of immoveable property". It is not disputed that if the application was in fact under r. 95, the order of the learned Judge must be taken to be an order under that rule, that s. 47 C. P. C., is applicable and that the plaintiff's remedy was not by a suit under r. 103, O. XXI, but by appeal from the order under s. 47, which appeal is specifically given by the Code under s. 2 (2) and s. 96. This point was not taken in the first Court but the learned District Judge allowed it to be taken before him, and as it has been argued in *extenso* before me I must deal with it. The learned District Judge thought that though Ex. C-5 made no reference to any obstruction and owing to lapse of time the affidavit in support of the petition was not available before him, some reference to an obstruction must have been made therein, otherwise the Court would have ordered delivery which

would have been the appropriate order under r. 95 and not have referred the plaintiffs to a suit. The learned Judge, therefore, held that Ex. C-5 was an order passed in execution on a matter of removal of obstruction to delivery of possession and, therefore, that the order in Ex. C-5 was one made against the plaintiffs, in that the Court refused to carry out their prayer for delivery and referred them to a suit. With regard to that, I entertain grave doubts whether the learned Judge was right. Mr. K. V. Krishnaswami Iyer for the respondents contends that, assuming the order in Ex. C-5 was one under r. 103, the terms of the rule have not been complied with and the plaintiffs are, therefore, not persons against whom an order has been made and, therefore, no remedy by a suit under r. 103, was open to them. All one can say is that there was no evidence that in October 1912 there was a continued obstruction by the defendants such as has been reported to the Court in June 1910, Ex. C-4. It looks as if the Court was mistaken and thought that the petition Ex. C-5 was really under r. 97 and hence referred the plaintiffs to a suit. However that may be, it will not affect my decision on the main point which I now proceed to consider. It was urged for the plaintiffs-appellants before me that the remedy under r. 103 does not take away the right of appeal under s. 47. Three cases are referred to in *Sivasamba Iyer v. Kuppan Samban* (1), where it was held that s. 47 is comprehensive and the fact that an alternative procedure by suit instead of appeal is provided in certain circumstances cannot affect its character. In *Meyyappa Chetty v. Chidambaram Chetty* (2), a decision of the same two learned Judges, they held that O. XXI, r. 103, should not be read as providing expressly against any right of appeal which would otherwise be available. *Badmi Seshiah v. Katti Chinna Marippa* (3) was also referred to in this connection where a Bench of this Court held that r. 103 is not restricted by the general provisions of s. 47. I might add that this latter is a short judgment and no reasons are given for the decision. In *Veyindramuthu Pillai v. Maya Nandan* (4) decided by the learned Judges who decided

(1) 32 Ind. Cas. 769; 29 M. L. J. 629.

(2) 61 Ind. Cas. 319; 39 M. L. J. 603; 12 L. W. 273, (1920) M. W. N. 562.

(3) 52 Ind. Cas. 928.

(4) 51 Ind. Cas. 209; (1919) M. W. N. 881; 26 M. L. T. 391; 32 M. L. J. 32; 43 M. 107.

the cases just cited from the Madras Law Journal, they held that where claim proceedings under O. XXI, fall also under s. 47, O. XXI, r. 103 does not prevent an appeal against an order therein as it falls under s. 47 of the Code. That is to say, that with regard to this case and those cited from the Madras Law Journal it was held that a suit under r. 103 does not bar an appeal under s. 47. The learned Judges did not consider the case here, namely, whether a case really arising under s. 47 would bar a suit under r. 103. I agree with the contention of the learned Vakil for the respondents that the cases cited (with the possible exception of 52 Indian Cases) do not establish the proposition that the two remedies are concurrent, so that assuming that this is a suit under r. 103 and that the order in Ex. C-5 was really one under s. 47, it was not open to the plaintiffs to proceed at their option either by a suit or by way of appeal. It is also to be observed that s. 47 expressly bars a suit in *contra-distinction* to r. 103 which says that the order on obstruction proceedings shall be conclusive subject to the result of the suit if any. It has, as far as I know, never been suggested in any case that the procedure under s. 47 and under r. 103 is cumulative. If this were the law, it is not difficult to imagine that anomalies would arise. I must hold, therefore, that the learned District Judge was right in holding that the matter arose under s. 47 and that, therefore, the plaintiffs ought to have appealed. For this appeal they are now, of course, hopelessly out of time. The appellants, therefore, urge the matter which will be dealt with hereafter under the third point. Further the rules provide that an investigation should be made under r. 97 (2) and this is a *sine qua non* of an order under rr. 98 and 99. These rules bear some analogy to rr. 58 and 63 which are headed "Investigation of claims and objections". But it will be observed that under r. 63 no investigation is necessary and a suit can be brought by the party against whom an order is made. That an investigation is necessary under r. 97 (2) is clear from the rulings in *Sarat Chandra Bisu v. Tarini Prasad Pal Chowdhry* (5), *Majjiga Venkatasubba Reddi v. Chundi Linga Reddi* (6), by a Bench of this Court and *Gouri Churn Patni v. Sita Patni* (7). This

only shows again that the plaintiffs ought to have appealed from the order passed on Ex. C-5 if it was mistakenly made under r. 95 as mentioned above or in any case as having been passed without complying with the condition precedent laid down in r. 97 (2). However, there is nothing whatever on the record here to show that any investigation was in fact made. I must, therefore, decide against the appellants with regard to the first point.

The second point is that an act of the Court should not be allowed to injure the appellant. If the Court made a mistake in referring the appellant to a suit, he should not suffer and there was no obligation on him to file an appeal against that order. The reply is this that no estoppel is pleaded and there is nothing on the record to show that the respondent was responsible for the order passed.

The third point is that if as I have held an appeal ought to have been preferred against the order on Ex. C-5, I should convert this into an appeal under s. 47, C. P. C. It is pointed out that as the point was taken by the District Judge, appeal against the order passed by him holding that the matter falls under the purview of s. 47 lies to this Court. The order passed on Ex. C-5 was by a former District Judge and was, therefore, *res judicata* in the lower Appellate Court. The authority quoted for so treating the appeal is the judgment in C. M. A. No. 127 of 1920 where the learned Judges held that in the facts of that case they should exercise the power. It may be pointed out that the order was one passed in 1912 and I am being asked over 12 years after that time to allow the erroneous procedure taken on that order to be eliminated and practically that the parties should be absolved from the course they took. On the other side, it is represented that the fault, if any, was with the Court and that the plaintiffs may have been misled by the order passed on Ex. C-5. It will be observed that there is no contention in the written statement that the plaintiff's suit was misconceived and even if there were, it is now too late for an appeal under s. 47. Further *Muttia v. Appasami* (8) shows that the petition Ex. 5 is perfectly legal under s. 47 although the petitioner therein had been previously obstructed. It was held there was nothing to prevent the decree-holder

(5) 34 C. 491; 11 C. W. N. 487.

(6) 41 Ind. Cas. 640.

(7) 5 Ind. Cas. 710; 14 C. W. N. 346 at p. 351.

(8) 13 M. 504; 4 Ind. Dec. (N. S.) 1063.

or purchaser who had been obstructed or resisted in his attempt to get possession of the property from making a fresh application for delivery [see also *Abdul Karim Sahib v. Timmaraya Chetty* (9), a judgment of this Court] The learned District Judge considered this question very carefully in para. 17 of his judgment. He held that the decision in Ex. C-5 was a decision on jurisdiction and that not having been appealed against and there being no prayer in the plaint in the suit to set it aside it was final as regards himself and barred the present suit being converted into an execution application and that in either view, the suit viewed as an application for possession is out of time. Under s. 47 (2) the Court is at liberty to treat a proceeding under this section as a suit or a suit as a proceeding but subject to any objection as to limitation or jurisdiction. It seems to me that here the plea of limitation must prevail. It is said that there are good grounds for excusing the delay and for allowing the matter to be converted into a proceeding. I am, however, unable to agree. I think that the suit being misconceived *ab initio*, the plaintiffs are not entitled to ask me in second appeal for such a concession as this. I, therefore, think that the appeal fails on all these grounds and must be dismissed with costs.

V. N. V.

Appeal dismissed.

N. H.

(9) 24 Ind. Ca¹ 512.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 433 OF 1924.

February 24, 1925.

Present:—Justice Sir Ewart Greaves, Kt.,
and Mr. Justice Mukerjee.

HARI MOHAN DALAL—

APPELLANT

versus

PURENDRA NATH NAG CHOUDHURY

AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—“Representative”, meaning of—Mortgagee, whether representative of judgment-debtor—Bengal Tenancy Act (VIII of 1885), ss. 148A, 160 (g)—Rent suit by co-sharer landlord, frame of—Patni mortgage executed for benefit of zemindar, whether protected interest.

A person affected by a decree is a representative of the judgment-debtor within the meaning of the term as used in s. 47 of the C. P. C. Therefore, a mortgagee of a *patni taluk* is a representative of the *patnidar* against whom a decree for rent of the *patni* has been

obtained and is competent to challenge the execution of the decree. [p. 956, col. 2.]

It is of the essence of a suit under s. 148A of the Bengal Tenancy Act that either the whole rent must be due or else the plaintiff must be unable to ascertain whether or not the whole of the rent is due. For a suit to fall under the provisions of that section it must be a suit to recover the whole of the rent due. [p. 957, col. 1.]

Where a mortgage of a *patni taluk* is created for the benefit of the *zemindar*, the mortgage is an interest which comes within the provisions of s. 160 (g) of the Bengal Tenancy Act and is thus protected from annulment on a sale of the *patni* for arrears of rent. [p. 958, col. 1.]

Appeal against an order of the Subordinate Judge, Third Court, 24-Perganas, dated the 6th December 1924.

Mr. Basak and Babu Narendra Nath Dalal, for the Appellant.

Babus Rupendra Kumar Mitter and Pramatha Nath Mitra, for the Respondents.

JUDGMENT.

Greaves, J.—This is an appeal from an order of the Third Subordinate Judge of Alipur dated the 6th of December 1924. For an understanding of the matters that arise in the appeal and the Rule it is necessary to state a few facts. One Raj Mohan Nag Choudhury was the owner of certain property. He died leaving a son Chandra Nath Nag Choudhury who had married a lady named Nisadini. Chandra Nath had six sons one of whom named Bhupendra Nath Nag Choudhury was dead at the time of the events hereinafter referred to and his interest has passed to his son Chandi Charan Nag Choudhury. After the death of Raj Mohan who had left all his properties by Will to his grandsons, the sons of Chandra Nath, a suit was commenced for partition of the estate of Raj Mohan and for administration thereof and a Receiver was appointed. In order to clear off the debts of Raj Mohan's estate it was necessary to raise money in some way or other and the Receiver applied for and obtained an order for the sale of a portion of Raj Mohan's estate for the liquidation of his debts. Against that order an appeal was presented to this Court and was numbered 385 of 1913 and this Court decided that it was inadvisable to sell the two *mehals* in accordance with the order of the Court below and that it would be better that a *patni* lease should be created of these two *mehals* and of another *mehal* and that out of the *selami* to be paid by the *patnidars* the debts of Raj Mohan's estate should be

paid off. The *patni* was put up to auction to the highest bidder and eventually Surendra Nath Nag, one of the grandsons of Raj Mohan Nag, and Nisadini Dasi the widow of Chandra Nath were the highest bidders for the *patni*. The *patni* was to be granted at an annual rent of Rs. 7,000 and at a *selami*, I should mention that several strangers competed for the *patni* amongst others one Harendra Nath Ballav, Surendra Nath Nag Choudhury and Nisadini Dasi being the highest bidders and a *patni* was granted to them at a *patni* rent of Rs. 7,000 and a *selami* of Rs. 1,82,000. Surendra and Nisadini had no money to pay the *selami* and accordingly they mortgaged the *patni* to the applicant before us Hari Mohan Dalal in order to pay the *selami*. The mortgage included not merely the *patni* interest but also the *zemindari* interest of Surendra, Nisadini and Upendra. Subsequently, Nisadini and Surendra failed to pay the *patni* rent and a suit was brought for the rent and a decree was obtained. In execution of the decree the decree-holders sought to bring the *patni* to sale and it is against the order for sale of the *patni* that this appeal has been preferred by Hari Mohan Dalal the mortgagee of the *patni* interest and of a portion of the *zemindari* interest. He applied under the provisions of s. 47 of the C. P. C., to the lower Court asking for an order that the execution was legally untenable and that the property should be sold subject to the liabilities for his mortgage which amounted to a sum of over 3 lacs of rupees and in respect of which he has obtained a mortgage-decree. The Court below dismissed the mortgagee's application on various grounds which are stated in the various orders which appear in the paper book and accordingly this appeal has been preferred.

At the outset a preliminary objection was taken on behalf of the respondents that no appeal lay. The objection was based on the ground that the present appellant before us, the mortgagee was not a party to the rent suit which had been brought by the *zemindars* for the *patni* rent and that he was not a representative within the meaning of that word and that accordingly he was not entitled to appeal to this Court. There is also a rule which was obtained by the appellant before us having regard to the difficulty that was felt on this point. We think, however,

that this objection must fail because we think that within the meaning of the decisions of this Court the appellant is a representative and, therefore, comes within the scope of the provisions of s. 47 of the C. P. C. In the case of *Ishan Chunder Sirkar v. Beni Madhub Sirkar* (1), the matter was discussed by a Full Bench of this Court and according to the judgment of that Court a representative is a person who is bound by the decree and the learned Judges further said that a person affected by the decree was really a representative within the meaning of the term as used in s. 47 and there is another case which has some bearing on the point, namely, the case of *Srimati Nissa Bibi v. Radha Kishore Manikya* (2). It was held in that case that the person to whom a transferable occupancy holding was mortgaged before its sale in execution of a rent decree was a representative of the judgment-debtor within the meaning of s. 244 of the C. P. C. We think, therefore, that the preliminary objection must fail and that an appeal is permissible to this Court.

Now various questions have been raised before us in this appeal. It is not necessary, we think, to deal with all of them because we think that two points that have been urged before us really dispose of the matter. Firstly, it has been urged before us that this is not a rent-decree but is merely a money-decree. As against this we were referred to the provisions of s. 148A of the Bengal Tenancy Act and it was argued on behalf of the opposite parties that having regard to the words of that section and the decisions of this Court the decree passed was a rent-decree and it could be executed as such. Section 148A provides that where a co-sharer landlord who has instituted a suit to recover the rent due to all the co-sharer-landlords in respect of an entire tenure or holding and has made all the remaining co-sharers parties, defendants, to the suit is unable to ascertain what rent is due for the whole tenure or holding or whether the rent due to the other co-sharer-landlords has been paid or not owing to the refusal or neglect of the tenant or of the co-sharer-landlords, defendants to the suit, to furnish him with correct information such plaintiff co-sharer-

(1) 24 C. 62; 1 C. W. N. 36; 12 Ind. Dec. (N. S.) 707.

(2) 11 C. W. N. 312.

landlord is entitled to proceed with the suit for his share only of the rent. The Vakil for the opposite parties referred to us the plaint in the suit and to the allegations there made as showing that the suit fell within the exact terms of s. 148A and we were referred to various decisions of this Court in support of this proposition notably to *Nunda Lal Choudhury v. Kala Chand Choudhury* (3), *Brohmandan Nath Deb Sirkar v. Hem Chandra Mitter* (4), *Baikuntha Nath Sen v. Ramapati Chatterjee* (5), *Profulla Chandra Ghose v. Baburam Mandal* (6), and *Jagabandhu Nandi v. Abdul Hamid Mea* (7). In all these cases, in some of which the suits were held to fall within the provisions of s. 148A and in others not, what were the necessary allegations in a suit of this nature were discussed and considered and it seems to us that for a suit to fall under the provisions of s. 148A it must be a suit which is to recover the whole of the rent due. It is true that some of the rent may turn out not to be actually due as it may have been paid to some of the co-sharers. But it certainly seems to be of the essence of a suit under s. 148A that either the whole rent is due or else the plaintiffs are unable to ascertain whether or not the whole of the rent is due. Now it seems to us that the present case does not fall under any such principle. From the facts which I have already stated it appears that some of the *zemindars* were themselves *patnidars* and, consequently, it was clear that no rent in respect of the *patni* was due to those *zemindars* who occupied the dual positions of *zemindars* and *patnidars* as well. Consequently the suit was not and could not be to the knowledge of the plaintiff in the suit—a suit for the whole rent in respect of a tenure or holding—and for these reasons we think that the suit does not fall under the circumstances of this case, which are, of course, special, under the provisions of s. 148A, that is to say, it follows that the decree which has been passed is not a rent decree within the meaning of s. 148A but merely a money-decree which can only be executed as such.

The second point which arises is whe-

(3) 8 Ind. Cas. 50; 15 C. W. N. 820.

(4) 23 Ind. Cas. 981; 18 C. W. N. 1016.

(5) 45 Ind. Cas. 767; 27 C. L. J. 101.

(6) 65 Ind. Cas. 1; 31 C. L. J. 462.

(7) 85 Ind. Cas. 214; 28 C. W. N. 757; (1925) A. I. R. (C.) 82.

ther the interest of the mortgagee here is a protected interest within the provisions of s. 160 (g) of the Bengal Tenancy Act or not. The opposite party says 'No'. The appellant before us says that it is a protected interest under the provisions of s. 160 (g) of the Bengal Tenancy Act. The sub-section provides that any right or interest which the landlord, at whose instance the tenure or holding is sold, or his predecessor-in-title has expressly and in writing given the tenant for the time being permission to create shall be deemed to be protected interest within the meaning of Ch. XIV of the Bengal Tenancy Act. Now I have already stated the circumstances under which the mortgage was created. It was created if I may repeat what I have stated to preserve the property which formed Raj Mohan's estate and to clear that property from debts and to prevent a sale of any portion of that estate. The judgment of this Court in Appeal No. 385 of 1913 to which I have referred states that the *patni*-lease was granted by the order of the Court and that it would be binding upon all the parties to the litigation and it directed that the *patnidars* who had borrowed the money for the purpose of paying the *selami* from the mortgagee should execute a mortgage in his favour as arranged between the parties. On behalf of the opposite party it is urged that so far as the mortgage is concerned the plaintiffs in the rent suit are not in any way parties thereto or bound thereby and we were referred to the terms of the *patni* and to the mortgage itself. We were further referred to the fact that the *patni* rent was a sum of Rs. 7,000 and that over and above the *patni* rent the collections from the *mehals* amounted to an additional Rs. 10,000 or Rs. 11,000 and we were further referred to the fact, which I have already stated, that strangers came forward and bid for the *patni* and that it was by mere accident that in the end Nisadini and Surendra happened to be the highest bidders and that for the purpose of this suit they should be treated as strangers in respect of the transaction. We feel some difficulty in agreeing with this contention. It seems to us that the mortgage was created for the benefit of the whole body of *zemindars* and certainly the plaintiffs in the rent suit, although they were not *patnidars* and were not parties to the mortgage in any way, have been benefited

by the creation of the mortgage and by the clearing of the estate from the debts out of the money advanced by the mortgagee. It seems to us, therefore, that the interest, that is to say, the mortgage in this instance, which has been created is an interest which comes within the provisions of s. 160 (g). It was created by the order of the Court and with consent of all the parties to the suit and it seems inequitable to say that it is not an interest which should receive the protection given to such an interest under the provisions of s. 160 (g). We were referred to various cases dealing with protected interests and to the words which are said to be sufficient in a *patni* to bring an interest within the provisions of s. 160 (g). We do not think, however, that it is necessary to refer to the cases in detail because for the reasons which I have already indicated we think that the interest is a protected interest within the provisions of s. 160 (g) and we are fortified in this by the actual words of the *patni* which empowers (cl. 2) the *patni-dar* to exercise all acts of proprietorship in accordance with his own will, to transfer the *patni* and to do all other acts of proprietorship.

The result, therefore, is that the appeal succeeds and we hold that the decree obtained by some of the *zemindars* was merely a money-decree and not a rent-decree within the provisions of s. 148A and that the interest of the mortgagee is a protected interest within the provisions of s. 160 (g) of the Bengal Tenancy Act. The appellant will be entitled to his costs in this appeal which he will add to his mortgage. We assess the hearing fee at 5 gold *mohurs*.

Let the record be sent down at once.

Mukerji, J.—I agree.

Z. K.

Appeal allowed.

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL No. 407
OF 1924.

March 20, 1925.

Present :—Mr. Justice Lentaigue.

MA E MYA AND ANOTHER—PLAINTIFFS—
APPELLANTS

versus

U PE LAY AND OTHERS—DEFENDANTS—
RESPONDENTS.

*Buddhist Law, Burmese—Inheritance—Orasa son—
Death of mother—Re-marriage of father—Right of son*

to claim $\frac{1}{4}$ th share of jointly acquired property, nature of—Death of son—Right, whether heritable.

Under the Burmese Buddhist Law whilst an *orasa* son cannot claim a $\frac{1}{4}$ th share of the property jointly acquired by his parents merely by reason of his mother's death, the re-marriage of his father gives him a right to claim the $\frac{1}{4}$ th share, which he would not have if his father did not re-marry. This right of the *orasa* son is a vested right and if the *orasa* son after acquiring this right dies before obtaining possession of his $\frac{1}{4}$ th share, the right devolves on his heirs and legal representatives. [p. 961, col. 1; p. 962, col. 2.]

Mr. Foucar, for the Appellants.

Mr. On Pe, for the Respondents.

JUDGMENT.—This is a second appeal against the judgment and decree of the District Court of Amherst, reversing the decree of the Sub-Divisional Court of Moulmein. The plaintiffs-appellants are the widow and minor children of one Maung Po Min, who was the first-born child and eldest son of the defendant-respondent U Pe Lay and his wife Ma Thin. According to the plaint, the said Ma Thin died about ten years before the institution of this suit, leaving her surviving husband the defendant-respondent U Pe Lay and five children, namely, the said Maung Po Min as the eldest child and described in the plaint as the "*orasa son*" and four daughters—Ma E May, Ma On Myaing, Ma E Gywe, and Ma On Sein (who are not made parties to this suit). The plaint also stated that about eight years before the institution of the suit, the defendant U Pe Lay married a second wife Ma Sein; and that the *orasa* son was alive at that time and survived this second marriage of U Pe Lay by about one year when the said Maung Po Min died leaving the plaintiffs as his heirs. The plaint further alleged that the old couple U Pe Lay and his first wife Ma Thin acquired the joint property specified in the plaint consisting of certain lands valued at Rs. 6,000. The claim of the plaintiffs was that on the death of his mother Ma Thin, Maung Po Min was the *orasa* son and that on the father U Pe Lay taking a second wife eight years before the suit, the said Maung Po Min as the *orasa* acquired a vested right to one-quarter share of the said jointly acquired property of his parents; and that on the death of the said *orasa* about seven years before the institution of the suit, the said vested right of the *orasa* devolved on the plaintiffs as his widow and children. It was not alleged that the *orasa* son had in fact made a claim or an election to claim the said one-quarter share; but the case

of the plaintiffs was based on the allegation that such share had become vested in the *orasa* son on the re-marriage of his father, and that, on the death of the *orasa* son, such right became vested in the plaintiffs as his widow and children. The plaintiffs had been permitted to sue in *forma pauperis* and the prayer of the plaint was for a declaration that plaintiffs are entitled to one-fourth share in the properties described in para. 2 thereof and for partition and possession of the land.

The defendant U Pe Lay contested plaintiffs' claim on three grounds:—(1) that the suit is premature; (2) that the first plaintiff, the widow of Maung Po Min, has married again; and (3) that if plaintiffs are entitled at all to any share, it is only to an one-eighth share of the joint estate. He also alleged that Ma Sein, his second wife, was no longer his wife, but, as that issue was decided against him, it need not be considered further in this appeal.

The learned Trial Judge framed four issues—

(1) whether the plaint is bad in law for mis joinder of parties:

(2) whether the suit is premature or not;

(3) whether Ma Sein is no longer defendant's wife. If so, how, if at all, are plaintiffs' rights effected?

(4) what share, if any, are the plaintiffs entitled to under the Burmese Buddhist Law?

On the first issue, the learned Trial Judge stated that it was contended by the defendant that his other four children were necessary parties and that the first plaintiff Ma E Mya should not join as plaintiff, because she had re-married after the death of Maung Po Min. The learned Judge then stated that the plaintiffs had specifically stated that they were suing only as heirs and legal representatives of Maung Po Min for his *orasa* share in the estate, on account of the defendant's re-marriage; and that they are not suing for their rights of inheritance to the estate; and on this ground he found on the issue in the negative. (I point out below that this is not in fact a claim to the *orasa* share, but a claim of a different kind arising on the re-marriage of the surviving parent.) I have set out the above passages because I understand that it is admitted by the plaintiffs that if the case is decided against the plaintiffs on the main question as to their right of suit for

full one-quarter share, then the suit must be dismissed and it will be unnecessary to consider what would be the right of the plaintiffs as children of an *orasa* child claiming merely the ordinary preferential right of an equal share with each of their aunts. I understand that position to be admitted and I may add that neither side has addressed me on any of the aspects of the alternative case that would arise on such question or on the point as to whether the four aunts would be necessary parties.

On the other issues the learned Trial Judge decided in favour of the plaintiffs and holding that the re-marriage of the first defendant gave Maung Po Min the right to claim one-quarter share and that such right devolved on his heirs, he granted the plaintiffs a decree as prayed with costs.

On first appeal, the learned District Judge discussed the law very fully and holding that, though Maung Po Min had the right to claim one-quarter share on the re-marriage of the defendant, he died without making such claim and that the right did not devolve on his heirs. He allowed the appeal and reversing the decree of the Trial Court, he dismissed the suit with costs.

The only point, therefore, for determination on this second appeal is whether that decision of the learned District Judge is correct; or, to put the question differently the points for determination are *firstly*, whether any right to claim a quarter or other fixed share in the joint estate of the parents was acquired by Maung Po Min by reason of such re-marriage of the surviving father and whether such right devolved on the plaintiffs as heirs of the eldest son who had survived his mother and had also survived the re-marriage of his father, but had omitted to claim such quarter share before his death.

I must first point out that on the more recent decisions it is necessary to consider separately questions as to the meaning of the term *orasa* child and as to the share claimable by the *orasa* child. According to the judgments of the majority of the Judges in the Full Bench decision of *Maung Sin v. Mrs. Kirkwood* (1), it would seem

(1) 68 Ind. Cas. 49; 11 L. B. R. 220 on appeal 84 Ind. Cas. 567; 2 R. 693; 3 Bur. L. J. 304; 48 M. L. J. 1; 51 I. A. 334; 29 O. W. N. 653; (1924) A. I. R. (P. O.) 238 P. O.).

that Maung Po Min was technically an *orasa* child, because being the eldest-born child of the marriage, he had attained his majority and otherwise become competent to acquire, and, therefore, did acquire, that status of *orasa* child during the lifetime of both parents; but he never in fact acquired what I may describe as the further right of the *orasa* child to claim the one-quarter share of the joint estate under that decision, because that right would only have been acquired by him on his father predeceasing his mother, and as his mother died first, no male member of that family could acquire such right to a quarter share. It is most important to keep the above points clearly in mind, because the claim which has been made in this case is really based on the use of the word "vested" with reference to the claim of an *orasa* son to his one-fourth share as against his surviving mother on the death of the father who had predeceased the mother. Though the word "vested" was not used by the Privy Council, the share of the *orasa* child was described as a definite one-fourth part of the estate, in terms which implied that it was a vested share, in a decision of the Privy Council in the case of *Tun Tha v. Ma Thit* (2). In consequence of that decision the vesting of the right in the *orasa* son was recognized in the subsequent decision of a Bench of the late Chief Court in the case of *Maung Pan On v. Maung Tun Tha* (3) and certain aspects of the right connected with and depending on this vesting of the right were considered in the decision of a Bench of this Court of which I was a member in the case of *Arunachellam Chetty v. Maung San Ngwe* (4). The decision that the right of the *orasa* child to the quarter share is a vested right suggests the question whether the right to the quarter share does or does not devolve on the children of the *orasa* child even in the event of the death of the *orasa* child before the *orasa* child has made the claim to the quarter share. In this connection I must draw attention to the doubt raised on this point by Maung Kin, J., in the answer to the seventh question at page 248 in 11 L. B. R. and at page

718 of 2 Rangoon of the report of the decision in *Maung Sin v. Mrs. Kirkwood* (1), where he remarks: "Supposing the eldest born child dies after it became entitled to claim a quarter share under the circumstances of the case, the question may arise whether his children will be entitled to claim the quarter share from their surviving grand-parent. This question does not arise here and need not be answered." It appears that this question will be *res integra* when it arises, but it is one which is directly suggested by the authorities cited above. In the case now before me it might appear that we are not *directly* concerned with the question arising on these authorities as to whether such right of the *orasa* son to claim his quarter share against his mother could on his death devolve on his children; but the question arises *indirectly*, if it can be held on a parity of reasoning that the different class of claim which I will discuss below is a claim to a vested right.

As pointed out above the claim which it is alleged that Maung Po Min had to one-quarter share on the re-marriage of his father was not a claim as *orasa* son arising on the death of a parent; but it was the entirely different claim of the eldest son to a quarter share on the re-marriage of the surviving parent.

The right to claim such quarter share on the re-marriage of the surviving parent was decided in the case of *Maung Seik Kaung v. Maung Po Nyein* (5), and was recognized by a Full Bench of the late Chief Court in the case of *Shwe Po v. Maung Bein* (6). In the latter case, Hartnoll, J., observed that because the eldest son had allowed the twelve years' period to pass, he could not claim the one-fourth share and so it became irrecoverable and lapsed in his father's estate; and that he could claim nothing further until his father died and then he would not claim as an heir entitled to inherit any portion of the estate consequent on his mother's death, but as an heir to his father's estate. In the case of *Maung No v. Maung Po Thein* (7), May Oung, J., stated that he was in entire agreement with that statement of the law and that it followed in his view that the

(2) 38 Ind. Cas. 809; 9 L. B. R. 56; 19 Bom. L. R. 294; 15 A. L. J. 96; 32 M. L. J. 71; 21 M. L. T. 97; 21 C. W. N. 527; 44 C. 379; 26 C. L. J. 169; 10 Bur. L. T. 138; 44 I. A. 42 (P. C.).

(3) 67 Ind. Cas. 769; 11 L. B. R. 292.

(4) 83 Ind. Cas. 550; 2 R. 168; (1924) A. I. R. (R.) 323.

(5) 1 L. B. R. 32.

(6) 27 Ind. Cas. 632; 8 L. B. R. 115; 8 Bur. L. T. 25.

(7) 76 Ind. Cas. 612; 1 R. 363 at p. 363; 2 Bur. L. J. 109; (1923) A. I. R. (R.) 239.

right of the eldest son to claim a quarter share from his father on the latter's re-marriage after his mother's death is not a vested one; and then he went on to apply the same view to the claim, if any, of the *kanittha* children. These remarks, however, were *obiter*, and the actual decision in that case was based mainly on the law of *res judicata* and on the decision that the *kanittha* children had no right to make the claim after the death of the surviving parent.

The decision in *Maung Seik Kaung v. Maung Po Nyein* (5) was partially discussed by Heald, J., at page 276 of the report of *Maung Sin's case* (1) in 11 L. B. R. and at page 753 in 2 Rangoon; but the same question was again more fully considered by Heald, J., in the later case of *Maung Shwe Ywet v. Maung Tun Shein* (8), where he discussed all the *dhammathats* and other authorities at considerable length; and he came to the definite conclusion that the law is now settled that whilst an *orasa* son cannot claim a one-fourth share of the property jointly acquired by his parents merely by reason of his mother's death, the re-marriage of his father gives him a right to claim the one-fourth share, which he would not have if his father did not re-marry. This decision appears to me, when taken with the previous Full Bench decision and the decision in *Maung Seik Kaung v. Maung Po Nyein* (5) to make it binding on me to hold that Maung Po Min had acquired the definite right to claim the one-fourth share on the re-marriage of his father.

The remaining question requiring consideration is whether such right to claim the one-fourth share has devolved on the plaintiffs, having regard to the fact that Maung Po Min had not in fact made the claim before his death. I have referred above to the view expressed by May Oung, J., in the case of *Maung No v. Maung Po Thein* (7), that, on the remarks of Hartnoll, J., in the Full Bench decision in *Shwe Po v. Maung Bein* (6), the right would not be a vested right. I find that Heald, J., had also referred to this Full Bench decision in his judgment in *Maung Sin's case* (1) at page 283 of 11 L. B. R. and at page 763 of 2 Rangoon where he says that the Full Bench case of *Shwe Po v. Maung Bein* (6) is interesting for the pur-

poses of the present reference only, because its suggestion that the *orasa* has an option and can either claim the one-fourth share or wait till the death of both parents and come in with the other children, seems to have been since overruled by the Privy Council in the case of *Tun Tha v. Ma Thit* (2). This opinion was likewise *obiter*, but as I construe this remark, it means that the Privy Council, having held in *Tun Tha's case* (2) that the right of the *orasa* to the one-fourth share is a vested right, have in effect overruled the previous decisions to the effect that the right was a mere option or right to elect as distinct from a vested right.

The consideration of this point brings me back to the question whether on a parity of reasoning, the remarks and reasoning of their Lordships of the Privy Council can apply to the share arising on the re-marriage of the surviving parent; I think the remarks and reasoning can so apply. At page 56 of the report of *Tun Tha's case* (2) in 9 L. B. R. it will be noticed that the Bench of the Chief Court refer to one question for determination on the appeal as being whether an eldest son must act with reasonable promptitude in exercising his "option" of taking one-fourth of his parents' joint property on the death of the father, etc., whilst the contention that was rejected by the Privy Council was put in the different form as an *election* or a right *to elect* and on page 59 of the same report the Lord Chancellor states that, "Their Lordships do not think that it is desirable to express an opinion upon the true construction of r. 14. It is a matter that may arise for determination hereafter, and its determination is not relevant to the present question, because, even assuming in favour of the respondents, that the rights of the eldest son would change in the event of his not having segregated his one-fourth share before his mother's death, it by no means follows that the right which he got under r. 5 was merely the right *to elect* within a certain limited period of time whether he would take the property or not. Their Lordships can find no ground whatever for the suggestion that he got anything under r. 5 excepting a definite one-fourth part of the estate, a right which he was at liberty to assert within any period that was not outside the period fixed by Art. 123 of the Indian Limitation Act as the period within

(8) 66 Ind. Cas. 538; 11 L. B. R. 199.

which a claim must be made for a share of property on the death of the intestate." In other words, the use of the word "option" in this connection is misleading and does not mean a mere right to elect. Every person, who owns property or a share in property which has been in the possession of another person, has an option to avoid asserting his claim, but that fact does not prevent the interest from being a vested one.

If we apply these remarks to the case of the right to a share of one-fourth arising in favour of the eldest son on the death of the surviving parent, we also find either the word *option* or passages describing the right as if the claim to it were optional and I think that the *option* in that case likewise was not a mere right to elect, but was a very similar option to the option the *orasa* child to take a definite one fourth part of the estate. The reference to Art. 123 of the Indian Limitation Act, 1908, does not affect the question, because, the period under that Article begins to run from the time when the share was payable or deliverable. The share would obviously not be a vested share prior to the re-marriage of the surviving parent, but a reference to the enactments as to contingent bequests should clear up any doubts arising under this head.

The fact that the right lapses after the twelve years, likewise does not make any difference, because the lapsing would be the same whether it was a lapsing of the right of an *orasa* child to take his *orasa* share as a definite one-fourth share in the joint estate, or whether it was a like failure to take the definite one-fourth share to which he had become entitled on the re-marriage of the father. Section 28 of the Indian Limitation Act, 1908, would equally apply and effect the extinguishment of the right in each case. The confusion which has arisen is the same in both classes of cases; and now that the Privy Council has finally decided the point in the one class of cases, it is, I think, the duty of the Courts to apply the like rule of construction in the other class of cases, which is exactly similar so far as the question of an option or question of election comes in. For these reasons I agree with the *obiter* opinion of Heald, J., that the previous view that the right was mainly an option or a mere option was impliedly overruled by

the decision of the Privy Council; and I must, therefore, hold that the right is a vested interest and right. That being so, I can see no reason why this vested interest and right should not devolve on the heirs and legal representatives of the holder of the vested interest or definite right to the one-fourth share.

In this connection I have also considered the question of the preferential right accorded by the *dhammathats* to the children of the *orasa* child. As pointed out in different passages in *Maung Sin's case* (1), this preferential right to an equal share with the younger uncles and aunts will be effective in cases where the *orasa* child though acquiring his status of *orasa*, subsequently predeceases both his parents. In such an event he obviously cannot acquire the one-fourth share either as *orasa* or in the other class of cases on the re-marriage of the surviving parent. That is one class of cases in which the preferential right clearly can come in. In the case of *Maung Po Min*, who, though an *orasa* child, had not acquired the right to the *orasa's* share, the same position would have arisen, if his father U Pe Lay had not re-married prior to the death of *Maung Po Min*. That is another class of cases in which the preferential right of the children of the *orasa* can come in. I am not aware of any reason why these two classes of cases should not be the only classes in which that preferential right arises. If *Maung Po Min* had in fact claimed and received his one-fourth share before his death, it is clear that his heirs and legal representatives would have inherited that one-fourth share on his death. Likewise, once it is clear that his right to that one-fourth share was a vested right to a definite one-fourth share, I can see no reason why it should not similarly devolve on his heirs and legal representatives.

For these reasons I allow the appeal and I set aside the decree of the lower Appellate Court; and I restore the decree of the Sub-Divisional Court granting the plaintiffs' claim as prayed with costs in all three Courts. I also direct that the amounts of Court fees which would have been paid by plaintiffs in the Trial Court and also on the second appeal in this Court, if they had not been permitted to file the suit and this appeal respectively as paupers, shall be calculated and recovered from the de-

fendants and that such amounts shall be a first charge on the subject-matter of the suit.

Z. K.

*Appeal allowed;
Decree set aside.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 107 OF 1924.

October 24, 1924.

Present:—Mr. Kinkhede, A. J. C.

ONKAR—APPLICANT

versus

DHAN SINGH AND OTHERS—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), s. 115, O. XXI, r. 89—Execution sale, setting aside of—Interest in property—Title negatived previously—Locus standi of applicant—Refusal to entertain application—Revision.

Order XXI, r. 89 of the C. P. C. of 1908, has wider scope than s. 310A of the old Code for which it has been substituted, and the right to make a deposit to set aside an auction sale is not now restricted to the judgment-debtor alone. [p. 965, col. 1.]

The words "owning such property" in O. XXI, r. 89, C. P. C., cannot be divorced from the rest of the clause so as to read them independently of the expression "by virtue of a title acquired before such sale" as if they, as also the other words "holding an interest therein," stand by themselves and are not controlled by the aforesaid expression. [p. 965, col. 2.]

The applicant under O. XXI, r. 89, C. P. C., must be a person who can even at the date of his application be proved to be a person either owning the property or holding an interest therein by virtue of a title, and further the title must be a pre-existing title, that is, a title acquired before the auction sale. [p. 965, col. 1.]

If in an objection to attachment in execution of a decree preferred by a person, as also in the declaratory suit following the order therein, the title of that person to the property is negatived, he has no right to make an application to set aside the auction sale by making a deposit under O. XXI, r. 89 of the C. P. C. [p. 967, col. 1.]

An auction-purchaser is entitled to take advantage of an adjudication in the objection case, as also in the regular declaratory suit. [p. 966, col. 2.]

Where a Court refuses to entertain an application under O. XXI, r. 89 of the C. P. C., on the ground that the petitioner has no *locus standi*, it is a case where the Court fails to exercise a jurisdiction vested in it by law within the meaning of s. 115 of the Code and the High Court can interfere in revision in such a case. [p. 967, col. 1.]

Civil revision against an order of the District Judge, Nimar, in Miscellaneous Civil Appeal No. 18 of 1923, dated the 7th February 1924.

Dr. H. S. Gour and Mr. W. R. Puranik, for the Applicant.

Sir B. K. Bose, R. B., N. G. Bose, Messrs. P. N. Rudra and Fida Hussain, for the Non-Applicants.

ORDER.—In Civil Suit No 84 of 1906. one Dhansingh obtained a mortgage-decree for sale of the mortgaged house, on 16th December 1916. That decree was made final on 20th October 1917 as against the defendant Martand who was a mortgagor in the case. The decree-holder on 8th August 1918 applied for a personal decree for the balance under O. XXXIV, r. 6 of the C. P. C., and accordingly on 28th September 1918 a money-decree was passed against Martand for Rs. 475-2 0 inclusive of costs. In execution of this decree a $3\frac{1}{2}$ pies share of Mouza Ichhapur was attached as belonging to the judgment-debtor Martand. One Onkar claimed to have purchased the said share from the judgment debtor as per sale-deed, dated 30th October 1918, which was registered on 5th December 1918, the presentation being also on that day. The objection was disallowed by the Executing Court on 28th June 1919 on the ground that the sale was not genuine and for consideration and that possession never passed to the objector. The unsuccessful claimant thereupon instituted Suit No. 89 of 1919 under O. XXI, r. 63, C. P. C., against the attaching creditor and also joined the judgment-debtor as a co defendant, for setting aside the summary order in the objection case. The suit was filed on 2nd September 1919.

As the property was in the meantime advertised for sale and going to be sold in execution of the said decree on 14th October 1919, Onkar obtained an injunction for staying the sale. The case was then fought on the merits between the claimant and the decree-holder. The judgment-debtor Martand supported Onkar's title based on the sale. The decision in the regular suit confirmed the decision in the objection case and accordingly the suit was dismissed on 31st March 1920 by the Munsif, Burhanpur. The appeal preferred by Onkar also failed on the merits on 8th September 1920. I have, therefore, before me a clear finding by the District Judge, Nimar, that the sale in Onkar's favour "was not *bona fide* and for valuable consideration, but that it was executed with a view to defeat" the decree-holder's claim. To this decision also the judgment-debtor Martand was a party. The cloud that was cast upon the title of the judgment-debtor Martand by the sale-deed, dated 30th October 1918, thus disappeared on 8th September 1920. The result was

that the property could be sold as the property owned and possessed by the judgment-debtor free of all claim by the objector on the basis of his title as an alleged purchaser.

The usual C Form was prepared and sent to the Collector on 17th December 1921 for execution and sale of the property. On 4th July 1922 Onkar applied for permission to deposit the amount of the decree for payment of the decree-holder, as the Collector had fixed a date for sale. The permission was granted without issuing notice to the decree-holder or judgment-debtor. The judgment-debtor thereafter moved the Court to discharge that order and to return the deposit, and the decree-holder also joined with him in asserting that Onkar had no right to deposit the money. The order was discharged and the judgment-debtor's application was allowed. A fresh C Form was prepared and sent to the Collector (the former C Form having been filed and sent to the Record Room by him). Onkar was thus ordered to take back his deposit on 2nd December 1922. It does not appear from the record as to what action was taken on that C Form.

On 27th January 1923 the decree-holder again moved the Executing Court to execute its decree in Suit No. 84 of 1916. On the Court being satisfied that the property was under attachment an order for sale was passed and the sale was held in due course on 2nd November 1923 the aforesaid *malguzari* share alone having fetched Rs. 1,920 as the price thereof. One Pirchand was the auction-purchaser. Onkar's sale was for Rs. 500 for the *malguzari* share and the house.

With a view to prevent the sale from being confirmed in favour of the auction-purchaser, Onkar made an application on 15th November 1923 for depositing the amount of the decree and the 5 per cent. commission payable to the auction-purchaser, under O. XXI, r. 89 of the C. P. C. To this application the decree-holder, judgment-debtor and the auction-purchaser are parties. The Court ordered the deposit to be accepted and fixed the application for hearing for 8th December 1923 for which date notices were issued to the aforesaid parties. It does not appear from the proceedings that any formal pleadings were recorded in answer to the application, but the decree-holder, judgment-debtor as well as the purchaser all opposed it on the ground

that the application could be made only by a person interested in the property and that the applicant Onkar had no interest in the property as decided between him, the decree holder and the judgment-debtor. The Court thereupon found that the applicant cannot be said to own the property sold in auction and accordingly disallowed the application and ordered the deposit to be returned to him and confirmed the sale in favour of the purchaser, and struck off the execution proceedings as fully satisfied. Against this order Onkar went up in appeal to the District Judge, Nimar, who held that the decision in the suit under O. XXI, r. 63, C. P. C. was *res judicata* not only between Onkar and Dnansingh the decree-holder, but also between him and Martand the judgment-debtor. He also held that "the genuineness of the transaction was definitely put in issue and it was found that the transaction was a bogus one and made with a fraudulent purpose; that is to say, it was decided that *it could convey no title*." With regard to the maintainability of the application under O. XXI, r. 89 of the C. P. C., his view is expressed in these words:—"It has been held by a competent Court that the appellant Onkar had not acquired the title which he now alleges. Consequently he is not the person entitled to apply to have the sale set aside. * * * Onkar brought a suit to declare his title to the property and it was decided that he had no title to the property and having no title he cannot make an application under O. XXI, r. 89." In this view the District Judge confirmed the order of the first Court refusing to entertain the application.

It is against this order dated 7th February 1924 that Onkar has preferred the present civil revision petition under s. 115 of the C. P. C., and challenges the correctness of the decision on every point decided against him. His learned Counsel contends that although he is not a person 'owning' the property, he is still a person "holding an interest therein" by virtue of the title acquired before the execution sale, within the meaning of O. XXI, r. 89, sub-r. (1), C. P. C., and that in rejecting his application the Courts below have refused to exercise a jurisdiction vested in them by law, and that consequently interference in revision with the decision is absolutely necessary. To this the non-applicants' reply is that this Court should not interfere in revision in a matter which is concluded by a pre-

vious decision between the parties so far as the applicant's title is concerned, and as the decision sought to be revised does not disclose a failure to exercise jurisdiction. Two points, therefore, arise for consideration:

- (1) As to whether O. XXI, r. 89, sub-r. (1), C. P. C., has been rightly construed; and
- (2) whether any question of jurisdiction is involved?

I will discuss these points in the following paragraphs and show that the construction put by the District Judge is correct, and that although I have jurisdiction to interfere under s. 115, C. P. C., no case for interference has been made out by the applicant.

I will first take up point No. 1. The main object of enacting s. 310-A of the old C. P. C. was to enable the judgment-debtor to prevent his property from being sold below the market-value. Difficulties were, however, experienced in actual practice, and it was thought expedient to hold that the protection must be extended to persons holding even a lesser interest than that of an owner like the judgment-debtor, as for example, a co-heir, a simple mortgagee, a member of the Mitakshara joint family or a lessee or a person in reversion and so on. Some Courts upheld their right while others did not. Different views thus prevailed. In *Paresh Nath Singha v. Nabogopal Chattopadya* (1) the words "any person whose immoveable property has been sold" in s. 310-A of the old Code were considered sufficiently elastic to admit a wider construction being put on them so as to include "every person, who has an interest in the property in question whether qualified, partial or absolute". The necessity for giving the power of making a deposit to a wider circle and to put a stop to the conflict of decisions was recognized by the Legislature and the law appeared in the form of r. 89 of the new Code in place of s. 310-A of the repealed C. P. C. This would show that the right to make the deposit is not restricted under the new Code to the judgment-debtor alone.

The sole question, therefore, is whether the words "any person either owning such property or holding an interest therein by virtue of a title acquired before such sale" cover the case of the present applicant, the transaction in whose favour has been found to be bogus, without considera-

tion and intended to pass no title but to be fraudulent in its nature, as stated above. Dr. Gour, for the applicant says that the only effect of the decision both in the objection case and in the regular suit (which is only a continuation of the objection proceedings, or as it were, an appeal in the form of a suit) was to negative his right to obtain an *absolute* release of the property from attachment *without payment*, as an owner thereof, but that does not affect any lesser 'interest' he may hold in it, at least, as a trustee, or a bogus purchaser for only an inadequate consideration, or a mere charge-holder, and that as such he can assert that he is 'a person, holding an interest' in the property, which entitles him to obtain the release on payment or deposit of the decretal amount and the auction-purchaser's commission, and thus prevent the sale of the property being confirmed. In other words, he argues that he has a right to prevent the property from being sold as the property of the judgment-debtor and from going out of his own or judgment debtor's hands to a stranger purchaser. The auction has fetched nearly four times the price which the applicant Onkar is alleged to have paid as consideration for the sale to the judgment-debtor. The latter, therefore, naturally supports the auction and gives a go-by to the private sale in favour of the applicant. To uphold the applicant's contention would be to put premium on fraud besides encouraging officious interference with the affairs of a judgment-debtor who does not care to have it, but on the contrary strenuously opposes it, and that too at the instance of a person proved to be a mere volunteer.

Moreover, there is a fallacy in the above argument. It lies in the fact that the words "owning such property" are sought to be divorced from the rest of the clause, and to read them independently of the expression "by virtue of a title acquired before such sale" as if they are also the other words "holding an interest therein" stand by themselves and are not controlled by the aforesaid expression "by virtue of a title acquired before such sale" used in r. 89 of the said Order. It has been pointed out in *Pandurang Laxman v. Govinda Dada* (2) that there is no reason to limit the words "by virtue of a title acquired before such sale" to the words "holding an interest therein" so as

(1) 20 C. 1 at p. 13; 5 C. W. N. 821 (F. B.).

(2) 37 Ind. Cas. 211; 40 B. 557; 18 Bom. L. R. 571.

to read the first clause "owning such property" as if it stood by itself. The Patna High Court has also in *Dhanwanti Kuerv. Sheo Shankar Lall* (3) taken the same view. The Madras High Court also has similarly accepted as correct the interpretation put by the Bombay High Court on the said words and overruled the contrary view which was held in the rulings in *Anantha Lakshmi Ammal v. Sankaran Nair* (4) and *Subba Rayudu v. Lakshmi Narasamma* (5) as will be seen from the Full Bench decision of *Sundaram v. Mamsa Mavuthar* (6). On the same principle, I say, there is no reason to read the words "having an interest therein" as if they are unconnected with or uncontrolled by the words "by virtue of a title acquired before such sale". So then, it is clear that the applicant under O. XXI, r. 89 of the C. P. C., must be a person who can even at the date of his application, be proved to be a person, either *owning* the property or *holding* an interest therein by virtue of a title; and further that, that title must have been a pre-existing title, that is to say, a title *acquired before* the auction-sale. It must not be a title once vesting, or sought to be established and already negatived, or declared in a Court as non-existent. If the very title be wanting or not subsisting, neither the alleged defunct ownership nor the alleged 'holding' of the 'interest' sometime in the past, is of any avail. The use of the words 'owning' or 'holding' in the above expressions indicates a present subsisting ownership or interest in the applicant, at the date of his application. In the case before me the applicant's so-called interest, whether it be that of a trustee or of a bogus purchaser or of a mere charge-holder, is derived from, or at any rate is sought to be based upon, the alleged purchase dated 30th October 1918, and not independently of it. But the decision in the claim or objection proceedings as also that in the suit brought under O. XXI, r. 63, of the C. P. C., as also the order dated 2nd December 1922 passed on the judgment-debtor's application, have one and all knocked that title on its head, and the so-called

right of Onkar to make the application in his capacity of a person either owning the property or holding an interest therein must be deemed to have been completely negatived long before the date of his application. The very basis of the right to apply being thus absent, the application of Onkar, under r. 89 aforesaid, was rightly rejected as not maintainable under law. The District Judge's finding quoted above clearly shows that Onkar had not the title in virtue of which he could assert either ownership or interest in the property sold by the auction. That an auction-purchaser is entitled to take advantage of an adjudication in the objection case and also in the regular suit is clearly established: see *Velu Padayachi v. Arumugam Pillai* (7) and *Singariah Chetty v. Chinnabbi* (8).

Reliance was placed on *Dulichand v. Ramkishan Singh* (9), *Jagdeo Narain Singh v. Rajah Singh* (10) and *Maharana Shri Jasvat Singji Fatesingji v. Secretary of State for India* (11) as supporting the applicant's right to deposit the decretal amount with or without protest as it were, in order to avert the confirmation of a sale already held. In the case of *Dulichand v. Ramkishan Singh* (9), the deposit was made after the sale was ordered but before it took place and in order to prevent that sale, and not after the decision of the regular suit. The person depositing the amount in that case, as also in *Kanhaya Lal v. National Bank of India* (12) had a subsisting interest of his own to safeguard by the said deposit. No regular suit was in fact filed in the earlier case of *Dulichand v. Ramkishan Singh* (9) under s. 282 of the old Code. Similarly in *Jagdeo Narain Singh v. Rajah Singh* (10), the deposit was made after the claim was disallowed but before the sale was actually held in order to prevent the property from being sold. There also the person making the deposit had a subsisting interest admittedly. In the case

(7) 56 Ind. Cas. 481; 38 M. L. J. 397 at p. 402; 11 L. W. 343; 27 M. L. T. 312.

(8) 60 Ind. Cas. 780; 44 M. 268 at pp. 272, 273; 12 L. W. 725; 28 M. L. T. 420; 40 M. L. J. 7; (1921) M. W. N. 33.

(9) 7 C. 648; 8 I. A. 93; 4 Sar. P. C. J. 245; 5 Ind. Jur. 493; 3 Ind. Dec. (N. S.) 966 (P. C.).

(10) 15 O. 656; 13 Ind. Jur. 217; 7 Ind. Dec. (N. S.) 1021.

(11) 14 B. 293; 7 Ind. Dec. (N. S.) 659.

(12) 18 Ind. Cas. 949; 40 C. 598; 17 C. W. N. 541; (1913) M. W. N. 406; 13 M. L. T. 406; 11 A. L. J. 413; 17 C. L. J. 478; 15 Bom. L. R. 472; 184 P. L. R. 1913; 25 M. L. J. 104; 40 I. A. 56 (P. C.).

(3) 51 Ind. Cas. 873; 4 P. L. J. 340.

(4) 18 Ind. Cas. 579; 24 M. L. J. 205; 13 M. L. T. 123; (1913) M. W. N. 101.

(5) 22 Ind. Cas. 193; 38 M. 775; 15 M. L. T. 98; (1914) M. W. N. 147; 1 L. W. 59.

(6) 63 Ind. Cas. 937; 40 M. L. J. 497; 13 L. W. 498; 29 M. L. T. 269; (1921) M. W. N. 272; 44 M. 554 (F. B.).

of *Maharana Shri Jasvatsingji Fatesingji v. Secretary of State for India* (11), no similar question was involved except that like all other cases the deposit was made under protest. In my opinion those cases bear no analogy to the case of an officious intruder like the applicant.

On the whole then I agree with the District Judge in holding that the applicant Onkar was not entitled to apply under O. XXI, r. 89 (1) of the C. P. C., and that his application was rightly rejected.

Since I hold that O. XXI, r. 89 (1) aforesaid has been rightly construed, there is no need for me to decide the question whether this Court can interfere with orders rejecting such applications on the revisional side. I may, however, state that there is ample authority in support of the view that the High Court can interfere in revision in such cases. The decision of the Judicial Committee in *Balakrishna Udayar v. Vasudeva Aiyar* (13) and the rulings of some other High Courts clearly recognize that a refusal by an Executing Court to deal with such a petition amounts to a non-exercise of its jurisdiction. The following decision exactly covers the point before me: *Sundaram Mamsa v. Mavuthar* (6), where it is laid down that "where a Court refuses to entertain an application under O. XXI, r. 89 of the C. P. C., on the ground that the petitioner has no *locus standi*, it is a case where the Court fails to exercise a jurisdiction vested in it by law within the meaning of s. 115 of the C. P. C. and the High Court will entertain a revision in such a case." Here on the facts the applicant is found to have no *locus standi*. There is no failure, therefore, to exercise a jurisdiction vested in the Courts by law. The jurisdiction has been rightly exercised. The revision petition, therefore, fails on its merits.

For all these reasons I reject the petition with costs. Costs in the Courts below will be paid as already ordered.

G. R. D.

Application rejected.

N. H.

(13) 40 Ind. Cas. 650; 40 M. 793; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48; 44 I. A. 261 (P. C.).

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 33
OF 1925.

March 18, 1925.

Present:—Mr. Justice Heald and
Mr. Justice Lentaigne.

MAHOMED HUSSAIN—APPELLANT

versus

HOOSAIN HAMADANEE & Co.—

RESPONDENTS.

Letters Patent (Rangoon), cl. 13—"Judgment," what is—Order refusing to issue commission for examination of witness, whether judgment—Appeal, whether lies.

An order which does not affect the merits of the dispute between the parties by determining some right or liability which is in controversy between them in the suit is not a "judgment" within the meaning of the word as used in cl. 13 of the Letters Patent of the Rangoon High Court.

An order refusing to issue a commission for the examination of a witness is a purely interlocutory order and is not a "judgment" and is not, therefore, appealable under cl. 13 of the Letters Patent of the Rangoon High Court.

Appeal against an order of this Court on the Original Side, in Civil Regular No. 283 of 1924.

Mr. Rahman, for the Appellant.

JUDGMENT.—In Suit No. 283 of 1924 on the Original Side of this Court, appellant, who was defendant in the suit, applied for a commission to examine a certain witness in India.

Affidavits were filed by both sides, and the learned Judge, after hearing Counsel, dismissed the application.

Appellant has filed an appeal against that order, but his appeal has not yet been admitted.

His learned Advocate contends that the order is a "judgment" within the meaning of that word in cl. 13 of the Letters Patent.

The meaning of the word "judgment" in that clause was recently considered by a Bench of this Court in the case of *Mooljee Dharsee & Co. v. M. E. Moolia* (1), and it was held that an order which does not affect the merits of the dispute between the parties by determining some right or liability which is in controversy between them in the suit is not a "judgment." As was remarked in the case of *Tuljaram Row v. Alagappa Chettiar* (2), "An order refusing to issue a commission, however, serious the ultimate results to the party, is a purely interlocutory order and not a judgment

(1) 88 Ind. Cas. 740; 3 R. 255; 4 Bur. L. J. 61; (1925) A. I. R. (R.) 225.

(2) 8 Ind. Cas. 340; 35 M. 1; (1910) M. W. N. 697; 8 M. L. T. 453; 21 M. L. J. 1.

terminating a suit or other proceedings or affecting the merits."

We are, therefore, of opinion that the order in this case was not a "judgment" within the meaning of cl. 13 of the Letters Patent, and that no appeal lies against it.

The appeal is accordingly dismissed.

Z. K.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 426 OF 1923.

April 14, 1925.

Present :—Mr. Justice Srinivasa Iyengar.
SRAMBIKKAL MALIAKKAL MOIDEEN
KOYA AND ANOTHER—DEFENDANTS—
PETITIONERS

versus

KATTAPARAMBATH MOIDEEN KUTTI
HAJI AND ANOTHER—PLAINTIFFS
—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XX, r. 4
—*Judgment of Small Cause Court—Mere statement of*
all issues being found for plaintiff—Judgment, whether
in accordance with law.

It is enough if a judgment of a Small Cause Court sets out only the points for determination and the decision with regard to each separately.

A judgment, however, which clubs together all the points arising in the case and merely contains a statement that all the issues are found in favour of the plaintiff is not a sufficient compliance with the provisions of O. XX, r. 4, C. P. C.

Komappa Kurup v. Velayichettichiar, 70 Ind. Cas. 791; 42 M. L. J. 583; 15 L. W. 642; 31 M. L. T. 124; (1922) A. I. R. (M.) 360, referred to.

Petition, under s. 25 of Act IX of 1887, praying the High Court to revise a decree of the Court of the Principal District Munsif, Calicut, in S. C. S. No. 408 of 1922.

Mr. K. P. Ramakrishna Iyer, for the Petitioners.

Mr. T. S. Viswanatha Iyer, for the Respondents.

JUDGMENT.—The judgment of the lower Court in this small cause case is an extremely unsatisfactory one. The learned District Munsif says that he finds all the issues for the plaintiffs. My attention has been drawn to the terms of O. XX, r. 4 and the decision of this Court reported as *Komappa Kurup v. Velayichettichiar* (1). In that case Spencer and Krishnan, JJ., laid down that it was enough for a Small Cause Judge to follow the provisions of

O. XX, r. 4, cl. (1) and the learned Judges further proceeded to observe that they are unable to follow the line taken by Seshagiri Iyer, J., in *Kandasami Chetty v. Ramalinga Chetty* (2). I should have been disinclined to interfere in this case if at any rate the District Munsif had, while setting out the points for determination according to him, at least stated his decision with regard to each separately. But when I find that he has clubbed them all together and made a statement merely to the effect that he finds all the issues in favour of the plaintiffs, I cannot regard it as a compliance even with the provisions of O. XX, r. 4. Taking one of the points for determination, namely, "did the defendant commit breach of contract as alleged by the plaintiffs" and taking the words of the District Munsif, the finding should be deemed to be that the defendants did commit breach of contract. It is not at all clear how the District Munsif found that the breach came to be committed by the defendants. This was not a case in which any time was fixed for the performance of the contract and the defendant, in his written statement set out that he was not only ready and willing to deliver to the plaintiffs the balance of the cocoanuts but that the plaintiffs refused to accept delivery of the same. No doubt if the defendant was bound to perform the contract within a reasonable time and failed to do so, he would have been guilty of breach of contract. But that would undoubtedly be a point for determination and I see no indication whatever in the judgment that the attention of the learned District Munsif was at all drawn to this feature of the case or that he came to any conclusion or decision with regard thereto. On the whole, I am satisfied that the judgment before me does not comply with the provisions of law and is also otherwise very unsatisfactory. I, therefore, set it aside and direct that the case be remanded to the lower Court for being disposed of according to law. If the parties desire, they would be at liberty to adduce such evidence or fresh evidence as may be deemed fit. Costs in this Court will be reserved and be dealt with and disposed of by the lower Court as part of its order for costs.

V. N. V.

Case remanded

N. H.

(1) 70 Ind. Cas. 791; 42 M. L. J. 583; 15 L. W. 642; 31 M. L. T. 124; (1922) A. I. R. (M.) 360.

(2) 59 Ind. Cas. 906; 12 L. W. 285

RANGOON HIGH COURT.CIVIL MISCELLANEOUS APPEAL No. 146
OF 1924.

March 25, 1925.

Present:—Mr. Justice Heald and Mr.
Justice Lentaigne.

MAUNG MYINT—APPELLANT

versus

OFFICIAL ASSIGNEE—RESPONDENT.

*Presidency Towns Insolvency Act (III of 1909),
ss. 15, 17, 21—Adjudication on petition of insolvent—
Withdrawal of petition, whether can be allowed—Pro-
cedure.*

A debtor who has been adjudicated insolvent on his own petition cannot, even with the leave of the Court, withdraw his petition. Section 15 (2) of the Presidency Towns Insolvency Act only applies to petitions that are pending before any order has been made, and once an order of adjudication has been made, the debtor becomes an insolvent and remains so until the order of adjudication is annulled or he obtains the discharge. [p. 969, col. 2.]

Mr. Keith, for the Appellant.

JUDGMENT.

Lentaigne, J.—This is an appeal by an insolvent against an order passed by May Oung, J., in the Original Insolvency Jurisdiction of this High Court dismissing an application made by the insolvent for leave to withdraw his petition in insolvency.

An order of adjudication had previously been passed on the 28th April 1924 on the insolvent's own petition under the provisions of the Presidency Towns Insolvency Act, 1909. On the 9th June 1924 the insolvent had also previously applied for the annulment of the adjudication; and on the same day some creditors also applied for the annulment of the adjudication; but on the 10th June 1924 such applications were dismissed on the ground that the case was not one within the provisions of s. 21 of the Act.

On the 5th August 1924 the insolvent filed an application for leave to withdraw the application for the benefit of the Act, and certain creditors appeared by learned Counsel at the hearing of that petition on the 6th August and again pressed for the annulment of the adjudication, and it was pointed out that the insolvent had filed his petition in insolvency for the benefit of the Act after he had been arrested in execution of a decree of the Court, and that it would be in the interests of the creditors that he should be allowed to withdraw or that the adjudication be annulled. This application for annulment was also rejected on the same grounds and the insolvent filed his schedule on the following day.

On the 8th August 1924 the insolvent renewed his application for leave to withdraw his petition for the benefit of the Act and this application purported to be made under s. 15, sub-s. (2) of the Act. After notice of this petition had been served on all creditors, certain creditors again appeared by Counsel on the 9th September 1924 and supported the application, and the attention of the Court was drawn to certain decisions under the Insolvency Statutes formerly in force.

It was held that these decisions did not bear directly on the question under consideration and that s. 15 of the Presidency Towns Insolvency Act, 1909, does not apply to a case where an order of adjudication has been made, because such a withdrawal with the permission of the Court could not remove the effects of the adjudication arising under the provisions of s. 17 of the Act, which would continue to operate so as to vest all the property of the insolvent in the Official Assignee and to debar creditors from proceeding against the insolvent's property or instituting suits against the insolvent except with the leave of the Court. For these and other reasons the application was dismissed.

The insolvent has now appealed against that decision, and the point for determination is whether a debtor's petition for the benefit of the Act can be withdrawn even with the leave of the Court after the order for adjudication has been passed. I find that Macleod, J., of the High Court at Bombay held *In re, Subrati Jan Mohammed* (1) that a debtor who has been adjudicated insolvent on his own petition cannot, even with the leave of the Court, withdraw his petition; that s. 15 (2) of the Presidency Towns Insolvency Act, 1909, only applies to petitions that are pending before any order has been made, as also does s. 13 (8) dealing with petitions by creditors; and that once an order of adjudication has been made, the debtor becomes an insolvent and remains so until the order of adjudication is annulled or he obtains his discharge; and that the Court can only annul the order of adjudication under s. 21 of the Act if the Court is of opinion that the debtor ought not to have been adjudicated an insolvent or it is proved to the satisfaction of the Court that the debts of the insolvent

(1) 20 Ind. Cas. 859; 38 B. 200; 15 Bom. L. R. 748.

have been paid in full, and in the latter case the "debts" including at least all debts actually and properly proved in bankruptcy, must have been fully paid in cash. It was also pointed out that this section is the same as s. 35 (1) of the English Bankruptcy Act of 1883.

I agree with that statement of the law so far as the point now before me is concerned. Sub-section (2) of s. 15 of the Presidency Towns Insolvency Act, 1909, enacts that "a debtor's petition shall not, *after presentation*, be withdrawn without the leave of the Court." The words "after presentation" may appear unnecessary, because no question of withdrawal could arise before a petition was presented, but the wording is analogous to the use of the words "at any time after the institution of a suit" in O. XXIII, r. 1, of the C. P. C., and I do not think that in either case the withdrawal could be effected after the adjudication as an order of adjudication of insolvency in the one case or in the shape of a decree in the other case of a suit, so long as such adjudication continued in force. The fact that a withdrawal can be effected in an appeal from a decree does not affect this question, because the setting aside of the decree is necessarily presupposed if there is a withdrawal with the permission of the Appellate Court. Similarly I think that after an adjudication order had been passed, an annulment of the adjudication order would be necessary and is the only way in which a Court could effect this purpose.

I also think that a consideration of the provisions of s. 17 of the Presidency Towns Insolvency Act, 1909, necessarily leads to the same conclusion. A mere withdrawal with the leave of the Court would not annul the application of the provisions of s. 17 of the Act, unless the adjudication were also annulled; and consequently the permission to withdraw would be futile, and the insolvent would still continue to be an insolvent, his property would still continue to vest in the Official Assignee and no suit could be filed against him without the leave of the Court. Section 23 of the Act contains express provisions as to what shall happen on annulment; but there are no similar provisions as regards what would happen on a withdrawal. I think that the reason for the absence of similar provisions in the case of a with-

drawal is because they are not required in the case of a withdrawal before an adjudication order has been passed, and that after the passing of the adjudication order, the right to apply for withdrawal is gone and the proper remedy is an application for annulment in a suitable case.

I find also that in England under the later Bankruptcy Act it has been held that after an adjudication, except in the case of a scheme under s. 21 of that Act, there is no power to annul other than the express power conferred by the s. 29. The decision of Cave, J., in the case of *In re Hester* (2) is instructive and other authorities are cited in this connection at page 131 of the 12th Edition of William's Bankruptcy Practice.

For the above reasons I think that the Court had no jurisdiction to allow the insolvent to withdraw his petition after the passing of the adjudication order. I would, therefore, dismiss this appeal.

Heald, J.—I concur.

Z. K.

Appeal dismissed.

(2) (1889) 22 Q. B. D. 632; 60 L. T. 943; 6 Morrell 85.

SIND JUDICIAL COMMIS- SIONER'S COURT.

ORIGINAL CIVIL SUIT No. 1285 OF 1920.

April 6, 1925.

Present:—Mr. Rupchand Bilaram, A. J. C.
JETHANAND AND OTHERS—PLAINTIFFS
versus

CHETUMAL AND OTHERS—DEFENDANTS

Civil Procedure Code (Act V of 1908), O. I, rr. 1, 3, O. II, r. 3—Joinder of parties and causes of action—"Same act or transaction"—Partnership—Suit for dissolution of main and branch firms—Multifariousness.

A suit for dissolution and winding up of a firm and its branch firm which consists of certain additional partners, who have no interest in the main firm, is bad for multifariousness. [p. 971, col. 2.]

Parchomal Vasandmal v. Pamandas Alamchand, 4 Ind. Cas. 600; 3 S. L. R. 108, followed.

Order I, rr. 1 and 3 of the C. P. C., apply to questions of joinder both of parties and causes of action. [p. 972, col. 1.]

Ramendra Nath Roy v. Brojendra Nath Dass, 41 Ind. Cas. 944; 21 C. W. N. 794; 45 C. 111; 27 O. L. J. 158, relied upon.

Umabai v. Bhavu Balvant, 3 Ind. Cas. 165; 34 B. 358; 11 Bom. L. R. 499 and *Jankibai v. Shrinivas Ganesh Valsankar*, 20 Ind. Cas. 533; 38 B. 120; 15 Bom. L. R. 684, not followed.

Payne v. British Time Recorder Co., (1921) 2 K. B. 1; 90 L. J. K. B. 445; 124 L. T. 719; 37 T. L. R. 295, referred to.

Under the present C. P. C. a plaintiff may not only join different causes of action against the same defendant or the same defendants when such defendants are jointly interested in all the causes of actions, as provided in O. II, r. 3, C. P. C., but he may also join different causes of action against different defendants, provided he is able to bring his case within the purview of O. I, r. 3, C. P. C., under which it is necessary not merely to show that a common question of law or fact would arise but that the right to relief in each case arises out of the same act or transaction or series of acts or transactions. [p. 972, col. 2.]

Ordinarily in a suit for settlement of accounts of a dissolved partnership and of any sub-partnership in which there are additional partners, the act or series of acts which give rise to relief for settlement of accounts of the main partnership are not the same as those which give rise to the relief for settlement of accounts of the sub-partnership. Though some of the evidence in support of the plaintiffs' contention may be common to both the causes of action, it does not thereby follow that there is a common question of fact involved in the two causes of action. [p. 972, col. 2; p. 973, col. 1.]

Mr. Kimatrai Bhojraj, for the Plaintiffs.

Messrs. G. A. Kikla and Kewalram Jethanand, for the Defendants.

JUDGMENT.—The only issue with which I am at present concerned is whether this suit is bad for multifariousness. The plaintiffs have prayed for settlement of partnership accounts of two different concerns, the business carried on in the name of Chetumal Murlidhar and its branch business carried on in the name of Abasapur (3) Co. The plaintiffs' case is that they and defendants Nos. 3 to 5 carried on business at Karachi in the name of Lilaram Lakhmichand. This was the parent firm. Plaintiffs Nos. 1 to 4 were its capitalist partners and plaintiffs Nos. 5 and 6 and defendants Nos. 3 to 5 were its working partners. Defendant No. 3 is one Bulchand. He is the brother of Chetumal and Murlidhar who are defendants Nos. 1 and 2. On March 16, 1915 the parent firm of Lilaram Lakhmichand took up defendants Nos. 1 and 2 as *gumash'ta* partners to carry on a separate business in the name of Chetumal Murlidhar. This business was to be chiefly done at Abasapur and was under the effective control of Chetumal and Murlidhar. The activities of the Firm of Chetumal Murlidhar were various and it is said that the Firm of Chetumal Murlidhar again in their turn entered into different sub-partnerships. Defendants No. 6 are a firm carrying on business at Multan in the name of Gerimal Lakhumall. Defendants No. 7 are likewise another firm carrying on business at Multan

in the name of Gulabrai Tarachand. It is said that one of the activities of the Firm of Chetumal Murlidhar was that they carried on business in partnership with defendants Nos. 6 and 7 at Abasapur and other places in the name of Abasapur 3 Co., and with the dissolution of the partnership carried on in the name of Chetumal Murlidhar in May 1919 the partnership carried on in the name of Abasapur 3 Co., also came to an end. The plaintiffs, therefore, now seek on behalf of this parent Firm of Lilaram Lakhmichand for settlement of accounts of the two concerns. Defendants Nos. 3 to 5 have been impleaded as defendants as they are said to have been unwilling to join as plaintiffs.

Chetumal and Murlidhar who are the chief contesting defendants admit being sub-partners of the Firm of Lilaram Lakhmichand during the year 1915, and perhaps a part of 1916, and to have done partnership business in the name of Chetumal Murlidhar. But they say that the partnership accounts for that period have been settled. They have denied the right of the plaintiffs to ask for settlement of accounts either of the business carried on in subsequent years in the name of Chetumal Murlidhar or of the business carried on in the name of Abasapur 3 Co., which they say was the business done by them on their own personal account in partnership with defendants Nos. 6 and 7 and in which the Firm of Lilaram Lakhmichand had no concern.

It is not seriously disputed that the suit is based on two different causes of action. But it is contended that the accounts of the Firm of Chetumal Murlidhar cannot be conveniently settled without a settlement of the accounts of the Firm of Abasapur 3 Co., and that there is a common question of fact to be tried whether the Firm of Lilaram Lakhmichand were partners in both the concern and that, therefore, this suit as framed is competent under O. I, r. 3, C. P. C.

In *Parchomal Vasandmal v. Pamandas Alamchand* (1), a Bench of this Court in its High Court jurisdiction held that a suit for dissolution and winding up of a firm and its branch firm which consisted of certain additional partners who had no interest in the main firm was bad for multifariousness. The plea that the accounts of the main firm could not be conveniently settled

(1) 4 Ind. Cas. 600; 3 S. L. R. 108.

without settlement of the accounts of the branch firm did not find favour with the Court. This ruling is on all fours with the present case.

Mr. Kimatrai has attempted to distinguish this ruling on a two-fold ground, firstly, that the suit out of which this second appeal arose was instituted under the old Code and secondly, that this ruling loses sight of the provisions of O. I, r. 3, C. P. C. This appeal was decided after the present Code came into operation and the observations of Crouch, A. J. C., who delivered the judgment of this Court would show that in delivering his judgment he had in view the provisions of the present Code. At page 113* he states as follows:

"But the one partnership was quite distinct from the other. Several causes of action can only be joined when they are against the same defendant or the same defendants (s. 45 of the old C.P.C. and O. II, r. 3 new Code). There is no justification for joining several causes of action against different defendants".

The provisions of O. I, r. 3, C. P. C. were either not then pressed at the Bar or were considered by the learned Additional Judicial Commissioner as being limited by O. II, r. 3, C. P. C.

Though with all due respect for the learned Judge I am not prepared to accept the broad proposition that several causes of action can only be joined in the same suit when all the defendants are jointly interested in them, I agree with the conclusions arrived at by the learned Judge that such a suit is not competent. Even if it were otherwise, sitting on the Original Side of this Court, I would be bound to follow this decision.

I would now give my reasons for arriving at the same conclusions. The effect of O. I, rr. 1 and 3 has been fully discussed by Woodroffe and Mukerji, JJ., in *Ramendra Nath Roy v. Brojendra Nath Das* (2) and it has been very rightly held dissenting from the view of Davar, J., in *Umabai v. Bhavu Balwant* (3) and *Jankibai v. Shrinivas Ganesh Valsankar* (4), that O. I, rr. 1 and 3 apply to questions of joinder both of parties and causes of action. With this view I

agree. Under the present Code a plaintiff may not only join different causes of action against the same defendant or the same defendants when such defendants are jointly interested in all the causes of action as provided in O. II, r. 3, C. P. C., but he may also join different causes of action against different defendants if he is able to bring his case within the purview of O. I, r. 3, C. P. C. As said by Mukerji, J., in the above case the determining factors applicable in such a case are "first, could the right of relief against the defendants be said to be in respect of or arising out of (expressions obviously of wider import than relating to) the same act or transaction and secondly would any common question of law or "fact arise if separate suits were brought." Where a series of acts or transactions are relied on as giving a right to relief it would equally appear that the same series of acts or transaction should give rise to the reliefs claimed against the different defendants. The word "same" which precedes the words "act or transaction" equally applies to and governs the words "series of acts or transactions". Ordinarily in a suit for settlement of accounts of a dissolved partnership and of any sub-partnership in which there are additional partners the act or series of acts which give rise to relief for settlement of accounts of the main partnership are not the same as those which give rise to the relief for settlement of accounts of the sub-partnership. In the present case it is the plaintiffs' case that the partnership in the name of Chetumal Murlidhar was formed at a different time and defendants Nos. 6 and 7 were not parties to it. The sub-partnership of Abaspur 3 Co. was admittedly formed at a different time between the partners of the Firm of Chetumal Murlidhar collectively as forming one *quasi* entity and the firms of defendants Nos. 6 and 7 as forming other *quasi* entities. The activities of the two firms were separate and distinct. It would, therefore, follow that the first ingredient required by O. I, r. 3, C. P. C. is not fulfilled. Therefore it is hardly necessary to consider the second ingredient. Under this rule it is not enough for the plaintiffs to show merely that a common question of law or fact would arise. For those words do not apply unless the right to relief in each case arises out of the same act or transaction or series of acts or transactions. The two conditions are not alternative. See the remarks of Vaughan Williams, L. J., in

(2) 41 Ind. Cas. 944; 21 C. W. N. 794; 45 C. 111; 27 C. L. J. 158.

(3) 3 Ind. Cas. 165; 34 B. 358; 11 Bom. L. R. 499.

(4) 20 Ind. Cas. 533; 38 B. 120; 15 Bom. L. R. 684.

*Page of 3 S. L. R.—[Ed.]

Stroud v. Lawson (5), on the construction of similar words used in O. XVI, r. 1, Rules of the Supreme Court which refers to the joinder of different plaintiffs and causes of action and corresponds to O. I, r. 1, C. P. C.

It is also difficult to see how a common question of fact arises in respect of the two causes of action in the present suit. The fact that the Firm of Lilaram Lakhmichand on the one hand and Chetumal and Murlidhar on the other carried on business in the name of Chetumal Murlidhar does not by itself lead to the inference that Chetumal and Murlidhar in their individual capacity could not or did not enter into a partnership with defendants Nos. 6 and 7 in the name of Abasapur 3 Co. With regard to each cause of action the plaintiffs will have to definitely prove who become partners in each firm. Though some of the evidence in support of the plaintiffs' contention may be common to both the causes of action, it does not thereby follow that there is a common question of fact involved in the two causes of action. Order I, r. 3, C. P. C. is the converse of O. I, r. 1, C. P. C. and if it be assumed that this suit had been instituted by defendants Nos. 1 and 2 and Nos. 6 and 7 against the Firm of Lilaram Lakmichand, i. e., the present plaintiffs and defendants Nos. 3 to 5 for settlement of accounts of the two partnerships of Chetumal Murlidhar Abasapur 3 Co., it cannot for a moment be asserted that such a suit would be competent under O. I, r. 1, C. P. C. The provisions of O. XVI, r. 4 Rules of the Supreme Court are wider than those of O. I, r. 3, C. P. C. and enable a plaintiff to join any number of causes of action against different defendants leaving it to the discretion of the Court to limit the plaintiff to any one or more of the causes of action. *Payne v. British Time Recorder Co.* (6). But the powers under O. I, r. 3, C. P. C. are not so wide and are co-extensive with those under O. I, r. 1, C. P. C. or O. XVI, r. 1, Rules of the Supreme Court.

I hold that the suit is bad for multifariousness. The plaintiffs must, therefore, elect to proceed on one of the two causes of action.

P. B. A.

Z. K.

Finding accordingly.

(5) (1898) 2 Q. B. 44 at p. 54; 67 L. J. Q. B. 718; 78 L. T. 729; 45 W. R. 626; 14 T. L. R. 421.

(6) (1921) 2 K. B. 1; 90 L. J. K. B. 445; 124 L. T. 719; 37 T. L. R. 195.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 314 AND 315 OF 1922.

February 13, 1925.

Present:—Justice Sir Charles Gordon Spencer, Kt., and Mr. Justice Ramesam.

KUPPUSWAMI IYER AND OTHERS—
DEFENDANTS NOS. 1 TO 3—APPELLANTS

versus

B. RAJA RAJESWARA SETHUPATHI
alias MUTHURAMALINGA
SETHUPATHI AVERGAL—PLAINTIFF—
RESPONDENT.

Contract—Compromise—Repudiation by one party—Other party, right of, to repudiate—Executed contract, effect of—Madras Local Boards Act (V of 1884), s. 73—Limitation Act (IX of 1908), Sch. I, Art. 120—Landholder, right of, to recover road cess from intermediate landholder—Limitation.

Where there is a compromise which finally settles the rights of the parties and nothing more has to be done to give effect to it, the conduct of one of the parties in acting in a manner inconsistent with the compromise does not justify the other party in repudiating it. [p. 975, col. 2.]

Srish Chandra Roy v. Banomali Roy, 31 C. 584; 8 C. W. N. 594; 6 Bom. L. R. 501; 14 M. L. J. 185; 2 A. L. J. 31; 31 I. A. 103; 8 Sar. P. C. J. 677 (P. C.), distinguished.

Ganga Varapu Krishna Venamma v. Maraparaju Venkata Mukunda Row, 4 Ind. Cas. 303; 7 M. L. T. 33; 33 M. 216, relied on.

A landlord made in favour of a *ryot* an absolute and hereditary grant of a village on *sarvamanyam* tenure. After the landlord's death, his son challenged the alienation, and the matter was compromised by the *ryot* agreeing to pay a favourable rent on the holdings. The son thereafter repudiated the compromise and sued to set aside his father's alienation on the ground of its having been executed under undue influence. The suit was dismissed. In a subsequent suit to recover rent on foot of the compromise:

Held, that the compromise settlement was not an executory contract and the plaintiff was entitled to sue to enforce its terms and was not disqualified from so doing by having sued for a greater relief than he was entitled to in the prior suit. [p. 975, cols. 1 & 2.]

Under s. 73 of the Madras Local Boards Act of 1884 the landholder is entitled to recover from an intermediate landholder the whole of the tax paid in respect of the land held by him less half the tax assessable on the amount of the *poruppu*. The limitation period for a suit to recover it is six years under Art. 120 of Sch. I to the Limitation Act. [p. 976, col. 1.]

Rajeswara Muthuramalinga Sethupathi v. Mahalinga Raju, 52 Ind. Cas. 468; 9 L. W. 287; (1919) M. W. N. 365, followed.

Appeal against the decrees of the Court of the Subordinate Judge of Ramnad at Madura, in O. S. Nos. 33 of 1917 and 53 of 1921, respectively.

Mr. R. Kesava Iyengar, for the Appellants.
Messrs. T. R. Ramachandra Iyer, L. A. Govinda Raghava Iyer and S. Soundara Raja Iyengar, for the Respondents.

JUDGMENT.—These appeals arise out of suits, brought by the Rajah of Ramnad to recover quit rent (or *poruppu*) as well as road-cess and rail-cess and *mahamai* from the defendants, who are in occupation of the village of Nedunthulasi in Rajasingamangalam Taluk of the Ramnad District.

Original Suit No. 33 of 1917 out of which A. S. No. 314 of 1922 arises, is a suit to recover what is due from the defendants for *Faslis* 1321 to 1325. This suit stood over for decision pending the issue of a suit (O. S. No. 157 of 1913) brought by the plaintiff for recovering possession of the village of Nedunthulasi, which he alleged had been obtained from his father as an absolute gift, free from all payments or liabilities through undue influence. The claim of the Rajah to recover the village from the possession of the defendants, was finally rejected by the judgment of the High Court in *Raja Rajeshwara Sethupathi Avergal v. Kuppusami Iyer* (1). The decision, to which one of us was a party, was dated 3rd May 1921. After this there was an attempt to obtain leave to appeal to the Privy Council, but leave was refused both here and in England. By our decision, we held that the Rajah could not recover the village from the defendants because he was bound by a compromise entered into during his minority by the trustee of his estate Venkatarangayyar and certain Nattkottai Chettis to whom the estate was leased. On September 17, 1894, the Rajah's father gave a 40 years' lease to the first defendant of the village of Nadunthulasi on *poruppu* (or favourable rent) of Rs. 804 in consideration of his having rendered services as a trusted *gumashta* of the estate. On 2nd June 1895, the plaintiff's father made an absolute and hereditary grant of the same village on *sarvamanyam* tenure, i. e., free from all liability for rent or tax. On 24th April 1902 the Dewan trustee of the estate and the Chetty lessees entered into an agreement with the first defendant by which the first defendant obtained a permanent lease of the village on payment of *poruppu* at the rate of Rs. 402 a year instead of Rs. 804 fixed under the lease of 1894. The Dewan trustee gave up his intentions of instituting proceedings to set aside the gift of the property made under the *sarva-*

manyam grant of 1895. Under this arrangement the defendants are bound to pay *poruppu* of Rs. 402-1-10 and *mahamai* and road-cess every *fasli*.

The main defence, to these suits is that the plaintiff, having brought O. S. No. 157 of 1913 to recover possession of the village, has shown his intention of not being bound by the compromise of 1902 and that, therefore, the defendants are entitled to treat the agreement as being rescinded and to refuse to pay *poruppu*.

Reliance is placed on cl. 13 of the agreement which runs thus:—"As an arrangement has been effected in this manner and this agreement entered into, the said Kuppuswami Iyer and his representative-in-interest, the said Dewan trustees Rao Bahadur Venkatarangayyar Avergal, and his representatives in-interest and the said lessees and their representatives in-interest and the Rajah who gets the said *samas-thanam* shall conduct themselves in accordance with the provisions contained herein."

In *Srish Chandra Roy v. Banomali Roy* (2), there was a compromise of a suit under which one party acknowledged the title of the other as an adopted son and the other party promised to execute a lease of certain *mouzas*, and afterwards the former party brought a suit to set aside the adoption and caused the other side to incur costs in litigation, and after having failed in this suit he sued for the specific performance of the agreement. The learned Judges of the Calcutta High Court (Hill J., with whom was Brett, J.) held that the Court of first instance rightly exercised its discretion in refusing to grant specific performance in favour of one party whose previous conduct had amounted to an abandonment of the agreement sought to be enforced. On appeal to His Majesty, the Judicial Committee confirmed the decision of the Calcutta High Court.

I think that there is a real difference between the facts of that case and the present one. The Calcutta High Court was dealing with a suit for specific performance, pure and simple. The present suit, which is before us in appeal, is a suit for recovery of rent by a landlord and the learned Judge in

(1) 68 Ind. Cas. 352; 41 M. L. J. 474; (1921) M. W. N. 722.

(2) 31 C. 584; 8 C. W. N. 594; 6 Bom. L. R. 501; 14 M. L. J. 185; 2 A. L. J. 31; 31 I. A. 103; 8 Sar. P. O. J. 677 (P. C.).

the Court below is mistaken when he speaks of it as a suit to direct the defendant to pay a certain amount. The suit would not be maintainable except on the footing that the parties are still in the relationship of landlord and tenant. If the defendants had relinquished possession of the village or if the Rajah had ceased to be the owner of the estate, there could be no suit for recovery of rent. At the time, when the trustee of the estate and the first defendant settled their disputes by the agreement of 24th April 1902, the trustee was threatening to bring a suit to set aside the absolute gift of June 2, 1895. It was an amicable settlement of a disputed claim. If the gift deed by the former Rajah had been declared in a suit brought for that purpose to be voidable owing to undue influence, the defendant would still have had a right to occupy the village on payment of *poruppu* of Rs. 804 under the 40 years' lease of 1894.

The parties compromised on the understanding that the first defendant should pay Rs. 402-1-10, as *poruppu*, i. e., about half the amount which he was paying previously. The agreement was not of the nature of an executory contract like that in *Srish Chandra Roy v. Banomali Roy* (2). Clause VIII of the agreement, referring to Act VIII of 1865, which was then the rent law in force, provides that no *pattas* or *muchilikas* need be executed. The document was stamped as a permanent lease for a rent of Rs. 402 and a release of the rights under the gift deed of 1895. There was no defeasance clause providing for divestment of the rights in the event of either party breaking any of the terms of the agreement. The consideration was executed consideration, the trustee having abstained from bringing a suit for recovery of possession and the first defendant having agreed to pay *poruppu* of Rs. 402. In *Srish Chandra Roy v. Banomali Roy* (2), there was a promise to execute a lease of the suit *mauzas* and in that respect, the agreement was executory; but the settlement in the present case left nothing to be done by the parties in future except to pay and receive *poruppu* at the rate agreed.

When the plaintiff brought O. S. No. 157 of 1913 to recover possession of the village the defendants, in their written statement para. 37, immediately asserted that they were no longer bound

to pay *poruppu* under the terms of the agreement of 24th April 1902, as the plaintiff had broken the agreement by bringing that suit. In that suit, however, neither party was willing to abide by the compromise. The defendants relied upon the absolute gift made by the Rajah's father and the plaintiff relied on that gift being voidable on account of undue influence. In the decision of the suit, it was made clear that the contentions of neither party were correct and that both sides were bound by the settlement. As the settlement was not an executory contract, I am of opinion that the plaintiff is entitled to sue to enforce its terms and that he is not disqualified by having sued for a greater relief in O. S. No. 157 of 1913 as his previous claim that he was entitled to *poruppu* at the rate of Rs. 804 does not prevent him from now claiming that he can recover at least Rs. 402 per annum. The suit is thus distinguishable from that in *Srish Chandra Roy v. Banomali Roy* (2) which was a case of an executory contract, and a suit for specific performance. In *Ganga Varapu Krishna Venamma v. Naraparaju Venkata Mukunda Row* (3), where there was a compromise which finally settled the rights of the parties and nothing more had to be done to give effect to it, it was held by this Court, that the conduct of the executant in acting in a manner inconsistent with the compromise did not justify the other party in repudiating it, and *Srish Chandra Roy v. Banomali Roy* (2) was distinguished.

In this view the lower Court was right in holding that the plaintiff was entitled to succeed and in giving him a decree for recovery of *poruppu* for the *faslis* in suit.

Two minor points remain to be decided. The lower Court's decrees allow interest at 12 per cent. from the date of suit till the date of the decree, and 6 per cent. thereafter till payment. During the pendency of O. S. No. 157 of 1913 and until the appeal was decided on 13th May 1921, the defendant did not tender payment and the plaintiff did not demand it probably with the idea, that if he accepted rent, he would not be able to successfully impugn the defendant's title. On one occasion Rs. 10 was paid, not by the defendants but by a friend named Venkatachari (*vide* Ex. X.

(3) 4 Ind. Cas. 303; 7 M. L. T. 33; 33 M. 216.

and the evidence of the second defendant D. W. No. I). This payment will not affect the rights of the parties since it was not a transaction between themselves. The fact remains, that during the pendency of the former litigation, the plaintiff was unwilling to receive and the defendants were unwilling to pay (*vide* para. 5 of the plaint in O. S. No. 33 of 1917).

Under these circumstances interest should not be charged until the former suit was finally decided by our decision in appeal on 13th March 1921.

The lower Court's decree will be amended by allowing interest only from May 14th, 1921. As regards road-cess, the appellant claims that he is only liable to pay half the road-cess, but it is clear from s. 73 of the Local Boards Act that, as he is an intermediate land-holder, the land-holder is entitled to recover from him the whole of the tax paid in respect of the land held by him less half the tax assessable on the amount of the *poruppu*. For this the limitation period is six years under Art. 120, *vide* *Rajeswara Muthuramalinga Sethupathi v. Mahalinga Raju* (4). The appellant's contention fails.

Subject to the modifications above stated the appeals are dismissed with proportionate costs.

V. N. V.

Decree modified.

N. H.

(4) 52 Ind. Cas. 468; 9 L. W. 287; (1919) M. W. N. 365.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1354 OF 1924.

July 17, 1925.

Present:—Mr. Justice Lindsay and
Mr. Justice Kanhaiya Lal.

Pandit CHANNU DUTTA VYAS

—DEFENDANT—APPELLANT

versus

His Holiness Shree SWAMI
GYANNANDJI MAHARAJ—PLAINTIFF—
RESPONDENT.

Easements Act (V of 1882), s. 2 (b)—Customary right, proof of—Appeal, second—Finding of fact involving conclusions of law, whether can be questioned—Appellate Court, duty of.

A Court should not decide that a local custom exists unless the Court is satisfied of its reasonableness and its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted or by stealth or by force and that it has been openly enjoyed for such a length of time as suggests that originally by

a greement or otherwise, the usage had become a customary law of the place in respect of the persons and things which it concerned. [p. 977, col. 1.]

Per Kanhaiya Lal, J.—A customary right may arise by agreement or prescription and may be deduced from long and open user. Its existence may be inferred from long enjoyment not exercised by permission, stealth or force. [p. 979, col. 2; p. 980, col. 1.]

There is no statutory period of enjoyment provided during which, in order to establish a local custom, it must be proved that the right claimed to have been enjoyed, has, by local custom, been so enjoyed. [p. 979, col. 2.]

The finality given by law to a finding of fact arrived at by a Court of first appeal renders it necessary that the finding should be arrived at after due circumspection and be expressed in clear and definite terms. [p. 980, col. 1.]

A party to an appeal is entitled to claim a clear, definite and specific finding on every issue of fact raised in the case, and if the finding is vague, indefinite or ambiguous, it is but right to insist on such a finding being given or to send an issue back in order that the question of fact might be determined on findings adduced in a manner not open to misconception or doubt. [*ibid.*]

While findings of fact cannot be questioned in second appeal, the soundness of conclusions drawn from any facts may involve matters of law and may be questioned in such appeal. [*ibid.*]

Second appeal from a decree of the District Judge, Benares, dated the 9th of October 1924.

Mr. N. P. Ashthana, for the Appellant.

Mr. P. L. Banerji, for the Respondent.

JUDGMENT.

Lindsay, J.—In my opinion this appeal fails in view of the findings of fact arrived at by the Court below.

The question for decision was whether the Hindu population of Benares, represented by the defendant-appellant had acquired a customary right to use the property of the plaintiff for the celebration of the *Ram Lila* festival. It was alleged that the Hindus had a right to enter on these premises for a period of three days during the *Ram Lila* and to occupy them for the purpose of giving a dramatic representation of certain incidents in the life of Rama.

The plaintiff in the suit purchased this property in the year 1922 from Gopal Das, Raghunandan Prasad and others in whose family it had been since the year 1854. This property consists of a garden enclosed by walls and inside the enclosure is a large garden-house consisting of a hall and some smaller rooms.

The plaintiff alleged that there was no right on the part of the Hindu public to enter and occupy any portion of these premises for the purposes mentioned above, and he, therefore, asked for a declaration

to this effect and also claimed an injunction restraining the defendant and those whom he represented from trespassing on his property.

The Court of first instance dismissed the claim; the lower Appellate Court has reversed the first Court's decree and has given judgment in favour of the plaintiff. The defendant now appeals.

The law on this subject is laid down in *Kuar Sen v. Mamman* (1). This case is cited in the judgment of the lower Appellate Court. I refer to a passage in the judgment which is to be found at page 92* and which reads as follows:—

"In our opinion a Court should not decide that a local custom...exists, unless the Court is satisfied of its reasonableness and its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted or by stealth or by force, and that it has been openly enjoyed for such a length of time as suggests that originally, by agreement or otherwise, the usage had become a customary law of the place in respect of the persons and things which it concerned".

The learned Judge applied the law thus stated to the facts as found by him, and he was of opinion that the defendant had failed to establish the existence of the customary right in the manner required. The Judge had clearly read and weighed all the evidence which had been adduced in the Trial Court. He began by finding that there was no proof of any dedication of the property to the uses claimed by the defendant although that was a plea which had been raised for the defence. He went on to observe as follows:—

"With the oral evidence I do not propose to deal at any length. That of it which is not partial, if indeed on either side there can be said to be any such, is so vague as to have little value in establishing or disproving a right to do certain definite and clearly specified acts in a certain place at a certain time. In my opinion the witnesses for the respondent did not give evidence such as would establish a customary right in derogation of the title of another".

Later on in the judgment the learned Judge observes as follows:—

(1) 17 A. 87; A. W. N. (1895) 10; 8 Ind. Dec. (N. S.) 381.

*Page of 17 A.—[Ed.]

"To my mind the evidence on the record does nothing more than prove that, as a result of the actors being allowed to sleep in the garden precincts, various episodes have from time to time been performed within the garden".

That in my judgment is a clear finding that the entry upon, and use of, the premises such as it was, was by leave granted and not as of right. The finding in my view is quite unambiguous and perfectly clearly expressed.

Another passage of the judgment may be quoted here. The Judge says:

"I do not think it can be said that if for reasons of convenience various episodes have from time to time been performed elsewhere, a certain and definite custom having the force of law has arisen".

Here again, in my opinion, there is a finding that there was no proof that the alleged customary right was certain and definite.

It has been argued before us that the findings of fact arrived at by the Judge are not clear and definite. It is said that the Judge having discarded the oral evidence could not properly find that the user of the premises had been permissive, but it is not correct to say that the Judge discarded the oral evidence. He certainly was not prepared to accept it wholesale and stated at the outset his intention of interpreting it in the light of the circumstantial evidence. Later on he refers to the evidence as partial and also as vague, but there is nothing to show that he rejected it altogether as being unworthy of credit.

There can be no doubt that there was before the Judge evidence that the user of the premises had been by leave of the proprietors. There was a statement of B. Raghunandan Prasad, one of the founders, and I take it that, to this extent at any rate, Raghunandan Prasad's evidence was accepted by the learned Judge. It is said that the Judge does not set out in his judgment that he believes the statement of Raghunandan Prasad, but he was not bound to do so. He had the whole evidence before him, and there being evidence to support the finding of permissive user it must be concluded that the evidence was believed to the extent of showing that the user had not been as of right but had only been made after leave was granted. These findings are fatal to the case which was put forward in the Courts below by the defendant-appellant. I am, therefore, of opinion

that the appeal should be dismissed with costs including in this Court fees on the higher scale.

Kanhaiya Lal, J.—I regret I am unable to agree with the order proposed. On the 26th of June 1922, the plaintiff purchased a garden, including a house and other buildings standing thereon, situated in Benares City, from Gopal Das and others. The defendants are the managers of a Ram Lila, known as the Chitrakut Ram Lila, which is celebrated at Benares every year. The Ram Lila is performed in parts at different places, representing different episodes of the Ramayan. As the Lila progresses, the scenes of the places of performance are also shifted. The allegation of the defendants was that that portion of the Ram Lila which represents the episodes connected with the Panch Vati used to be celebrated in the garden on a piece of high ground situated near the Pishach Mochan tank: and certain other episodes connected with the subsequent events used to be celebrated in the garden now purchased by the plaintiff, which is situated close to that place. The plaintiff sought to interfere with the performance of the Ram Lila in the said garden; and a proceeding was accordingly instituted by the defendant, Chunnu Dat Vyas, under s. 147 of the Cr. P. C., demanding that security should be taken from the plaintiff to prevent a breach of the peace. A prolonged enquiry followed, resulting in the plaintiff being bound over and restrained from preventing the managers of the Chitrakut Ram Lila from using the garden for the purposes of the Ram Lila for three days, namely on the 4th, 5th and 6th of Kuar Sudi each year, until the matter was decided by a competent Court.

The present suit has been brought by the plaintiff for a declaration that the defendants or any member of the Hindu community interested in the Chitrakut Ram Lila of Benares had no right to accommodate Sri Ram Chandrajī or to perform Ram Lila on the 4th, 5th and 6th of Kuar Sudi of each year inside the garden without his permission. He also asked for a permanent injunction to restrain the defendants and the members of the Hindu community from entering the said garden for the said purpose without his permission.

The main question for consideration was whether the defendants had been celebrating any portion of the Ram Lila inside the garden or the house situated in it on Kuar Sudi

4th, 5th and 6th of each year, and if so, whether they had been doing so as of right or with the permission of the owners of the said garden for the time being, and since when.

In the written statement the defendants asserted that it was part of the religious duty of those managing the Ram Lila performance that there should not be the slightest alteration in the time, place, paraphernalia, and method of the performance, and that the garden aforesaid was *waqf* for the limited purpose of celebrating the Ram Lila at that place on the days in question.

The Court of first instance went into the evidence in considerable detail and came to the conclusion that the garden aforesaid was used on Kuar Sudi 4th, 5th and 6th for the stay of Ram Chandrajī in the garden-house at night and for the performance of certain portions of the Ram Lila there on those days. It treated the garden as having been dedicated for the limited purposes aforesaid. The lower Appellate Court, however, found that no such dedication was established, and the correctness of that finding is not here seriously disputed. Regarding the right to celebrate the Ram Lila inside the garden it observed that while the oral evidence produced on either side was so vague as to have little value in establishing or disproving a right to do certain definitely clear and specified acts at a certain place at a certain time, or to establish a customary right in derogation of the title of another, all that could be said to have been proved by the evidence was that "as the result of the actors being allowed to sleep in the garden precincts, various episodes had from time to time been performed in the garden". It did not proceed to specify the particular episodes which were performed inside the garden and from what time; and it went on to observe that if for reasons of convenience various episodes have from time to time been performed inside the garden, it could not be said that a certain and definite custom, having the force of law, had arisen or that it could be regarded as certain or reasonable.

The property in dispute has been held by the immediate predecessors-in-title of the plaintiff since 1854. On the date of first hearing it was stated on behalf of the plaintiff that a man named Girija Kant Jha, who had verified the written statement, was acquainted with the facts. He was examined. He admitted that for the last forty

or fifty years Ram Chandrajī and his party used to be accommodated in the garden-house with the permission of the owners; but he denied that any episodes connected with the Ram Lila were actually performed inside the garden. The Courts below find that not only Ram Chandrajī and his party have been staying on Kuar Sudi 4th, 5th and 6th during the performance of the Ram Lila celebration in the garden from the last forty or fifty years, but certain episodes of the Ramayana which took place outside the Panch Vati were also celebrated there. It was the duty of the plaintiffs in these circumstances to establish that they did so by their leave. The only witness examined on the point was Raghunandan Prasad, one of the plaintiffs, whose statement was that he used to invite Ram Chandrajī into this garden year after year and supply *bhoj* (food) and perform *arti* on his own account during the said period. The learned District Judge does not discuss his evidence or that of the other witnesses examined in the case. On the other hand, he observes that although the witnesses on both sides were in the main men who from worldly position or religious profession should be above telling lies, he was by no means satisfied that the evidence of the witnesses either for the plaintiff or for the defendants could be unhesitatingly accepted as correct. It does not, therefore, appear whether the conclusion at which he arrived, namely, that the evidence on the record did nothing more than prove that, as a result of the actors being allowed to sleep in the garden precincts, various episodes used from time to time to be performed within the garden, was based on inferences drawn by him from the circumstances established by the evidence or from any other facts. He did not say that he believed the evidence of Raghunandan Prasad and that the user claimed by the plaintiff originated in permission granted to the managers of the Ram Lila. He probably thought that the actors must have been allowed to sleep in the garden "as a matter of convenience" and that that was enough to destroy or stop the growth of any right. A customary right is recognised by law (*vide* s. 2 (b) of the Easements Act, 1882) and as pointed out in *Kuar Sen v. Mamman* (1).

"Where a local custom excluding or limiting the general rules of law is set up, a Court should not decide that it exists—unless such Court is satisfied of its reason-

ableness and its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted, or by stealth, or by force, and that it had been openly enjoyed for such a length of time as suggests that originally, *by agreement or otherwise*, the usage had become a customary law of the place in respect of the persons and things which it concerned".

There was no statutory period of enjoyment provided, during which, in order to establish a local custom, it must be proved that the right, claimed to have been enjoyed, has, by local custom, been so enjoyed. In *Shadi Lal v. Muhammad Ishaq Khan* (2), it was held that the existence of a customary right could be inferred from long enjoyment not exercised by permission, stealth or force. The question as to whether the defendants have been using the garden for the celebration of certain episodes of the *Ramayan* and for the stay of Ram Chandrajī during the days in question inside the garden openly and as of right, or by leave or license, therefore, required determination on the evidence adduced; but the finding of the learned District Judge on the point is vague and ambiguous. He finds that certain episodes have from time to time been performed within the garden; but he observes that they are so performed as the result of the actors being allowed to sleep in the garden precincts. If his intention was to hold that the actors were allowed to enter the garden under some express permission granted to them by the owners of the garden from time to time, he ought to have explicitly said so, for in no portion of his judgment he refers to the evidence on which the theory of permission can be said to be based. In fact, he does not discuss the evidence of Raghunandan Prasad at all. If he meant to say that the user grew because it was acquiesced in or not objected to by the owners of the garden, the theory of invitation or express permission falls to the ground. If he made the above observation as an inference or conclusion drawn by him from the state of the locality or other facts established by the evidence, such as the existence of a doorway or a walled enclosure round the garden, that inference or conclusion ought to have been so expressed, for as pointed out by their Lordships of the Privy Council in *Ram Gopal v.*

(2) 9 Ind. Cas. 196; 33 A. 257; 8 A. L. J. 10.

Shamskhaton (3), while findings of fact cannot be questioned, the soundness of conclusions drawn from any facts may involve matters of law and may be questioned by a Court of second appeal. A party to an appeal is entitled to claim a clear, definite and specific finding on every issue of fact raised in the case, and if the finding is vague, indefinite or ambiguous, it is but right to insist on such a finding being given or to send an issue back in order that the question of fact might be determined on the evidence adduced in a manner not open to misconception or doubt. The finality given by law to a finding of fact, arrived at by a Court of first appeal, renders it necessary that the finding should be arrived at after due circumspection and be expressed in clear and definite terms. The conclusion arrived at by the lower Appellate Court in this case is expressed in such vague terms that it is difficult to say whether it meant to conclude that the user was permissive or that it had been acquiesced in in the past for reasons of convenience or otherwise. A customary right may arise by agreement or prescription and may be deduced from long and open user. In these circumstances, it seems to me that the proper course would be to send down an issue to the lower Appellate Court to determine whether the episodes in question were performed inside the garden with the permission of the plaintiff or the then owners of the garden-house in question or openly and as of right in accordance with a custom existing in the locality and from what period.

By the Court.—The order of the Court is that the appeal is dismissed with costs including in this Court fees on the higher scale.

Z. K.

Appeal dismissed.

(3) 20 C. 93; 19 I. A. 228; 6 Sar. P. C. J. 247; 17 Ind. Jur. 38; 10 Ind. Dec. (N. S.) 63 (P. C.).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 540 OF 1922.

September 30, 1924.

Present:—Mr. Justice Devadoss.

K. CHAMBU—PLAINTIFF—APPELLANT
versus

PAZANI *alias* CHAMBU—DEFENDANT—
RESPONDENT.

Malabar tarward—Karnavan, powers of, to demise

land on kanom and grant melcharth—Family with small property—Property held by junior members for maintenance—Demise, whether prudent.

The demising of lands on *kanom* in a Malabar *tarward* is in the ordinary course of management by the *karnavans* of well-to-do families, and the *karnavan* of a *tarwad* or *tavazhi* has ordinarily full power to demise lands belonging to the *tarwad* or *tavazhi* on *kanom*, and, after the expiry of the period of *kanom*, to give *melcharth*. [p. 981, col. 1.]

But where the family property is small and consists of very few items, which are actually in the possession of the junior members of the family under arrangement with the *karnavan* for maintenance and out of the income of which they maintain themselves and the *karnavan* has no other property with which to maintain them, it is not a prudent act on the part of the *karnavan* to grant the properties on *kanom* to a stranger and thereby dispossess them of the lands. Such a demise is not binding on the members affected. [p. 981, col. 2.]

Sankaranunni v. Appavu Pillay, 16 Ind. Cas. 571; 12 M. L. T. 556, relied on.

Second appeal against a decree of the Court of the Subordinate Judge of South Malabar, at Palghat, in A. S. No. 58 of 1921, preferred against that of the Court of the District Munsif, Alatur, in O. S. No. 482 of 1919.

Mr. P. S. Narayanaswami Iyer, for the Appellant.

Messrs. P. S. Ramachandra Iyer and K. Krishan Menon, for the Respondent.

JUDGMENT.—This is a suit by a *melcharthdar*. The *melcharthdar* sues for the possession of property in the hands of some members of the family, belonging to the *tavazhi* of the 4th defendant, who gave the *melcharth* in plaintiff's favour. The District Munsif dismissed the suit, on the ground that the giving of the *melcharth*, in favour of the plaintiff was not a *bona fide* act and was not in the interest of the family. On appeal, the Subordinate Judge took the same view and held that the *karnavan* maliciously granted the *melcharth* in order to prevent the defendants Nos. 2 and 3 from enjoying the property. The plaintiff has preferred this second appeal.

It is urged by Mr. Narayanaswami Iyer on behalf of the appellant, that the *karnavan* has got the power to demise property on *kanom* and after the expiry of the *kanom* to give *melcharth* and that his powers are unlimited, as regards the granting of *melcharth* provided the term of the *kanom* has expired. In this case, the *kanom* demise was in 1895, in favour of the 1st defendant and the period of twelve years expired in 1907. The *melcharth* was given in 1918. No doubt in ordinary cases the *karnavan* of a *tarwad* or the *karnavan* of a

tavazhi has got full power to demise lands, belonging to the *tarwad* or *tavazhi* on *kanom* and, after the expiry of the period of *kanom* to give *melcharth*. As observed by the learned Judges in a case reported as *Sankaranunni v. Apparu Pillay* (1), the demising of lands on *kanom* is in the ordinary course of management by the *karnavans* of well-to-do families. In the case of families which have very large landed properties, it is not possible for the family itself to cultivate all the lands: one of the ways of enjoying the properties is by demising the lands on *kanom* and renewing the *kanom* from time to time. But the question is "where the landed property is small and the members of the family are prepared to cultivate it, is the demising of such property on *kanom* and act of management, which a prudent manager of a family would do." In this case it appears from the evidence that the properties of the family are very limited. Exhibit I is the arrangement, under which the properties of the family were divided between two *tavazhis*. The A Schedule properties were allotted to the family of defendants Nos. 2 to 4 and some other members. Now what the 2nd defendant did was to get a transfer of the *kanom* right of the 1st defendant and thereby she and her children maintained themselves out of the income of the property. She is only in the position of a *kanomdar*, inasmuch as she has purchased the right of the 1st defendant, in whose favour the *kanom* demise was made in 1895. The 4th defendant does not live with the members of the *tavazhi* but lives, as observed by the Subordinate Judge, at some distance from the place where defendants Nos. 2 and 3 are living; and he does not seem to take any interest in the management of the family. The question, in such circumstances, is whether the giving of *melcharth* in favour of the plaintiff is an act, which the Court should uphold, as being an act of a prudent manager or a *karnavan*. Both the Courts have come to the conclusion that the 4th defendant was not actuated by any good feeling towards defendants Nos. 2 and 3, and as the Subordinate Judge observes, it is a malicious act, on his part, to have given the *melcharth*, as it has deprived the 2nd and 3rd defendants of their means of subsistence. Mr. Narayanaswami Iyer's

argument is that the 4th defendant has only given a *melcharth* and that it is open to defendants Nos. 2 and 3 to ask the 4th defendant for maintenance. This argument will be considered good, if it is shown that the 4th defendant is in possession of some property, out of the income of which, defendants Nos. 2 and 3 and the other members of the *tavazhi* could be maintained. From the evidence, it is clear that he is not in possession of any property, from the income of which he could support the 2nd defendant and other members of the *tavazhi*. In such circumstances, is it proper for the *karnavan* to deprive the members of the family of the property from the income of which they were able to support themselves? The contention of Mr. Narayanaswami Iyer is that if the *melcharth* is held to be invalid, the 2nd defendant would become the perpetual *kanomdar* and the rights of the *tavazhi* might be endangered. I cannot see how this argument can have any weight, as a *kanom* is redeemable as soon as the period expires. In this case, the period of the *kanom* has already expired and it is open to the *karnavan* to redeem the *kanom*, at any time he likes. If he is not in a position to redeem the *kanom*, it is difficult to see how he could maintain these people, after depriving them of this property.

Various cases were relied upon, by Mr. Narayanaswami Iyer, as supporting his contention. No doubt, in the case of any ordinary family, which has considerable properties, if the *karnavan* demises some property on *kanom* his act cannot be questioned by the junior members of the family; but where the family property consists of very few items, which items are actually in the possession of the members of the family and out of the income of which they are able to maintain themselves, it is not a prudent act, on the part of the *karnavan* to dispossess them of the lands by giving the *kanom* to a stranger. In this case, there is the additional fact that under Ex. I, there was an arrangement by which the 2nd defendant's *tavazhi* was put in possession of the plaintiff and other properties and was asked to discharge the encumbrances on them. The 2nd defendant could not redeem the *kanom*, for the simple reason that the 4th defendant would not join in doing so. The 4th defendant could not possibly find the money for redeeming the *kanom*. The best thing to be

(1) 16 Ind. Cas. 571; 12 M. L. T. 556.

done, in the circumstances, was to get a transfer of the right of the *kanomdar* and thereby get possession of the property.

If the 4th defendant was acting as *karnavan* and was maintaining the members of the family, one would naturally expect the documents of title, in respect of the plaint property, to be with him. Granting that he is the *karnavan*, there is no evidence that he was in a position to maintain the 2nd defendant and the other members of the *tavazhi* and that he gave the *melcharth* in the ordinary course of management. When it is found that the 4th defendant was not living with the family, but was living away from the family and that he was not in possession of property, with which he could maintain the members of the family, it was not a prudent act on his part, to deprive the members of the *tavazhi*, of the possession of property out of the income of which they were able to maintain themselves.

Another point was sought to be raised by Mr. Narayanaswami Iyer that the plaintiff is a *bona fide melkanhmdar* and it is also urged by him that the onus is on defendants Nos. 2 and 3, to prove that he is not a *bona fide melkanomdar*. This question was not specifically raised, in the lower Courts. Granting that he is entitled to raise this question, I think there are circumstances in the evidence to show that he is not a *bona fide melkanomdar*. Exhibit B ought to have put him on notice of the arrangement, under which this plaint property was allotted to the *tavazhi*. If he abstained from enquiry, he should be held to have knowledge of all the circumstances, under which this property came to be enjoyed by defendants Nos. 2 and 3. I do not think it is necessary to consider this question at any length, as it was not raised in the lower Courts and as the other side has not had an opportunity of meeting it.

In the result, the second appeal fails and is dismissed with costs.

V. N. V.

Appeal dismissed.

N. H.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2828 OF 1921.
April 17, 1925.

Present:—Mr. Justice Martineau and
Mr. Justice Zafar Ali.

HIRA LAL—DEFENDANT—APPELLANT
versus

BENARSI DAS—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 92—Promissory note payable on demand—Agreement to show that executant was not personally liable, whether can be proved.

Where a contract is founded on consideration and the party who has received the consideration writes down and signs the terms on which he has received it, it is not open to him to raise the plea that he did not agree to those terms. [p. 983, col. 1.]

The executant of a promissory-note cannot, under the provisions of s. 92 of the Evidence Act, be permitted to prove a separate agreement according to which the sum specified in the note is not, as expressed therein, payable on demand but represents merely a portion of the capital of a partnership into which the parties had entered for the purposes of a certain business. [p. 983, cols. 1 & 2.]

First appeal from a decree of the Senior Subordinate Judge, Ambala, dated the 28th October 1921.

Messrs. Jagan Nath Agarwala and Mehr Chand Mahajan, for the Appellant.

Messrs. Manohar Lal and Nawal Kishore, for the Respondent.

JUDGMENT.—This first appeal arises out of an action based on two identical promissory notes—one dated the 19th November and the other the 6th December 1919—for Rs. 20,000 each, payable on demand with interest at annas 12 per cent. The defendant, who is the appellant in this Court, admitted that he executed both the promissory notes and received Rs. 20,000 on each, but pleaded that the plaintiff did not advance these monies to him as loans, but invested the same in a cotton concern in which he (plaintiff) became his partner on the very day on which he made the first advance of Rs. 20,000 and that this being the nature and purpose of the advances the plaintiff was not entitled to recover the same as debts, but should sue for dissolution of partnership and rendition of accounts. This defence was on the face of it directly opposed to the plain terms of the promissory notes and was based on an alleged oral contemporaneous contract whose terms, according to the defendant's story, were reduced to writing by him, but the writing was not signed by the plaintiff. This defence, it was objected by the plaintiff, could not be allowed to be raised, and the lower Court, therefore framed the following issues:—

1. Was the sum of Rs. 40,000 received by the defendant towards partnership accounts?

2. Can the above defence be raised in the face of the express terms of the promissory notes relied upon by the plaintiff?

Unfortunately the Trial Court proceeded to take evidence on issue No. 1 before deciding issue No. 2, but after recording some evidence it refused to receive any more, holding that it was inadmissible, and decreed the plaintiff's suit on the defendant's admission that he had passed both the promissory notes and had received Rs. 40,000.

It is argued before us on behalf of the defendant-appellant, that he is entitled to prove the real nature of the money transactions and to produce evidence to show that he did not borrow the monies, but received the same for the business in which he and the plaintiff were partners; in other words, the defendant wants to prove that he is not bound by the terms of the promissory notes. This he cannot be allowed to do. Where a contract is founded on consideration, and the party who received the consideration wrote down and signed the terms on which he received it, it is not open to him to raise the plea that he did not agree to those terms. According to the clear and unambiguous terms of the promissory notes the defendant undertook to pay on demand the monies received. He cannot be allowed to put forward the plea that he did not incur any personal liability, and that he is not liable to pay the amounts on demand. There is no allegation of fraud, mistake, or compulsion, etc., and the defendant had no explanation to offer as to why he passed the promissory notes and thereby undertook to pay the monies on demand, while, as a matter of fact, he had incurred no personal liability. There was no written agreement relating to the alleged partnership, and the note in the defendant's own handwriting about the terms of that partnership is after all a memo. of the terms agreed to orally. That contemporaneous oral agreement could not nullify the promissory notes.

In *Sri Ram v. Sobha Ram-Gopal Rai* (1), it was held that the executant of a promissory note could not be permitted to prove a separate agreement according to which the sum specified in the note was not, as expressed therein, payable on demand, but

(1) 67 Ind. Cas. 513; 44 A. 521; 20 A. L. J. 315; 4 U. P. L. R. (A.) 153; (1922) A. I. R. (A.) 213.

after the adjustment of some accounts between the parties.

In *Vishnu Ramchandra v. Ganesh Krishna* (2), it was held that in a suit on a promissory note payable on demand no evidence can be allowed to prove a contemporaneous oral agreement whereby the plaintiff is said to have agreed that he would not present the note until he had discharged certain encumbrances on a property he had sold to a third party, and that such an agreement could not be brought within the terms of proviso 3 to s. 92 of the Evidence Act, 1872.

Where in a suit on a contract signed by the defendant personally, the defendant attempted to lead evidence to show that he was contracting as agent and that the name of his principal was disclosed at the time of the contract, it was held that such evidence was not admissible for the purpose of exonerating a contracting party from liability, for that would be substituting a different agreement from that evidenced by the writing, *Ebrahimhoy Pabaney Mills Co. Ltd. v. Hassan Mamooji* (3).

The defendant's Counsel built an argument on the erroneous supposition that the promissory notes were signed by the plaintiff also, but, as a matter of fact, they are not signed by him.

In view of what has been stated above we are of opinion that the defendant could not be allowed to prove the oral agreement set up by him and we, therefore, dismiss the appeal with costs.

Z. K.

Appeal dismissed.

(2) 63 Ind. Cas. 673; 45 B. 1155; 23 Bom. L. R. 488.

(3) 63 Ind. Cas. 482; 45 B. 1242; 23 Bom. L. R. 767.

MADRAS HIGH COURT.

CIVIL APPEAL No. 128 OF 1922.

February 3, 1925.

Present :—Justice Sir Charles Gordon Spencer, Kt., and Mr. Justice Ramesam.

RAMA RAJA THEVAR—DEFENDANT

No. 3—APPELLANT

versus

PAPAMMAL AND ANOTHER—PLAINTIFF
AND DEFENDANT No. 2—RESPONDENTS.

Hindu Law—Maintenance—Concubine, right of.

A permanent concubine is entitled to maintenance from the family property of her deceased paramour provided that she is the mother of illegitimate children and continues chaste. [p. 985, col. 1.]

Panchapakesa Odayan v. Kanaka Ammal, 42 Ind. Cas. 344; 33 M. L. J. 455; 6 L. W. 408, *Bai Monghibai v. Bai Nagubai*, 69 Ind. Cas. 291; 47 B. 401; 24 Bom. L. R. 1009; (1923) A. I. R. (B.) 130 and *Anandilal Bhagchand Marwadi v. Chandrabai Taty Patil*, 80 Ind. Cas. 536; 48 B. 203; 26 Bom. L. R. 63; (1924) A. I. R. (B.) 311, followed.

The question is not really so much one of the legal relationship between a man and a woman as of equity that a woman who has been kept for a number of years and given a position almost equal to that of a wife should not be left to starve after the death of the man who kept her. Thus it is a matter not of a contract during the lifetime of the parties but of obligations arising out of the personal law of Hindus as defined by their religious texts. [p. 985, cols. 1 & 2.]

The rule in favour of the maintenance of concubines is not limited to cases where there are no other heirs and the property would otherwise escheat to the Sovereign. [p. 985, col. 1.]

Appeal against a decree of the Court of the Subordinate Judge, Ramnad at Madura, in O. S. No. 30 of 1918.

Messrs. C. S. Venkatachariar and S. Soundara Raja Iyengar, for the Appellant.

Messrs. T. R. Ramachandra Iyer, B. Sitarama Rao and S. R. Muttusami Iyer, for the Respondents.

JUDGMENT.

Spencer, J.—The plaintiff was the permanent mistress of Muttu Doraiswami Thevar, who was in receipt of Rs. 700 per mensem as a rent charge on the estate of the Rajah of Ramnad. This sum of Rs. 700 has been erroneously described in various places as an annuity perhaps for the reason that the liability to pay it accrues annually, but it is not strictly an annuity as it is not for the duration of any one life, but is a charge on the revenues of the estate of the Rajah of Ramnad in perpetuity. The right to the rent charge was established as against the Rajah of Ramnad in a suit brought by Ramamani Ammal, the mother of Muthu Doraisami Thevar, which went up to the Privy Council (*vide Rajah of Ramnad v. Sundara Pandiyasami Tevar* (1)). The right has been mortgaged to a Chetty who is not a party to the present suit. The plaintiff claimed in this suit maintenance against the 1st defendant, who was the assignee from a reversioner of Muthu Doraisami Thevar's estate and the 1st defendant having died during suit, the claim was continued against his son the 3rd defendant. After Muthu Doraiswami Thevar's death, the plaintiff was responsible for other litigation before the present suit.

There was a suit under the Specific Relief Act for possession of the bungalow in which she lives, and another suit for a declaration that she was a landlord in respect of certain villages which were in the possession of the deceased Muthu Doraiswami Thevar. In the first suit she succeeded but she lost the second suit based on the footing that she was the wife and heir of Muthu Doraiswami Thevar.

Two questions have been argued in this appeal. Firstly, whether a concubine is entitled to maintenance against the estate of the man who kept her and secondly, whether the rate of maintenance of Rs. 100 per mensem (with 12 years' past maintenance) is a fair rate and one to which the plaintiff is entitled.

On the point of law as to the right of a permanent concubine for maintenance from the family property of her deceased paramour the leading decision in this Court is *Panchapakesa Odayan v. Kanaka Ammal* (2). But there are a number of decisions in the Bombay High Court, *viz.*, *Khemkor v. Umiashankar* (3), *Vrandavandas v. Yamunabai* (4), *Yashvantrav v. Kashibai* (5) and *Bai Monghibai v. Bai Nagubai* (6).

After hearing arguments on both sides, I see no reason why we should not follow the decision in *Panchapakesa Odayan v. Kanaka Ammal* (2). The basis of the right of a concubine to be maintained is the text of Mitakshara, Ch. II, s. 1, Placita 27 and 28. In these Placita Vigneswara refers to the text of Katyayana and Narada, and he states the word "*stri*" includes a concubine. It is true that the purpose with which the definition was made in this passage was in order to show that a wife was entitled to succeed to her husband's property but it is nevertheless established that the word "women" includes concubines in the ancient texts. The Courts have placed from time to time several limitations, conditions on the right of concubines, to be maintained. In *Bai Monghibai v. Bai Nagubai* (6), it was made clear that the rule was not applicable to every kept woman but only to those who are continuously and exclusively kept in a man's family and are, in other words, what is

(1) 49 Ind. Cas. 704; 42 M. 581; 17 A. L. J. 153; 36 M. L. J. 164; 23 C. W. N. 519; 29 C. L. J. 551; 25 M. L. T. 400; 21 Bom. L. R. 885; (1919) M. W. N. 511; 10 L. W. 322 (P. C.).

(2) 42 Ind. Cas. 344; 33 M. L. J. 455; 6 L. W. 408.

(3) 10 B. H. C. R. 381.

(4) 12 B. H. C. R. (A. C. J.) 229.

(5) 12 B. 26; 6 Ind. Dec. (N. S.) 502.

(6) 69 Ind. Cas. 291; 47 B. 401; 24 Bom. L. R. 1009; (1923) A. I. R. (B.) 130.

known as "*Avaruddha stri*" in Sanskrit. Another condition that has been put on the right of a concubine to be maintained is that she should be the mother of illegitimate children: see *Khemkor v. Umiashankar* (3) and *Strange's Hindu Law*, Ch. VIII, p. 174. Another is that she should be chaste and keep undefiled the bed of her lord and master: see *Yashvantrav v. Kashi-bai* (5) and *Anandilal Bhagchand Marwadi v. Chandrabai Tatya Patil* (7). In these two latter respects, it cannot be suggested that the plaintiff has lost her right to maintenance. She gave birth to a daughter when she was being kept by the deceased Muthu Duraiswami Thevar, and it is not now suggested that she has had anything to do with other men. It has been argued by Mr. Venkatachariar that the rule in favour of the maintenance of concubines only applies to cases where there are no other heirs and the property would otherwise escheat to the Sovereign, as those are the circumstances spoken of in the text of *Katyayana*. The argument that the rule is only applicable to cases of escheat was advanced before Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Iyengar, and in *Panchapakesa Odayan v. Kanaka Ammal* (2), they rejected any attempt to put such a restrictive interpretation on the texts. It has also been brought to our notice that in the *Saraswathi Vilasa* there is no restriction of the rule to cases of escheat only. In *Ramanarasu v. Buchamma* (8), it was held that a discarded concubine was not entitled to claim maintenance. This only amounts to saying that a man is not bound by law to keep a concubine, when he does not want her and so long as he is alive, he can put an end to the relationship between himself and a kept woman. If he dies without putting an end to the relationship, the presumption is that he intended the concubinage to be permanent, and as the learned Judges observed there is a moral obligation on the part of the man's heirs to see that his concubine should not be left destitute after his death, and it has been imposed as a conditional liability upon those who succeed to his property. The question is not really so much one of the legal relationship between a man and a woman as of equity that a woman who has been kept for

a number of years and given a position almost equal to that of a wife should not be left to starve after the death of the man who kept her. Thus it is a matter not of a contract during the lifetime of the parties but of obligations arising out of the personal law of Hindus as defined by their religious texts. For these reasons, I am of opinion that the lower Court's judgment allowing maintenance to the plaintiff can be maintained.

As for the rate of maintenance, the lower Court fixed it at Rs. 100 a month, although the claim was for Rs. 150. The plaintiff was also given a right to reside in the bungalow where Muthu Duraiswami Thevar was living. It appears that there are two bungalows and that she has been given a right of residence in the larger bungalow. It is suggested that the maintenance of Rs. 100 might be reduced on the ground that the plaintiff was letting out a portion of this bungalow which was more than sufficient for her use, and deriving a rent therefrom of Rs. 15 a month. That was only for a time when the bungalow was in good repair. As she is living as a single woman and has got her daughter married, the accommodation of the smaller bungalow would probably be sufficient for her, but as a matter of sentiment, she has been allowed to occupy the larger bungalow. I am of opinion, that if she would give up her present residence to the appellant and occupy the smaller bungalow in which he now lives, there would be no reason to decrease her allowance of Rs. 100 per mensem, but if she persists in living in the larger bungalow and occupying the whole of it, the allowance of Rs. 100 per mensem when she has a free right of residence besides, is rather excessive and the rate of maintenance should be reduced to Rs. 85 per mensem, provided that the 3rd defendant keeps the bungalow in proper repair, and it is stated to be in bad repair now. The plaintiff is willing to repair the big bungalow at her own cost if she is allowed to remain in it and to continue to receive Rs. 100 per mensem. The 3rd defendant will be given three months' time from now to put it in complete repair and if he does so the rate of maintenance will be reduced to Rs. 85 per mensem.

(7) 80 Ind. Cas. 536; 48 B. 203; 26 Bom. L. R. 63; (1924) A. I. R. (B.) 311.

(8) 23 M. 282; 10 M. L. J. 62; 8 Ind. Dec. (N. S.) 599.

Muthu Duraiswami Thevar died in 1905. The lower Court has allowed 12 years' past maintenance at the same rate of Rs. 100

till 1912. From July 1907, the plaintiff was in possession of four villages mentioned in the plaint and she has not accounted for her profits by showing how much was spent on the Chattram. Periaswami Thevan whose son married the plaintiff's daughter and managed the four Chattram villages admits in Ex. Q that the Chattram was never in his management and he did not pay any quit rent to the Rajah. The plaintiff has not accounted for the income of those villages during those five years. Under these circumstances, I am of opinion, that she is not entitled to more than seven years' past maintenance and the decree will be modified accordingly, maintaining the rate of Rs 100. In the plaint the plaintiff asked that she should be given a charge for her maintenance either on the allowance payable by the Rajah of Ramnad to the 3rd defendant or on the four Chattram villages. The Subordinate Judge directed that the amounts awarded by him should be a charge on the plaint mentioned villages and on the annuity payable by the 2nd defendant. On issue No. 7 he found that the plaintiff was entitled to this charge as the defendants had not placed before the Court any materials for determining what income was required for the charity. There is no finding whether these villages were burdened with the trust or whether the whole income has been dedicated to charity. *Prima facie* the villages themselves cannot be made the subject of this charge, as they are trust properties or burdened with a trust. Unless and until it is found in a regular suit instituted by some one interested in the trust that the whole income is devoted to charity, the decree in the present suit must provide that the maintenance should be a charge on the surplus funds, if any, derived from these villages, and the lower Court's decree must be amended in so far as it created a charge on the villages themselves.

The lower Court has further granted a personal decree against the 3rd defendant to pay maintenance. It is not contended that he is personally liable. The decree must, therefore, be amended by directing him to pay out of the assets of Muthu Duraiswami Thevar in his hands and by charging the amounts payable as above stated, viz., Rs. 50 on the annual rent charge as agreed to in the compromise in Sigappa Achi's suit O. S. No. 5 of 1921, and the remainder on the surplus if any, of the

income from the villages after performing the charities.

The lower Court's decree, subject to these modifications, is confirmed. The plaintiff will get proportionate costs throughout and she will be liable for the Court-fees due to Government.

Ramesam, J.—I agree. The expression "*Avarudhha stri*" was used by Vignaneswara not only in Mitakshara, Ch. II, s. 1, Placitum 23 and in Ch. I, s. 8, Placitum 22, but also explained in commentary on Verse 290 of Vyavahara Adhyaya of Yagnavalkya. So long as a woman satisfies this interpretation of the term "*Avaruddha stri*" vide *Bai Monghibai v. Bai Nagubai* (6) and satisfies the condition that she remains chaste, *Anandilal Bhagchand Marwadi v. Chandrabai Tatya Patil* (7), I do not see any reason why she should be deprived of her maintenance.

I agree with the order proposed by my learned brother.

V. N. V.

N. H.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1678 OF 1921.

March 11, 1925.

Present:—Mr. Justice Suhrawardy and Mr. Justice Duval.

HON'BLE MAHARAJA SIR MANINDRA CHANDRA NANDI BAHADUR
—DEFENDANT No. 1—APPELLANT

versus

BHAGABATI DEVI CHOWDHURANI
AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 4, O. XLI, rr. 4, 20, 33—Appeal—Death of plaintiff—respondent—Abatement, extent of—Suit for possession—Appeal, maintainability of—Test—Court, whether can add parties not substituted.

The test to be applied in determining the extent of the abatement caused by reason of the death of one of the plaintiffs-respondents is whether the suit could proceed in the absence of the deceased or, whether, if the plaintiffs were appellants, the appeal could proceed in the absence of the deceased either as appellant or respondent. [p. 987, col. 2.]

Dharamjit Narayan Singh v. Chandeshwar Prosad Narayan Singh, 11 C. W. N. 504; 5 C. L. J. 393, referred to.

An appeal arising out of a suit for possession of land to which one of the plaintiffs-respondents is not a party cannot proceed in his absence. [*ibid.*]

Kali Dayal Bhattacharjee v. Nagendra Nath Pakrashi, 51 Ind. Cas. 822; 24 C. W. N. 44; 30 C. L. J. 217, relied on.

Rule 20 of O. XLI of the C. P. C. is ordinarily intended to apply to cases where the Court finds that it cannot proceed with the suit without the presence of a party who was not made a party to the appeal. It is not intended to override the provisions of O. XXII of the Code. [p. 988, col. 2.]

The right obtained by a respondent when the appeal abates as against him is a valuable right and should not be lightly treated. [*ibid.*]

Pulin Bihari Roy v. Mahendra Chandra Ghosal, 67 Ind. Cas. 10; 34 C. L. J. 405, referred to.

Rule 4 of O. XLI of the C. P. C. is limited to the case of appellants and is not applicable to a case where all the respondents are not present on the record as parties to the appeal. [p. 988, col. 1.]

The provision contained in r. 33 of O. XLI of the C. P. C., is intended to cover cases where the Court may vary the decree in such a way or pass such an order as to make the party in whose favour the order of the lower Court was passed liable under the order passed by the Appellate Court. It is not intended to apply to a case in which all the necessary parties have not been brought on the record. [p. 988, col. 2.]

Appeal against a decree of the District Judge, Rangpur, dated the 19th of April 1921, modifying that of the Subordinate Judge of that district, dated the 22nd September 1919.

Babus *Ram Chandra Majumdar*, *Sarat Kumar Mitter*, *Kali Kinkar Chakravarty*, for the Appellant.

Babus *Hemendra Chandra Sen*, *Promotha Nath Mitter* and *Jatindra Mohan Chaudhury*, for the Respondent.

Babu *Biraj Mohan Majumdar*, for the Registrar.

JUDGMENT.

Suhrawardy, J.—The present suit was brought by several persons for declaration of title to and recovery of possession of, the disputed land which is said to be on the boundary between the plaintiff's and the defendant's *mouzas*. The real issue in the case that was tried was whether the disputed land forms part of the plaintiff's *Mouza Kadamtola* or of the defendant's *Mouza Sitaijhar*. The Trial Court decreed the suit in part holding that a portion of the land in suit belonged to the plaintiff's *mouza*. On appeal by the plaintiff, the learned District Judge found that the entire land in suit belonged to the plaintiff's *mouza* and decreed the suit. Against this decree the present appeal has been preferred by defendant No. 1 making all the plaintiffs and some of the defendants-respondents to the appeal. During the pendency of the appeal in this Court the plaintiff, respondent No. 3 *Gopal Das Roy Chowdhury* died and an application was made by the appel-

lant after the period of limitation fixed for that purpose to have the abatement of the appeal as against that respondent set aside and for substitution of his heirs in his place. A Rule was issued by this Court; but it was finally discharged on the 18th February last. The result of the decision in the Rule is that the appeal as against the plaintiff-respondent No. 3 has abated.

At the hearing of this appeal a preliminary objection is taken on behalf of the respondent that the appeal is incompetent and cannot proceed in the absence of one of the plaintiffs-respondents against whom it must be taken to have been dismissed. I am of opinion that this objection must prevail. The suit was brought jointly by a number of persons for recovery of possession of a certain property. The suit was decreed and the plaintiffs without specification of their interest in the property were declared to be entitled to possession on a certain right claimed by them. Any person who is dissatisfied with the decree must have a declaration in the presence of the entire body of the plaintiffs that they are not entitled to the right claimed by them which is based upon a common ground of title alleged by them. In a case like the present the real test to be applied is what is suggested in the case of *Dharamjit Narayan Singh v. Chandreshwar Prosad Narayan Singh* (1), namely, whether the suit as framed could proceed in the absence of one of the plaintiffs. There is yet another test—whether, if the plaintiffs were appellants, the appeal could proceed in the absence of one of the plaintiffs either as appellant or respondent. If the defendant succeeds in this appeal and it is declared that the property in suit belongs to his *mouza* then there will be two decrees—one against all the respondents on the record in whose presence it is decreed that the property belongs to the defendant's *mouza* and another decree of the lower Court in favour of plaintiff No. 3 who is no party to this appeal to the effect that the property in suit belongs to the plaintiffs' *mouza* of which he was a part proprietor. In view of this anomalous result it has been held that an appeal arising out of a suit for possession of land to which one of the plaintiffs-respondents is not a party cannot proceed in his absence. The point was fully considered in the case of *Kali Dayal Bhattacharjee*

v. *Nagendra Nath Pakrashi* (2), where all the cases on the point have been referred to and commented upon. Most of these cases were placed before us by the appellant and the question re-argued. I have given my best considerations to this point and decided to follow the decision in the case of *Kali Dayal Bhattacharjee v. Nagendra Nath Pakrashi* (2). Reliance is placed on behalf of the appellant on the decisions in the case of *Chandarsang v. Khimabhai* (3) and *Upendra Kumar Chakravarti v. Sham Lal Mandal* (4) which follows the Bombay case. These cases have been considered in the case of *Kali Dayal Bhattacharjee v. Nagendra Nath Pakrashi* (2) and have been justly distinguished and are not of much authority because no reasons were assigned in support of the view there taken. In the Bombay case the real point was as to the competency of the appeal in the absence of one of the appellants. In considering the case of one of the respondents who had also died and whose heirs were not brought on the record the learned Judges observed that the Court could proceed under s. 544 of the Code of 1882 (corresponding to O. XLI, r. 20 of the present Code) against the rest of the respondents. In the case of *Upendra Kumar Chakravarti v. Sham Lal Mandal* (4), the Bombay case was referred to and accepted without any argument. I do not find myself prepared to follow these cases. It is argued further on behalf of the appellant that we should proceed in this case under O. XLI, r. 4, C. P. C., though one of the plaintiffs-respondents is not a party to this appeal. I do not think that we should follow the course suggested. That rule is limited to the case of appellants. An analogous provision is to be found in the proviso to O. IX, r. 13, C. P. C. where a number of persons are adversely affected by a common decree any one of them may move the Court to have the decree varied and the Court may vary it not in respect of such person but also in favour of other parties against whom it was passed. But it does not entitle a person against whom the decree is passed to have it varied in the absence of a person in whose favour it was made.

It is next prayed that we may proceed under the provisions of O. XLI, r. 20, C. P.

(2) 54 Ind. Cas. 822; 24 O. W. N. 44; 30 C. L. J. 217.

(3) 22 B. 718; 11 Ind. Dec. (N. S.) 1061.

(4) 34 C. 1020; 11 O. W. N. 1100; 6 C. L. J. 715.

C. and bring in the heirs of the deceased plaintiff-respondent No. 3 on the record and hear the appeal in their presence. An application for that purpose has been formally made. I do not think that we should accede to this request. Order XLI, r. 20 is ordinarily intended to apply to cases where the Court finds that it cannot proceed with the suit without the presence of a party who was not made a party to the appeal. It is not intended to override the provisions of O. XXII, C. P. C. The right obtained by a respondent when the appeal abates as against him is a valuable right and should not be lightly treated. Reference in this contention has been made to the case of *Pulin Behari Roy v. Mahendra Chandra Ghosal* (5), where the procedure suggested by the appellant was adopted. Without examining the ratio of that case we are not prepared to follow the procedure adopted therein.

We are again asked to exercise our powers under O. XLI, r. 33. That provision of the law is also not applicable to this case. It is intended to cover cases where the Court may vary the decree in such a way or pass such an order as to make the party in whose favour the order of the lower Court was passed liable under the order passed by the Appellate Court. Whatever view may be taken with regard to the inherent power of this Court as contained in O. XLI, C. P. C., or outside the Code, the present case is not one in which such power should be exercised.

In the result, this appeal must be held to be incompetent and dismissed with costs.

The application filed by the appellant is rejected.

Duval, J.—I agree.

Z. K.

Appeal dismissed.

(5) 67 Ind. Cas. 10; 34 C. L. J. 405.

ALLAHABAD HIGH COURT. FULL BENCH.

FIRST CIVIL APPEAL No. 273 OF 1922.

July 21, 1925.

Present:—Mr. Justice Lindsay,
Mr. Justice Kanhaiya Lal and Mr. Justice
Daniels.

LAL BAHADUR LAL AND ANOTHER—
DEFENDANTS—APPELLANTS

versus

KAMLESHAR NATH—PLAINTIFF
—RESPONDENT.

Hindu Law—Joint family—Alienation by father—

Suit by son to set aside alienation—Legal necessity—Consideration, insignificant portion of, not proved to be for legal necessity, effect of.

Where in a suit by a Hindu son to set aside a sale of family property by the father on the ground of want of consideration and legal necessity, the portion of the consideration for the sale for which legal necessity is not established is, as compared with the total consideration, insignificant, the sale ought not to be set aside. [p. 990, col. 2.]

First appeal from a decree of the Subordinate Judge, Basti, dated the 2nd May 1922.

ORDER OF REFERENCE TO A FULL BENCH.

Mears, C. J., and Mukerji, J.—

This is the appeal of Lal Bahadur Lal who on the 25th of April 1918 bought a 2-arnas share in village Phulpur from Adit Bahadur, the father of the plaintiff. The plaintiff commenced a suit for the setting aside of the sale on the ground that there was no legal necessity for it and that in truth there was no consideration. The learned Subordinate Judge analysed the six items which made up the consideration of Rs. 5,995 and we have followed the same course dealing with each and every item because either the appellants or the respondent challenged one or other of them. We need not go into the details of these because they present no special features.

Item (a). The learned Subordinate Judge found that item (a) Rs. 356 was for legal necessity. Mr. Sheo Prasad Sinha has not been able to challenge this item.

As regards item (b) Rs. 849 that was disallowed, but having regard to the recent decision of the Privy Council in *Brij Narain Rai v. Mangla Prasad Rai* (1) which has been decided subsequent to the decision of the learned Subordinate Judge that item of Rs. 849 must now be included.

Item (c). The learned Subordinate Judge allowed Rs. 119 of the item of Rs. 256, but again it is agreed that the whole Rs. 256 is recoverable.

Item (d). No question arises on this item of Rs. 250.

As regards item (e) Rs. 1,725 we are of opinion that the transaction of mortgage between the father and Ganesh Kunwari was a genuine transaction and that this Rs. 1,725 was a debt due by the father and properly dischargable by an advance by

the defendant.

Item (f). The learned Subordinate Judge allowed Rs. 1,619-8-0 of the item of Rs. 2,559. It is this item which has been the subject of the greater part of the argument. Rs. 1,500 was said to have been the amount borrowed from Lal Bahadur Lal to pay for the redeeming of ornaments belonging to the daughter of Adit Bahadur which the latter had pledged. Completely satisfactory evidence was given showing the redemption of Rs. 1,307 worth, but there is no evidence as regards the Rs. 193. That amount, therefore, must be struck off. As regards Rs. 500 payment of rent, only Rs. 492-1-0 has been proved and, therefore, again Rs. 7-15-0 was disallowed. An item of Rs. 200 relates to a stamp. The appellants had in fact advanced Rs. 200 to Adit Bahadur for the purchase of a stamp in respect of a transaction which Adit Bahadur intended to enter into with a third party. For some reason, not material to this case, the transaction went off, but nevertheless that money had been borrowed and constituted a debt from the father Lal Bahadur Lal. As regards the sum of Rs. 100 we disallow it on the ground that there is no evidence as to the circumstances under which this was advanced. It is admitted that the final amount of Rs. 300 was one properly incurred.

The addition of all these items allowed comes to Rs. 5,735-1-0 and, therefore, Rs. 259-15-0 is declared to be the amount for which there was no legal necessity.

When these figures were arrived at there naturally arose the question as to the form of the decree and our attention has been called to what undoubtedly is a conflict of opinion. We think it desirable that this case should be considered and that a Full Bench should be asked to say whether on the figures as found by us the sale should be set aside on payment by Kamleshar Nath of Rs. 5,735-1-0 or whether the sale should be confirmed to Lal Bahadur Lal in his paying to Kamleshar Nath Rs. 259-15-0 or whether a third course should be taken of giving no relief to Kamleshar Nath at all.

The difference between the views taken by Benches of this Court will appear from a perusal of the following cases:—

Ram Dei Kunwar v. Abu Jafar (2), *Bachchan Singh v. Kamta Prasad* (3), *Jai*

(2) 27 A. 404; A. W. N. (1905) 63

(3) 5 Ind. Cas. 585; 32 A. 392 at p. 396; 7 A. L. J. 337.

(1) 77 Ind. Cas. 639; 21 A. L. J. 934; 46 M. L. J. 23; 5 P. L. T. 1; 28 O. W. N. 253; (1921) M. W. N. 68; 19 L. W. 72; 2 Pat. L. R. 41; 10 O. & A. L. R. 82; (1921) A. I. R. (P. C.) 50; 33 M. L. T. 457; 46 A. 95; 20 Bom. L. R. 500; 11 O. L. J. 107; 51 I. A. 129; 1 O. W. N. 48; 41 O. L. J. 232 (P. C.).

Narain Pande v. Bhagwan Pande (4), *Dwarka Ram v. Jhulai Pande* (5), *Sanmukh Pande v. Jagarnath Pande* (6), *Allah Jilai v. Qabiz* [First appeal No. 69 of 1922 decided by Mr. Justice Mukerji and Mr. Justice Dalal on the 11th June, 1924.] *Jiwan Singh v. Gauri Shankar* [First Appeal No. 140 of 1922, decided by Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal on the 30th of March, 1925.] Reference might also be made to *Medai Dalavoi Thirumalaiappa Mudaliar v. Nainar Teven* (7), and to *Girdharee Lall v. Kantoo Lall* (8).

On the return of the opinion of the Full Bench let this matter be put up before us again for final orders.

Messrs. P. L. Banerji, N. P. Upadhiya and Gadadhar Prasad, for the Appellants.

Mr. Shiva Prasad Sinha, for the Respondent.

JUDGMENT OF THE FULL BENCH.

On the question which has been referred to us by a Bench we are of opinion that in this particular case the sale should not be set aside but should be confirmed in favour of the purchaser. The consideration which is mentioned in the sale-deed is Rs. 5,995 and it is found that for only a sum of Rs. 259-15-0 out of this sum no legal necessity has been established. In our opinion this item is an insignificant sum which should be left out of consideration in deciding the question whether the sale should or should not stand. The sale was a sale of a 2 annas share out of a 5 annas 4 pies share and we have no reason to suppose that the precise sum for which legal necessity existed could have been realised by a sale of any less share than that of 2 annas.

We need not discuss the case law on the subject. The latest case to which we have been referred will be found in *Daulat v. Sankatha Prasad* (9). That refers back to recent decisions which are to be found in *Jai Narasn Pande v. Bhagwan Pande* (4)

(4) 80 Ind. Cas. 1006; 44 A. 683; 20 A. L. J. 621; (1922) A. I. R. (A.) 321.

(5) 72 Ind. Cas. 134; 45 A. 429 at p. 431; 9 O. & A. L. R. 494; (1923) A. I. R. (A.) 248.

(6) 83 Ind. Cas. 838; 46 A. 531; 22 A. L. J. 417; L. R. 5 A. 289 Civ.; (1924) A. I. R. (A.) 708.

(7) 74 Ind. Cas. 604; (1922) M. W. N. 801; 16 L. W. 478; 4 U. P. L. R. (P. C.) 92; (1922) A. I. R. (P. C.) 307; 27 C. W. N. 365; 21 A. L. J. 282; 31 M. L. T. 149 (P. C.)

(8) 12 A. 321; 22 W. R. 56; 14 B. L. R. 187; 3 Sar. P. C. J. 380; (P. C.)

(9) 86 Ind. Cas. 91; 47 A. 355; 23 A. L. J. 55; L. R. 6 A. 167 Civ.; (1925) A. I. R. (A.) 324.

and *Sanmukh Pande v. Jagaranath Pande* (6). The whole case-law on the subject has been referred to in one or other of these rulings. The only authority on which Mr. Shiva Prasad Sinha for the respondent relies is the case of *Dwarka Ram v. Jhulai Pande* (5). We do not wish to criticise the merits of that decision for we are satisfied that on the merits the decision was a perfectly correct one, if we may say so, but we are of opinion that there are certain expressions in the judgment which cannot be accepted literally and which are expressed too widely. We refer to the passage at page 432* of the report which runs as follows :—

"If any part of the consideration was invalid and not binding on the plaintiff, the plaintiff would be entitled to have the sale set aside. But if a portion of the consideration was good and binding on the plaintiff, he would be entitled to reimburse it to the defendant. The form of the decree in a case of this kind should, therefore, be a decree for possession in favour of the plaintiff, subject to his paying to the purchaser so much consideration as was required for the necessities of the family. This is the form of the decree in a suit of this kind which has always been maintained."

We do not think it is correct to say that if any part of the consideration, however insignificant, was invalid and not binding on the plaintiff, the plaintiff is entitled to have the sale set aside. On the contrary there is plenty of authority for the proposition that where the portion of the consideration for which no legal necessity can be proved is insignificant the sale will stand. That was laid down in the case of *Girdhari Lal v. Kantu Lal* (8) and the relevant passage of that judgment will be found quoted in the Bench decision reported as *Jai Narain Pande v. Bhagwan Pande* (4). Nor again do we think it is correct to say that the form of the decree in a suit of this kind which has always been maintained is the form by which the plaintiff is given a decree for possession subject to his paying to the purchaser so much of the consideration as was required for the necessities of the family. On the contrary there are cases in which the suit of the plaintiff has failed altogether, i. e. cases where the portions of the consideration money for which no legal necessity could be found

*Pages of 45 A.—[Ed.]

were so inconsiderable as to be liable to be ignored.

Then only other matter upon which we are called upon to express an opinion is whether in the circumstances of this case the purchaser is liable to pay to the plaintiff a sum of Rs. 259-15-0 for which no legal necessity has been held to be established. In our opinion the vendee in this case ought not to be made liable to pay this sum. It seems to have been held that this amount was actually paid to the father of the plaintiff, and that being so, we can see no good reason why the vendee should be required to pay the money over again.

Let this answer be returned to the Referring Bench.

FINAL JUDGMENT.

Mears, C. J. and Mukerji, J.—The facts of this case will appear from our order, dated 24th of June 1925, referring a point of law to a Full Bench. The point referred to is also stated in that order.

The Full Bench have now decided the point and have held that the sale impeached by the son, who was the plaintiff-repondent in this Court, should be upheld in its entirety without any condition attached to the decree.

We accordingly allow the appeal and dismiss the plaintiff-repondent's suit with costs throughout. The costs in this Court will include Counsel's fees on the higher scale.

Z. K.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL NO. 360
OF 1924.

April 30, 1925.

Present:—Justice Sir Charles Gordon
Spencer, Kt., and Mr. Justice Ramesam.

In re PETA NAGAYYA—DEFENDANT—
APPELLANT.

Civil Procedure Code (Act V of 1908), O. XVI, rr. 10, 11, 12—Witness, failure of, to obey summons to attend Court—Court's power to impose fine—Attachment or proclamation, whether condition precedent—Words "such person" in r. 12, meaning of.

Neither the issue of a proclamation nor an order for attachment of property is a condition precedent to the imposition of a fine for non-attendance of a person who has been summoned to attend a Civil Court as a witness. [p. 991, col. 2.]

Per Spencer, J.—The words "such person" in r. 12 of O. XVI of the C. P. O. do not mean a person against whom a proclamation has been issued or whose property has been attached; but mean a person to whom a summons has been issued and who fails to attend under r. 10 (1). [p. 991, col. 2; p. 992, col. 1.]

Ram Gopal v. Secretary of State for India, 55 Ind. Cas. 425; 31 C. L. J. 363 and *Ashutosh Mullick v. Secretary of State for India*, 57 Ind. Cas. 302, dissented from.

Per Ramesam, J.—Order XVI, r. 12, C. P. C., deals with all cases of disobedience not covered by r. 11, whether there has been attachment or not and is not confined to cases in which there has been an attachment. [p. 992, cols. 1 & 2.]

Appeal against an order of the Court of the Additional Subordinate Judge, Masulipatam, dated the 13th February 1924, made in O. S. No. 47 of 1923.

Mr. A. Venkatachalam, for the Appellant.

Mr. C. V. Anantakrishna Iyer (Government Pleader) for the Crown.

JUDGMENT.

Spencer, J.—The appellant was summoned on the 26th January 1924 to appear as a witness on the 8th February. He did not appear and a warrant was issued and he was fined Rs. 40 for disobedience of summons. His explanation was that, as he was going to Court, after arriving at the place where the Court was held, he was met by the plaintiff and defendants who told him that the case had been adjourned. We have no means of testing whether this statement is true. The parties were not examined to corroborate him, but the Judge did not accept the explanation. He only gave him five days' time to pay the fine.

It is argued that the Subordinate Judge acted without jurisdiction inasmuch as there was no issue of a proclamation or attachment of property before the fine was imposed. This argument is based on the decisions in *Ashutosh Mullick v. Secretary of State for India* (1) and *Ram Gopal v. Secretary of State for India* (2). I regret that I must express dissent from the opinion of the two learned Judges of the Calcutta High Court who decided these cases. I am unable to construe the provisions of rr. 10 to 12 of O. XVI of the C. P. C., as meaning that the issue of a proclamation or an order for attachment of property are conditions precedent to the imposition of a fine for non-attendance of a person who has been summoned to attend a Civil Court. Beachcroft, J., treats r. 12 as an alternative to r. 11 and he understands the words "such person" in r. 12 as meaning a person against whom a proclamation has been issued or whose property has been attached. In my opinion "such person" means a person to whom a summons has been issued

(1) 57 Ind. Cas. 302.

(2) 55 Ind. Cas. 425; 31 C. L. J. 363.

and who fails to attend under r. 10 (1). Rule 12 itself provides both for cases where an attachment has been made and for cases where an attachment has not been already made but is made in enforcement of the order of fine. It seems to me that to say that a Judge cannot fine a witness for disobedience of summons unless the preliminaries are first gone through of attaching his property or issuing a proclamation against him is to put a great and unnecessary limitation on the powers of Courts to deal with refractory witnesses. The Subordinate Judge's order was thus passed in the exercise of his jurisdiction.

There is nothing to show that the witness had ever previously disobeyed a summons of Court. He did not prove that he was told by the parties that the case had been adjourned, and, even assuming that story were true, it would not legally be a sufficient excuse for non-attendance. The fine of Rs. 40 is rather excessive, and is in contrast with the fact that all the other witnesses who were fined in the case were excused when they appeared before the Court and represented their reasons for non-appearance. I reduce the fine imposed by the lower Court from Rs. 40 to Rs. 5 (Rs. five). The excess will be refunded. In other respects the appeal is dismissed. No costs.

Ramesam, J.—I entirely agree.

The case of *Ashutosh Mullick v. Secretary of State for India* (1) merely follows the earlier case of *Ram Gopal v. Secretary of State for India* (2) and contains no additional reasoning. It seems to me that the argument addressed to Beachcroft, J., in *Ram Gopal v. Secretary of State for India* (2) and which was rejected by him, namely, that O. XVI, r. 12 should be construed independently of r. 11 and should be taken to refer to r. 10 is sound and might have been accepted by him. I am of opinion that O. XVI, r. 12 deals with all cases of disobedience not covered by r. 11 whether there has been attachment or not. If it were not so, there would be cases of flagrant disobedience with which Courts would have no power of dealing but, apart from such considerations, O. XVI, r. 12 contains clear indications that it deals also with cases where there has been no attachment. It provides for a fresh attachment of property where the witness has failed to give a satisfactory explanation, if there has been no attachment of property, and, if

there has been an attachment already, for sale. Both cases being expressly referred to in the sections it is difficult to construe O. XVI, r. 12 as being confined to cases in which there has been an attachment.

I agree with the order passed by my learned brother.

V. N. V.

S. E.

Petition dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1528 of 1923.

July 21, 1925.

Present :—Mr. Justice Lindsay and
Mr. Justice Sulaiman.

BAKHTAWAR—DEFENDANT—APPELLANT
versus

SUNDER LAL AND OTHERS—PLAINTIFFS
—RESPONDENTS.

Registration Act (XVI of 1908), s. 17 (1) (b)—Family arrangement—Petition of compromise addressed to Court—Antecedent title, recognition of—Registration, whether necessary.

Where a *bona fide* dispute between the parties is eventually composed, each party recognizing an antecedent title in the other and the parties address a petition to the Court stating the terms of the agreement arrived at between them, there is no necessity to have the petition registered. Such a petition does not purport to create, assign, limit, extinguish or declare any rights in immovable property within the meaning of s. 17 (1) (b) of the Registration Act. It is merely a recital of facts by which the Court is informed that the parties have come to an arrangement. [p. 994, col. 2.]

Per Sulaiman, J.—Division of property by way of family settlement does not amount to a transfer by one party to the other, nor does any party to such settlement derive title through the other. The settlement merely recognizes the right of the other party and accepts it in part. Not being a transfer, gift or exchange from one party to the other the transaction does not fall under any of the sections of the Transfer of Property Act which require registration. [p. 993, col. 2.]

Even in the absence of a registered document it is open to either party to a family settlement to prove that there has been a family settlement which was acted upon. [*ibid.*]

Where, however, a compromise is reduced to writing, then if the document is sought to be used as a document of title purporting to create or declare rights in immovable property worth more than Rs. 100 the deed would require registration. If the document does not purport to be a document of title creating or declaring such right but contains a mere recital of a previous settlement arrived at between the parties, the document may be used in evidence in proof of that previous settlement, even though not registered. [*ibid.*]

Second appeal from a decree of the District Judge, Meerut, dated the 28th September 1923.

REFERRING ORDER.

Sulaiman, J.—I think this is a fit case to be referred to a Bench of two Judges. The learned Judge begins his judgment by saying that this is rather a difficult case and he had had to look up numerous rulings which were cited before him.

The main question in the case was whether the compromise arrived at in 1909 between *Musammam Kamli* the mother of the plaintiffs and *Bakhtawar*, the defendant, was in the nature of a family settlement or not. The learned Judge has to my mind unnecessarily gone into the question whether the defendant has or has not proved in this case the validity of his adoption. There was no issue framed in the first Court and the defendant was not called upon to lead evidence on that point. The question of adoption was irrelevant, the main question being whether in 1909 there was a *bona fide* dispute about the alleged adoption and whether *Musammam Kamli* believed that she had a rival claimant to meet and thought it desirable to settle the dispute with him rather than to carry on a long continued litigation. Having found that the oral evidence adduced by the defendant to prove his adoption was not satisfactory and having come to the conclusion that the application mentioning the compromise filed in the Revenue Court was inadmissible for want of registration he has been forced to record a finding that it was not reasonable for *Musammam Kamli* to have given away the rights of her children to an outsider. He has not considered whether even if for want of registration the application were inadmissible, the recital in it is or is not admissible for purposes of proving her admission of the adoption. At one place he has also remarked "I have already held that there is not sufficient oral evidence to prove that the compromise was a *bona fide* transaction" but in the previous portion of his judgment he nowhere recorded any such express finding. If the Bench is of opinion that the case is concluded by findings of fact then the question of law would not arise, otherwise the question which has to be considered is whether the application made to the Revenue Court which refers to a compromise between the parties is inadmissible in evidence because it is an unregistered document.

There can be no doubt that there are conflicting rulings on this point some of which are not easily reconcilable. If the

matter were wholly *res integra* I would have no hesitation in holding (1) that division of property by way of family settlement does not amount to a transfer by one party to the other, nor does any party to such settlement derive title through the other. The settlement merely recognises the right of the other party and accepts it in part. Not being a transfer, gift or exchange from one party to the other the transaction does not fall under any of the sections of the Transfer of Property Act which require registration; (2) that even in the absence of a registered document it is open to either party to the family settlement to prove that there had been a family settlement which was acted upon; (3) that if the compromise is reduced to writing then if that document is used as a document of title purporting to create or declare rights in immoveable property worth more than Rs. 100 the deed would require registration; but (4) that if the document does not purport to be a document of title creating or declaring such right but contains a mere recital of a previous settlement arrived at between the parties the document may be used in evidence in proof of that previous settlement, even though not registered.

I feel, however, that I would not be justified in acting on these propositions in face of considerable conflict of opinion which exists on the subject. That there is such a conflict admits of no doubt.

Leaving aside cases which were decided prior to March 11th, 1916, which are referred to in the Full Bench case of *Jagrani v. Bisheshar Dube* (1), the learned Judges who formed the Full Bench themselves were not unanimous on the rules of law which should be adopted. Richards, C. J., at page 373* remarked: "It is said that the transaction in the present case was a 'family arrangement' and it is urged that documents connected with 'family arrangements' need never be registered. I think that there is no justification for such a proposition. Documents which disclosed 'family arrangements' and which at the same time 'purport or operate' to create, declare, assign, limit, or extinguish, etc., must be registered, just as much as any other documents unconnected with 'family arrangements.'" He took the view that none of the cases in which their Lordships of the Privy Council had considered

(1) 35 Ind. Cns. 701; 38 A. 366; 14 A. L. J. 449 (F. B.)

*Page of 38 A.—[Ed.]

the 'family arrangement' could be used as authorities for the proposition that such documents were exempted from the provisions of the Registration Act. Tudball, J., at page 375* also remarked "If this document were one which purported or operated to extinguish the plaintiff's title, registration thereof would, in my opinion, be compulsory". And at page 376* he further remarked: "Where a family settlement, *bona fide* and free of fraud, is made and acted upon by all the parties, even though a full and proper document be not duly executed and registered, the Courts have refused to go behind it." Rafique, J., at page 378* held "If a compromise has been validly made and acted upon it must be given effect to". He was of opinion that if the compromise filed before a Revenue Court was merely an intimation of the fact of a compromise already made and nothing more than the question of the admissibility of the document, was irrelevant; but that the previous compromise itself "should have been in writing and registered" (pages 379*).

The matter has come up recently before a Bench consisting of Piggott and Kanhaiya Lal, JJ., in the case of *Baldeo Singh v. Udal Singh* (2) where also the learned Judges did not take exactly the same view. Kanhaiya Lal, J., was of opinion that petition which contained nothing more than a recital of the oral settlement effected out of Court and did not by itself purport to create, assign or declare any rights in immoveable property, did not require to be registered. Piggott, J., held that if the entire settlement were reduced to writing the provisions of the Registration Act and possibly also those of s. 91 of the Indian Evidence Act would come into force. He, however, held that in that particular case the settlement had not been reduced to writing in its entirety.

I accordingly refer this case to a Bench of two Judges.

Mr. Ambika Prasad (with him Dr. N. C. Vaish), for the Appellant.

JUDGMENT.

Lindsay, J.—After hearing arguments in this case, I am of opinion that the appellant is entitled to succeed. The whole question turns on the document dated the 9th of January 1909 which was presented in the Revenue Court. It appears that this document was presented after the death of one

(2) 58 Ind. Cas. 732; 18 A. L. J. 877; 2 U. P. L. R. (A.) 202; 43 A. 1.

*Pages of 38 A.—[Ed.]

Musammatt Surjaiti who was the widow of Dungar. When Musammatt Surjaiti died Bakhtawar who is the grand nephew of Dungar seems to have applied to the Revenue Court claiming to be the heir and to be entitled to have mutation of all property which had belonged to Dungar, and it further appears that he was putting forward a title by saying that Musammatt Surjaiti had adopted him to her husband Dungar.

The claim in the Revenue Court was opposed by Dungar's daughter Musammatt Kamli and on the date above mentioned we find that a petition was presented to the Court which is described as *darkhast razinama*. This document recited that the two parties, namely, Bakhtawar and Musammatt Kamli had already composed their differences regarding the property and had come to an arrangement between themselves by which Musammatt Kamli's name was to be entered in respect of 7 *bighas*, 12 *biswas* odd whilst Bakhtawar's name was to be entered in respect of the rest of the property amounting to 7 *bighas* 2 *biswas* odd. The petition describes Bakhtawar as the adopted son of Musammatt Surjaiti.

It is not disputed that the entries have remained in this way ever since the mutation Court made an order upon this petition. I am of opinion that this petition is evidence of a previously arranged family settlement arrived at between Bakhtawar and Musammatt Kamli, and the true view of the transaction appears to me to be that there was no transfer by one party to the other, nor was there any creation of a fresh title. Bakhtawar was setting himself up as the adopted son whilst Musammatt Kamli was opposing him in her character as daughter and heir of the deceased Dungar. It is reasonable to assume that there was a *bona fide* dispute between the parties which was eventually composed, each party recognising an antecedent title in the other. In this view of the circumstances I am of opinion that there was no necessity to have this petition registered. It does not, in my opinion, purport to create, assign, limit, extinguish or declare within the meaning of these expressions as used in s. 17 (b) of the Registration Act. It is merely a recital of fact by which the Court is informed that the parties have come to an arrangement. The whole question raised here has been discussed by me in a ruling which will be found in *Satrohan*

Lal v. Nageshar Prasad (3). I have nothing to add to or subtract from what I said on that occasion. I need only say further that this ruling was cited in a Bench decision reported as *Baldeo Singh v. Udal Singh* (2). I would, therefore, allow this appeal and setting aside the decrees of both the Courts below dismiss the plaintiff's suit with costs in all Courts including in this Court fees on the higher scale.

Sulaiman, J.—I agree and adhere to the four propositions laid down by me in my Referring Order which I was inclined to accept if the matter were wholly *res integra*.

Z. K. *Appeal allowed.*
(3) 35 Ind. Cas. 770, 19 O. C. 75; 3 O. L. J. 339.

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 31
OF 1925.

March 23, 1925.

Present:—Mr. Justice Heald and
Mr. Justice Lentaigne.

MENGHA SINGH—APPELLANT
versus

SUCHA SINGH—RESPONDENT.

Letters Patent (Rang.), cl. 13—Civil Procedure Code (Act V of 1908), O. XXXVIII, r. 5, order under, whether "judgment"—Appealable order, whether "judgment."

An order under O. XXXVIII, r. 5, C. P. O., requiring an appellant to give security, is not a "judgment" within the meaning of cl. 13 of the Letters Patent (Rangoon), because it is merely an interlocutory order which does not affect the merits of the dispute between the parties by determining some right or liability which is in controversy between them in the suit.

Mooljee Dharsee & Co. v. M. E. Moolia, 88 Ind. Cas. 740; 4 Bur. L. J. 61; (1925) A. I. R. (R.) 225; 3 R. 255, followed.

Seshagiri Row v. Nawab Askur Jung Aftab Dowla, 26 M. 502 and *Soonabai v. Tribhovandas*, 32 B. 602; 10 Bom. L. R. 337, not followed.

Semle.—Where an appeal against an order actually is given by the C. P. C., it might well be argued that the order ought to be regarded as a "judgment" within the meaning of the Letters Patent.

Civil miscellaneous appeal against an order of the Original Side in C. R. No. 473 of 1924.

Mr. Auzam, for the Appellant.

JUDGMENT.—In Suit No. 473 of 1924 on the Original Side of the Court respondent sued Bahan Singh and certain relatives of Thakur Singh, among whom was appellant

to recover Rs. 6,900 which he alleged to be due on a promissory note executed by Bahan Singh and Thakur Singh.

Respondent also applied for attachment before judgment in respect of a motor car No. 4315 belonging to appellant on the ground that the appellant had sold another motor car No. 3677, which belonged to the estate and kept the proceeds, and that appellant was trying to sell car No. 4315 and was intending to leave the jurisdiction of the Court. That application was dismissed.

Respondent then filed a fresh application claiming on the same ground that appellant should be ordered to deposit in Court Rs. 1,700 as being the amount which Thakur Singh had paid for his interest in car No. 4315 and to give security for costs.

Affidavits in respect of that application were filed by both parties, and after examining one of respondent's witnesses and hearing Counsel, the learned Judge passed an order directing appellant to furnish security in Rs. 1,784.

Appellant desires to appeal against that order, but his learned Advocate has been unable to satisfy us that an appeal lies.

He has referred us to the provisions of O. XLIII, r. 1 (q) but it is clear that the order against which he wishes to appeal is not one of the orders mentioned in that rule.

The order of the learned Judge was presumably an order made under the provisions of O. XXXVIII, r. 5 and would not, in our opinion, be a "judgment" within the meaning of cl. 13 of the Letters Patent, because it is a mere interlocutory order which does not affect the merits of the dispute between the parties by determining some right or liability which is in controversy between them in the suit.

It is true that it was held in the case of *Seshairi Row v. Nawab Askur Jung Aftab Dowla* (1) that an order directing a plaintiff to furnish security for costs, made under the provisions corresponding to O. XXV, r. 1 was a "judgment" within the meaning of a corresponding clause of Letters Patent and that the ruling was followed in *Soonabai v. Tribhovandas* (2) but it is clear from the judgment that both the Madras and the Bombay Courts regarded the matter as being open to doubt. The meaning of the word "judgment" in the Letters Patent

(1) 26 M. 502.

(2) 32 B. 602; 10 Bom. L. R. 337.

has recently been considered by this Court in the case of *Moolji Dharsee & Co. v. M. E. Moola* (3) and on the reasoning adopted in that case we are of the opinion that the order in this case was not a "judgment."

The question would have been different if an order under O. XXXVIII, r. 6 had been made because an appeal from such an order actually is given by the Code and it might well be argued that orders against which an appeal is given by the Code ought to be regarded as "judgments" within the meaning of the Letters Patent.

In the present case the order would not be appealable as an order under the Code and we are of opinion that it is not appealable as a judgment under cl. 13 of the Letters Patent.

The appeal is accordingly dismissed.

N. H. *Appeal dismissed.*

(3) 88 Ind. Cas. 740; 4 Bur. L. J. 61; (1925) A. I. R. (R.) 225; 3 R. 255.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1089 OF 1923.

February 25, 1925.

Present:—Mr. Justice Mukerji.

Chaudhuri MUHAMMAD ABDUL HAMID
KHAN—PLAINTIFF—APPELLANT

versus

UDA AND OTHERS—DEFENDANTS—
RESPONDENTS.

Jurisdiction—Assistant Collector of Second Class, decree of—Appeal, third, whether lies.

No third appeal lies from a decree of an Assistant Collector of the Second Class.

Second appeal from a decree of the Additional District Judge, Aligarh, dated the 7th April 1923.

Mr. *Gulzari Lal*, for the Appellant.

Mr. *Panna Lal*, for the Respondents.

JUDGMENT.—This and the connected appeals Nos. 1090 to 1093 are third appeals from a decree of an Assistant Collector of the Second Class.

A preliminary objection is taken by Mr. *Panna Lal* that no third appeal lies. His contention is supported by the case of *Lachmi Narain v. Nirotom Das* (1). Mr. *Gulzari Lal* relies on the case of *Chhajmal Das v. Sirya* (2). That is a judgment by a Single Judge while the opinion expressed in the case of *Lachmi Narain v. Nirotam Das* (1) is by two Judges. This case was

(1) 29 A. 69; 3 A. L. J. 688; A. W. N. (1906) 272.

(2) A. W. N. (1906) 254; 3 A. L. J. 625.

re-affirmed by a Bench of two Judges, in this Court in the case of *Gulzari Lal v. Latif Husain* (3).

I hold that no third appeal lies and dismiss this appeal with costs.

Z. K. *Appeal dismissed.*

(3) 35 Ind. Cas. 27; 38 A. 181; 14 A. L. J. 84.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 837 OF 1922.

February 18, 1925.

Present:—Mr. Justice Devadoss.

CHINNAMMA NAIDU AND OTHERS—
DEFENDANTS—APPELLANTS

versus

VENKATAMMAL AND OTHERS—PLAINTIFFS
—RESPONDENTS.

Construction of document—Maintenance deed—Provision for payment of paddy or equivalent value—Option—Market rate, claim at, maintainability of.

It is not an invariable rule that where a person undertakes to pay maintenance in kind he should always pay it in kind. Where a document is clear, effect must be given to its terms.

Where a person by a deed of maintenance undertook to deliver to a maintenance holder paddy worth Rs. 30 for every year, 3 *podies* of paddy without moisture and chaff, and the deed further provided that "if at any time the giving of maintenance is delayed at the rate of 13 only for every *pod* money should be collected or sued for":

Held, that the document gave an option to the grantor to give maintenance in kind or in cash at the rate mentioned and that the maintenance holder was not entitled to insist on payment at the market rate on the date of the plaint.

Asutosh Mukhopadhyaya v. Haran Chandra Mukherjee, 53 Ind. Cas. 382; 47 C. 133; 30 C. L. J. 41; 23 C. W. N. 1021, relied on.

Second appeal against a decree of the District Court, Salem, in A. S. 92 of 1921, preferred against that of the Court of the District Munsif, Namakal, in O. S. No. 341 of 1920.

Mr. *K. Ramanath Shenai*, for the Appellant.

Mr. *C. V. Anantakrishnier*, for the Respondents.

JUDGMENT.—The only point urged in this second appeal is whether the plaintiff is entitled to get maintenance secured under Ex. A, at the rate at which paddy was selling on the date of the plaint. Both the Courts have given a decree for the amount of paddy payable to her at the rate prevailing on the date of the plaint. Mr. *Ramanath Shenai* on behalf of the appellants urges that Ex. A, provides for payment of money in lieu of the payment of maintenance in kind, and his client is

entitled to pay maintenance at the rate mentioned in Ex. A. On the other side it is contended that the document provides for payment of maintenance in kind and that the value of the paddy is given only for the purpose of ascertaining the value for registration purpose and therefore it is said that there is no option to the defendant to pay maintenance in money at the rate mentioned in the document. The recital in the document "is to deliver that paddy worth Rs. 39 for every year, 3 *podies* of Sambali paddy without moisture and chaff before 17th November every year according to the measure by which paddy is measured for sale. On failure to give every year, with interest at the rate of 4 Vallams for every year on the outstanding paddy from the date of default." Lower down there is this clause, "If at any time the giving of maintenance is delayed at the rate of 13 only for every *podu* money should be collected or sued for." But for the later clause I would be inclined to hold that the defendant is bound to deliver paddy according to the document and in default of delivery of paddy he should pay the value of the paddy at the market rate. The concluding portion of the document is emphatic in its terms and gives an option to the defendant to pay at the rate of 13 for every *podu*. If the value of the paddy is given either for the purpose of registration or for some other purpose, no doubt the defendant could not escape his liability to deliver paddy, and on default to pay the value of the paddy at the market rate. The respondent relies upon a number of cases in support of this contention that the defendant is bound to deliver paddy, and in default to pay the value of the paddy at the market rate or wherever the claim is made. Only recently I decided in S. A. No. 460 of 1922 following the decision of a Bench of this Court, that a lessee was bound to pay rent in kind and in default he should pay the value of the paddy at the rate ruling on the date of the plaint. But the terms of that document are not the same as the terms of the document in this case. Here the concluding portion of the document which I have already extracted is emphatic and it gives the defendant an option to pay maintenance in kind or in cash at the rate mentioned in the document. There are a number of decisions on this point and they are not all reconcilable.

The difficulty has arisen from the facts that Courts have tried to interpret one document in the light of the recitals of another. Where there is no general principle governing the interpretation of the documents each document should be interpreted as it reads. It is not proper to go outside the document to try to find out what the intention of the parties to the document was in fixing a certain amount as the value of the grain rent payable. In a recent case reported as *Asutosh Mukhopadhyaya v. Haran Chandra Mukherjee* (1), the learned Chief Justice and two other learned Judges have held that it was not the invariable rule that the rent should be paid in kind; and that each document should be interpreted according to its tenor. In that case reference was made to a number of previous cases and also to an unreported decision of Maclean, C. J., and Banerji, J. The principle deducible from all these cases is that it is not an invariable rule that where a lessee or other person undertakes to pay rent or maintenance or any such thing in kind he should always pay it in kind. Where an option is given to the promisee to pay in kind or in money and if the amount payable in money is fixed in the document, Courts should not go behind the document and say that the intention of the parties was to pay only in kind. It is unnecessary to discuss the cases to which my attention was drawn by the learned Vakil for the respondent. I think the document is clear in its terms and I must give effect to its terms. In the view I have taken I think the judgment of the Court below cannot be supported.

It is also vehemently urged by the learned Vakil for the respondent that this is a maintenance arrangement and the plaintiff is entitled to have the maintenance paid in kind as it is required for her food. But that would not take away the clause at the end of the document. I, therefore, consider that the decree of the lower Court on this point is wrong. I allow the plaintiff the amount mentioned in Ex. A, as the value of the paddy which was payable on default of the payment of the 3 *podies* of paddy. The plaintiff will have a decree for Rs. 39 with interests at the rate mentioned in the document till the date of deposit. In the circumstances I do not think I should allow costs to the appellants. Both

(1) 53 Ind. Cas. 332; 47 C. 123; 30 C. L. J. 41; 23 C. W. N. 1021.

parties will bear their own costs in this suit.

V. N. V.

Z. K.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 26 OF 1923.

March 16, 1925.

Present:—Mr. Justice Suhrawardy and
Mr. Justice Duval.

NABIN CHANDRA BISWAS—DECREE-
HOLDER—APPELLANT

versus

ABDUL AZIZ AND OTHERS—JUDGMENT-
DEBTORS—RESPONDENTS.

Execution of decree—Attachment—Occupancy holding, whether liable to sale.

The transfer for value of the whole or part of an occupancy holding, apart from custom or local usage, is operative as against the *raiyat* whether it is voluntary or involuntary. The principle is of general application and applies to creditors other than the landlord.

Chandra Binode Kundu v. Sheikh Alla Bux, 58 Ind. Cas. 353; 48 C. 184; 24 C. W. N. 818; 31 C. L. J. 510 and *Kenaram Pal v. Kinu Mandal*, 75 Ind. Cas. 379; 50 C. 508; (1924) A. I. R. (C.) 52, relied on.

Appeal against an order of the District Judge, Chittagong, dated the 4th of September 1922, modifying that of the Munsif, South Rauzan, dated the 22nd February 1922.

Babu Narendra Kumar Das, for the Appellant.

Babu Charu Chandra Sen, for the Respondents.

Babu Biraj Mohan Majumdar, for the Deputy Registrar.

JUDGMENT.—This appeal raises a question which has now been settled by authorities. The appellant obtained a decree against the respondents and attached certain properties described in three schedules. The appeal is confined to the finding of the lower Court with respect to Schedule III. The judgment-debtors claimed that the properties described in that Schedule could not be sold as they had non-transferable occupancy interest in them. The learned District Judge of the Court of Appeal below has given effect to this contention. This view is untenable. In the Full Bench case of *Chandra Binode Kundu v. Sheikh Alla Bux* (1), it was held that the transfer for value of the whole or part of an occupancy hold-

ing apart from custom or local usage is operative as against the *raiyat* whether it is voluntary or involuntary. The question involved in the Full Bench case was confined to the right of the landlord to bring a non-transferable occupancy holding of a tenant to sale in execution of a money-decree obtained by him; but the principle upon which this decision is based is a general one which applies to the case of creditors other than landlords; and this view has been adopted in the case of *Kenaram Pal v. Kinu Mandal* (2). We see no reason to differ from the view taken in those cases and we must hold that the properties of Schedule III are liable to attachment in execution of the decree obtained by the appellant.

It is argued on behalf of the respondent that these properties were claimed by the respondents as their own and, therefore, there should be an enquiry into that question. We do not think that this question was raised in any of the Courts below. On reading the judgments of the Courts and the pleadings, we are of opinion that this was a question which was not within the contemplation of the parties in the Court below. The only points upon which they went to trial was whether the occupancy right in lands of Schedule III was liable to be sold in execution of the appellant's decree.

The result is that this appeal is allowed and the order of the lower Appellate Court set aside and we hold that the properties mentioned in Schedule III of the application for execution are liable to be attached and sold in execution of the appellant's decree.

There was a cross-appeal in the Court below against the order of the Munsif that the decree-holder should produce at the time of the sale landlord's consent to the transfer of the lands mentioned in Schedule III. In the view that we take of the law, we think that this order should also be set aside. The judgment of the lower Appellate Court with regard to properties mentioned in the other Schedules will stand. We make no order as to costs.

Z. K.

Appeal allowed.

(2) 75 Ind. Cas. 379; 50 C. 508; (1924) A. I. R. (C.) 52.

(1) 58 Ind. Cas. 353; 48 C. 184; 24 C. W. N. 818; 31 C. L. J. 510.

MADRAS HIGH COURT.SECOND CIVIL APPEALS Nos. 176 AND 549
OF 1921.

February 22, 1924.

Present:—Sir Victor Murray Coutts
Trotter, Kt., Chief Justice, and Mr. Justice
Wallace.

KIZHAKKAPET KRISHNAMADAR

PLAINTIFF—APPELLANT

versus

MARAMBATTE UNNIMAMMU AND OTHERS

—DEFENDANTS NOS. 1, 3, 4 AND 5—

RESPONDENTS.

*Malabar Compensation for Tenants Improvements
Act (I of 1900), s. 4—Improvements—Conversion of one
crop into two crop land—Burden of proof.*The effect of s. 4 of the Malabar Compensation for
Tenants Improvements Act is to throw upon the
landlord, when once it is shown that one crop land has
been converted into two crop land, the burden of proving
that this was not due to anything done or spent
by the tenant.In such a case it is unnecessary to prove that the
improvement was definitely due to the exertions of the
tenant.Second appeal against a decree of the
Court of the Subordinate Judge, Ottapalam, in A. S. Nos. 18 and 21 of 1914 and
in A. S. No. 29 of 1914, preferred against
those of the Court of the District Munsif,
Wallaward, in O. S. Nos. 488 and 489 of
1912 respectively.

Mr. K. P. Menon, for the Appellant.

The Advocate-General, for the Respondents.

JUDGMENT.—In this case the plaintiff sued for recovery of lands let to the defendants who were his tenants. Under the Malabar Compensation for Tenants Improvements Act of 1899 it is well-known that the landlord, is bound to compensate the tenant on ejectment for the improvements effected by the tenant. In this case the improvement that is in dispute in second appeal was an improvement alleged to consist of the conversion of one crop into two crop lands described in the suit as item (1). The case for the tenants was that this land having been at one time one crop land, had at the time of the ejectment become two crop land and having regard to the provisions of s. 4 of the Act, that was enough for them, because the effect of that section clearly is to throw upon the landlord, when once it is shown that one crop land has been converted into two crop land, the burden of proving that this was not due to anything done or spent by the tenant. In this case the story set up by the landlord in the Courts below

was that this land had been two crop land throughout its history or, at any rate, throughout its history under the tenancy of the defendants or their predecessors-in-title. That is dealt with by both the Courts below, by the learned Subordinate Judge in para. 9 of his judgment and by the District Munsif in para. 15 of his judgment, and it is clear therefrom that these learned Judges rejected the story, and the only story at that time put up by the plaintiff to rebut the presumption created by s. 4 of the Act. Now it is sought to be said that, because the word "improvements" in the section is paraphrased by the words "works or the products of such works," therefore, we must demand proof that the improvement, the conversion of one crop land into two crop land, was definitely due to the exertions of the tenant or otherwise it cannot be described as "work." It appears to us that to accede to such an argument would in effect be to throw the burden of proof in the opposite direction, to where the Statutes has deliberately indicated that it should lie. In support of this contention, reference is made to the case of *Kunnath Madampil Kunjunni v. Mannarghat Ramanunni* (1). I do not think it is necessary for me to say very much about that case. I observe that so far as appears from the report no reference is made to the all important section of the Statute, s. 4, and I will content myself at this stage with saying that I am by no means clear that that case was rightly decided and that I reserve for myself the right to re-consider the correctness of that decision if on any future occasion, it should be directly challenged.

The result is that Second Appeal No. 176 is dismissed with costs. Second Appeal No. 549 follows Second Appeal No. 176 and it is also dismissed with costs. Time for redemption is extended by three months.

V. N. V.

Appeals dismissed.

Z. K.

(1) 48 Ind. Cas 925; 35 M. L. J. 219; (1918) M. W. N. 666.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 30 OF 1925.

July 24, 1925.

Present:—Sir Grimwood Mears, Kt.,
Chief Justice, and Mr. Justice Sulaiman.
MITTAR SAIN AND ANOTHER—PLAINTIFFS
—APPELLANTS

versus

DATA RAM—DEFENDANT—RESPONDENT.

Hindu Law—Adoption by widow—Conditions imposed on adopted son, legality of—Agreement entered into by adopted son, whether binding—Stranger, whether can enforce agreement—Family arrangement, what amounts to—Trust—Charge—Contract Act (IX of 1872), s. 2—Transfer of Property Act (IV of 1882), s. 100.

A Hindu widow is not entitled when making an adoption to her deceased husband to impose any conditions on the adopted son which would diminish the value of the ancestral estate in the hands of the adopted son for the benefit of the widow's relatives. [p. 1001, col. 2.]

Per *Sulaiman, J.*—In such a case, however, the adopted son, if of age, would not be prevented from undertaking a liability upon himself for consideration. He would be bound by his agreement not because the widow has power to impose such conditions on him before adopting him but because he has himself entered into an agreement in lieu of consideration. The binding force of the agreement would be derived not from the authority of the widow to impose such conditions but from the act of the adopted son himself. [p. 1003, col. 2.]

The agreement of the widow to adopt a certain person is a good consideration for an agreement entered into by the latter to hand over a portion of the estate belonging to the adoptive father to certain nominees of the widow. The nominees themselves, however, not being parties to the arrangement, would not be entitled to bring a suit against the adopted son to enforce the terms of the agreement. [p. 1004, col. 1.]

Although under the Contract Act it is not necessary that the consideration for an agreement should move from the promisee himself, it is nevertheless necessary under s. 2 of the Act that the proposal should be made to the promisee and the latter should signify his assent thereto. Therefore, a stranger cannot enforce a contract to which he was himself no party, unless the agreement amounts to a family arrangement or creates a trust or creates a charge. [p. 1005, col. 1.]

A family arrangement is an arrangement arrived at between the members of the same family in settlement of doubtful claims where there is uncertainty as to the rights of the various claimants, the dispute being composed by a settlement based upon the acknowledgment of pre-existing title in the parties concerned. There must be a *bona fide* dispute which has to be settled by a private family settlement without having recourse to law. The mere fact that the agreement is entered into by persons who are relations of each other does not make such an agreement a family settlement so as to be binding on persons who are not even parties thereto. [p. 1005, cols. 1 & 2.]

A Hindu widow at the time of making an adoption to her deceased husband executed a deed reciting the fact that she was about to make the adoption and stating that the adopted son would pay a certain sum of money to a person named by her and that if the money was not paid the latter would be entitled to

obtain payment through Court by causing the property of the widow to be sold at auction or by any other way he liked. The adopted son also executed an agreement binding himself to abide by all the conditions specified in the deed executed by the widow :

Held, (1) that there was no trust created in favour of the nominee of the widow inasmuch as no money belonging to the widow had been expressly entrusted to the adopted son for the purpose of payment to her nominee ; [p. 1005, col. 2.]

(2) that there was no charge created on any portion of the estate of the widow's deceased husband inasmuch as the widow had no power to create a charge which would enure for the benefit of the chargeholder beyond her lifetime and the adopted son had merely accepted the condition laid down in the deed but had not himself purported to create any charge on the estate ; [p. 1006, cols. 1 & 2.]

(3) that, therefore, it was not open to the nominee, who was himself a stranger to the arrangement, to sue the adopted son for the recovery of the sum mentioned in the deed. [p. 1006, col. 2.]

Letters Patent Appeal against a judgment of Mr. Justice Lindsay, (differing from that of Mr. Justice Mukerji), dated the 7th of January 1925, printed as 87 Ind. Cas. 724.
Mr. *Iqbal Ahmad*, for the Appellants.

JUDGMENT.

Mears, C. J.—This was a suit by two brothers for a declaration that the defendant was liable to pay them Rs. 15,000 within 15 years from the 14th of December 1918 in accordance with the terms of two documents of the 12th of December 1918 and the 14th of December 1918 respectively. There was a difference of opinion between Mr. Justice Lindsay and Mr. Justice Lal Gopal Mukerji, with the result that this case has come before us for decision.

About the year 1912 one Dalip Singh died childless, leaving a widow *Musammatt Manohri*. He was a Vaish Jain Agarwal. The case as put by the plaintiffs is that *Musammatt Manohri* had been given an express authority to adopt, and shortly before or on the 27th of October 1918—that is some six years after her husband's death she agreed to adopt the plaintiff, a man of full age, provided he would consent to pay according to her directions sums *inter alia* amounting to Rs. 20,000 and an annuity of Rs. 360 a year to a certain person. The defendant was a penniless man, and these sums of money were to be paid out of the estate which would come to him on adoption; in particular the Rs. 15,000 which is the subject-matter of this suit, was a sum which the defendant had to agree to pay to *Musammatt Manohri's* brother as a condition of being adopted. On the 12th of

December 1918 the lady executed a document, which has been termed a Will, and a deed of adoption, and on the 14th of December the defendant executed a document, which in effect promised to carry out the conditions that she had imposed. The action has been brought now, because it is said that the defendant is making away with what undoubtedly was the ancestral property of Dalip Singh and the plaint contains a prayer also for relief against the property on the ground of an alleged charge contained in the document of the 14th of December.

The defendant attacks the validity of the transaction on a number of grounds. His principal contention is that he is entitled to the benefit of the adoption freed from any conditions. He says that the conditions were not such as a Hindu widow could legally impose. It has been conceded by the defendant that a Hindu widow when making an adoption can impose stipulations which are reasonable and proper for her own protection, and that agreements of this character for maintenance, and at times management of the property have been upheld. But it is urged that there is no case in which a widow has been permitted to benefit her own relatives and friends and has bargained for money or property to be made over to them as a condition of the adoption. The plaintiff contended that as regards a Vaish Jain Agarwal, there is a custom by which the widow could impose any conditions she liked. But custom was not pleaded nor was any evidence given of it.

I think that the case must be governed by the general principles of law applicable to Hindu widows, and that this Court would be setting up a dangerous precedent if it accepted the view that *Musammatt Manohri* had power to make any bargain which was pleasing to her; advantageous to her relatives, and detrimental to the ancestral estate. The ancestral property left by Dalip Singh is probably in the neighbourhood of two lakhs in value. The defendant contends that the lady had unlimited and unfettered power and could have made such an agreement as would have given a few thousand or a few hundred rupees only to the man whom she was adopting to her husband, and that she could have required in return for the adoption the payment over by the son of practically the whole balance of the estate to her nominees.

I am of opinion that a Hindu widow, be she a Jain or of any other caste, possesses no such power, and that though she was negotiating with a man of full age, she was not entitled in law to propose any arrangement which could diminish the value of the ancestral estate in favour of her relatives.

Mr. Justice Lindsay has referred to the case of *Venkappa v. Fakirgowda* (1), and I am in agreement with his view that this was an unlawful bargain for the widow to make. I am also in complete agreement with him on the other matters of argument which arose during the hearing of the case. The objection as to the legality of the conditions sought to be imposed in the adoption is, in my opinion, fatal to the claim of the plaintiffs. I would, therefore, allow the appeal with costs and fees on the higher scale.

Sulaiman, J.—I agree that the suit should be dismissed. The case put forward by the plaintiffs in the plaint was that *Musammatt Manohri* was the full owner in possession of considerable estate, that on the 12th of December 1918 she executed a deed of adoption stating that she was adopting the defendant as her son and bequeathed to him all her property with certain conditions, that on the 14th of December 1918, the defendant executed a deed of agreement by which he accepted and adopted all the conditions and provisions laid down in the deed of adoption, that among the conditions there was a provision that the defendant would pay Rs. 15,000 to the plaintiffs, that although since *Musammatt Manohri's* death the defendant is in possession of all the property and is bound by all the conditions he is denying his liability to pay the said amount. The plaintiffs asked for a declaration (1) that the defendant was liable to pay them the aforesaid sum and (2) that the payment of that amount was a charge on the entire estate of the deceased lady. In the plaint there was no suggestion that at any time prior to the 14th of December 1918 the defendant had agreed to abide by the conditions sought to be imposed by *Musammatt Manohri*. The defendant in his written statement denied that *Musammatt Manohri* was the absolute owner of the estate and *inter alia* pleaded that the adoption having taken place sometime before the 12th of December 1918, the agreement was not binding upon him; in

fact he pleaded that it had been obtained under unlawful pressure. As the application of the 14th of June 1921 shows, the plaintiffs were fully aware of the fact that the defendant was denying that any condition was agreed upon prior to or at the time of the adoption. The parties, however, understood that the issues framed by the Court were comprehensive enough to include this dispute. The plaintiffs in the first instance led no oral evidence whatsoever to show that there was any agreement by the defendant at or before his adoption. The defendant, on the other hand, went into the witness-box and deposed that when he was adopted it was not settled between *Musammatt Manohri* and him that any money, etc., should be paid to the plaintiffs. His own brother Bano Mal also deposed that *Musammatt Manohri* had not laid down any condition up to the time of the adoption. Two more witnesses Jia Lal and Puna Mal were also produced by the defendant to prove that there had been no settlement at the time of the adoption. After the defendant's evidence was closed the plaintiffs' Vakil made a statement that he would produce no evidence to the effect that at the time of the adoption or prior to it, it had been settled that the plaintiffs would be paid Rs. 15,000 but would only rely on the recital in the deed; but that by way of rebutting evidence he would produce evidence to show that the deed of agreement was not executed under unlawful pressure. He accordingly led further evidence on this last mentioned point.

The learned Subordinate Judge found that the deed of agreement had not been executed under unlawful pressure. He preferred the recitals in the agreement to the defendant's oral evidence and concluded that the terms must have been agreed upon before the adoption. He accordingly held that the agreement was for consideration and the defendant was liable to pay the amount but he considered that no charge was created on the property received by the defendant. The suit was accordingly decreed in part.

Both the parties appealed to this Court. The appeal first came up before Mukerji and Dalal, JJ., who sent down issues to ascertain whether the property left by *Musammatt Manohri* was her absolute property or not. The findings that have been returned make it quite clear that although *Musammatt Manohri* was a Jain widow she had

only a Hindu widow's estate in the property because this was the ancestral property of her husband and not his self-acquired property. No objections were filed to this finding and this position is now accepted.

The appeal came up for final disposal before Lindsay and Mukerji, JJ., and the two learned Judges differed, hence this appeal under the Letters Patent.

On the question of fact as to whether the conditions had been offered and accepted at or before the time of the adoption Mukerji, J., in view of the recitals contained in the defendant's agreement and the probabilities of the case was satisfied that the condition must have been arrived at before the adoption. Lindsay, J., although thinking that the matter was not so clear to him, did not feel prepared to differ as regards this matter. In the Will executed by *Musammatt Manohri* there is no reference to any condition having been agreed to at the time of the adoption. In fact she purports to impose this condition as if she were an absolute owner of the property entitled to lay down this condition. In the agreement the relative words are "my adoption is (or more favourably to the plaintiffs, has been) held conditional to my accepting the stipulation aforesaid". There is no clear recital in the deed that the adoption was held conditional before the adoption took place. This ambiguous recital is the solitary piece of evidence in favour of the plaintiffs and is supposed to outweigh the oral evidence of the defendant. I must say that I share the reluctance of Lindsay, J., as the matter is not so clear to me also. I am, however, loath to take a different view of the interpretation at this stage and must assume that the condition was agreed upon by the defendant before his adoption took place.

Lindsay, J., was of opinion that the agreement to pay Rs. 15,000 to the brothers of the adoptive mother was contrary to Hindu Law and illegal and unenforceable. He further held that this agreement did not amount to a family arrangement, nor under the agreement any trust was created in favour of the plaintiffs, nor was any charge created on the property. He accordingly held that the plaintiffs not being parties to the contract were not entitled to enforce it. On the other hand Mukerji, J., did not consider that such an agreement was contrary to Hindu Law and, therefore, illegal or

unenforceable, but held that the arrangement amounted to a family settlement, that it created a trust in favour of the plaintiffs and also a charge on the property and was accordingly binding on the defendant.

It has not been contended before us that apart from any prohibitions of Hindu Law the objection to the validity of the agreement can be founded on the ground that it is opposed to public policy. It is very difficult to extend the doctrine of public policy beyond the classes of cases already covered by it. Courts are reluctant to invent new heads. It is, however, contended that stipulations made by the widow before adoption are in the nature of a bargaining which is contrary to Hindu Law. It is pointed out that if such an arrangement were to be accepted by Courts, agreements would be encouraged which would be detrimental to her husband's estate. On the other hand if a widow cannot be allowed to make any arrangement she may very often refuse to make an adoption and thus fail to carry out the desire of her husband. No doubt the adopted son does not claim through the widow but in his own right which comes into existence as soon as he is adopted. It is, therefore, quite reasonable to assume *prima facie* that a Hindu widow can have no power to impose conditions on the estate which is going to vest in the adopted son. It is not disputed that a Hindu father can impose conditions before the adoption but the position of a Hindu widow with limited powers is certainly quite different as she does not possess a full disposing power over the estate.

In cases where a minor son is given in adoption by his natural guardian and the latter enters into an agreement with the widow curtailing the estate, it is a vexed question of law how far that agreement would be binding on the minor son. The general opinion seems to be that an agreement so far as it can be considered to be reasonable would be binding on the son because it was entered into by his natural guardian for his benefit and considered necessary by the guardian at the time. In the present case the defendant was admittedly of age when he himself entered into the agreement. He must be deemed to have been in the best position to know his own interest and his benefit. He entered into the agreement with open eyes apparently knowing full well that but for such an

agreement he would not be adopted and would not inherit this valuable estate. Under such circumstances the question whether it was or was not reasonable, does not arise. Unless the agreement can be said to be void either for want of consideration or as being opposed to Hindu Law, it would be binding on him in its entirety. The question whether it can be enforced by third parties will be considered hereafter.

To my mind the question whether a widow can impose conditions on the boy to be adopted or the estate is entirely different from the question whether the adopted son can or cannot himself undertake a liability in lieu of consideration. I am prepared to concede that a Hindu widow as a general rule has no power to impose conditions. At the same time it has been held in several cases that an agreement with the natural guardian of the boy before adoption for allowing the widow to remain in possession of the entire estate for her lifetime is binding on him. Similarly other reasonable agreements under which the adopted son's powers were curtailed have also been upheld. Cases where such agreements have not been upheld are based not on a supposed ground that such agreements are illegal and opposed to Hindu Law but rather on the ground of want of authority in the widow to impose conditions on a minor son which are not for his benefit. I would, therefore, feel great difficulty in holding that agreements of this kind are prohibited by the Hindu Law so as to make them absolutely illegal and void.

Even if, therefore, the widow has no power to impose conditions on her would-be adopted son, I see no good ground for holding that the adopted son, if of age, is prevented from undertaking a liability on himself for consideration. The adopted son would be bound by his agreement not because the widow had power to impose such condition on him before adopting him but because he himself entered into an agreement in lieu of consideration. The defendant is bound not by the authority of the widow but by his own agreement.

It is now well settled by the Full Bench case of *Fateh Singh v. Thakur Rukmini Rawanji Maharaj* (2) that a reversioner if he gives his consent to an alienation by a Hindu widow would be estopped from

(2) 72 Ind. Cas. 8; 21 A. L. J. 235; 45 A. 339; (1923) A. I. R. (A.) 387.

challenging it if he himself succeeds to the estate on her death. The position of the adopted son is somewhat analogous and I fail to see why he also should not be estopped from challenging his own agreement after the property becomes vested in him.

The widow though directed by her husband to adopt cannot be legally compelled to adopt a boy. The adoption to some extent is a matter of her discretion, and this is specially so when the boy to be adopted has not been named. In the case of Jain widows they can adopt even without an express authority of the husband [*vide* the case of *Manohar Lal v. Banarsi Das* (3).] Her agreeing to adopt the defendant is certainly an act which was a good consideration for the agreement. Under s. 2, sub-cl. (d) of the Indian Contract Act, when at the desire of the promisor the promisee or any other person has done or abstained from doing or does or abstains from doing or promises to do or to abstain from doing, something such act or abstinence or promise is called a consideration for the promise. It would be difficult to deny that the act of the widow in selecting the defendant and not selecting any other person to be adopted and adopting him did not amount to a consideration within the meaning of the section. It might have been her moral or even religious duty (which is doubtful in the case of a Jain widow), to adopt a boy, but it was certainly not her legal duty to adopt one and much less to adopt the defendant. Her agreement to adopt him was, therefore, a good consideration, and it is not possible to hold that the deed of agreement executed by the defendant was void for want of consideration.

That agreements entered into at the time of adoption are neither absolutely illegal nor without consideration has been assumed in several decided cases; *vide* the cases of *Visalakshi Ammal v. Sivaramien* (4) and *Kashibai Ramchandra Ghatge v. Taty Genu Pawar* (5). The Privy Council case of *Ramasami v. Venkata Ramaiyan* (6) is, in my opinion, a clear authority that agreements curtailing the rights of the adopted son are not absolutely void but in the case of a

minor merely voidable, and capable of ratification on his attaining majority. In that case the natural father of the boy had entered into an agreement with the adoptive mother that the boy would have no concern with certain properties previously sold and disposed away by the widow and that he would inherit only certain properties described by name which were in the possession of the widow. There was a clear covenant that 'whether or not there are more properties neither the natural guardian nor his begotten son, who is the adopted son, would have any sort of claim or title to the same or to their enjoyment.' When the boy attained majority he ratified this agreement but subsequently went back upon it and sued to set aside all the alienations and to claim all the properties. On the facts their Lordships felt themselves bound to assume that the father consented to give his son in adoption on the understanding that he would inherit only about one-third of the late husband's property being aware, or not caring to enquire, how the remaining two-thirds had been disposed of. The High Court had held that the agreement was void in law in so far as it relinquished on behalf of the plaintiff his right to any part of the property which had been his adoptive father's. Their Lordships of the Privy Council remarked "How far the natural father can by agreement before the adoption renounce all or part of his son's rights, so as to bind that son when he becomes of age, is also a question not altogether unattended with difficulty; although the case of *Chitko Raghunath Raja Diksh v. Janaki* (7) certainly decides that an agreement on the part of the father that his son's interest shall be postponed to the life-interest of the widow is valid and binding. In this case their Lordships think it enough to decide that the agreement of the natural father which has been set out was not void, but was, at the least capable of ratification when his son became of age. The main question in the case when his son became of age is, therefore, reduced to this, whether the son did or did not validly ratify it". Accordingly when their Lordships found that the plaintiff had on attaining majority ratified the agreement they held that he was bound by it. This, in my opinion, is a clear pronouncement in support of the view of Mukerji, J., that agreements of this nature are neither

(3) 29 A. 495 at p. 510; A. W. N. (1907) 121; 4 A. L. J. 407.

(4) 27 M. 577; 14 M. L. J. 310.

(5) 36 Ind. Cas. 546; 40 B. 668; 18 Bom. L. R. 740.

(6) 2 M. 91; 5 C. L. R. 347; 6 I. A. 196; 3 Shome L. R. 39; 3 Ind. Jur. 472; 4 Sar. P. C. J. 42; 3 Suth. P. C. J. 663; 1 Ind. Dec. (N. S.) 335 (P. C.).

(7) 11 B. H. C. R. 199.

prohibited by Hindu Law nor are without consideration.

If a minor is to be bound by an agreement entered into by his natural father and subsequently ratified by him when he comes of age, there is no good ground for holding that an adult adopted son cannot be bound by an agreement into which he enters with open eyes. I would, therefore, hold that the agreement executed by the defendant was neither illegal nor without consideration.

Although under the Indian Contract Act it is not necessary that the consideration should move from the promisee himself, it is nevertheless necessary under s. 2 that the proposal should be made to the promisee and the latter should signify his assent thereto. It would, therefore, follow that a stranger cannot enforce a contract to which he was himself no party. This point is completely covered by the case of *Jamna Das v. Ram Autar Pande* (8) affirming a decision of this Court where a person for whose payment money was left in the hands of a transferee was held not entitled to maintain a suit against the transferee. Mukerji, J., has conceded that a stranger cannot enforce an agreement to which he was not a party unless the agreement amounted to a family arrangement or created a trust or created a charge.

In support of his view that this transaction amounted to family arrangement he has relied on the case of *Kashibai Ramchandra Ghatge v. Tataya Genu Powar* (5). That case is certainly an authority for that view. The facts of the present case also are very similar to the facts of that case. In both cases the adopted son was of age at the time of the agreement. But with great respect I am unable to agree that the correct basis of decision was the existence of a family settlement. Lindsay, J., has correctly pointed out that a family arrangement is one arrived at by members of the same family in settlement of doubtful claims, cases in which there being uncertainty as to the rights of the various claimants, the dispute being composed by a settlement based upon the acknowledgment of pre-existing title in the parties concerned. There must be a *bona fide* dispute which has to be settled by a private family settlement without having recourse to law. In the present case there could be no dispute

whatsoever. The widow particularly as she was a Jain widow, had a full discretion both in the matter of adoption and in the choice of the boy. The brothers of the widow had no claim to the estate and no right to be paid an amount. There was, therefore, no dispute which required a settlement and in fact none was settled. The mere fact that an agreement is entered into by persons who are relations of each other does not make such an agreement a family settlement so as to be binding on persons who are not even parties thereto. Section 23, sub-cl. (c) under which a compromise of doubtful rights between the members of the same family can be specifically enforced by any person beneficially entitled thereunder cannot, therefore, be applicable.

I also agree with Lindsay, J., that the compromise to pay Rs. 15,000 to the widow's brother did not amount to a trust. The defendant merely declared that he should abide by all the conditions laid down in the Will of *Musammatt Manohri*. His agreement at best amounted to a promise to pay Rs. 15,000 to the brothers within 15 years. There was no money belonging to the widow over which she had created a trust, nor was the possession of the defendant that of a trustee holding trust property for the benefit of the plaintiffs. It was merely an agreement to pay them the said amount and by this agreement he constituted himself a promisor liable to pay them that amount. In the case of *Jamna Das v. Ram Autar Pande* (8), the money which had been left in the hands of the transferee was money actually belonging to the mortgagor and had been expressly left in the hands of the transferee for payment to a named creditor. Even then their Lordships did not consider that such a transaction created a trust in favour of the person to whom it was to be paid. In the present case there was not even any money in existence at the time of the agreement and such money certainly did not belong to the widow who can be said to have created a trust in favour of the plaintiffs. Mukerji, J., has considered that it falls within the definition of a trust as given in s. 3 of the Indian Trusts Act (Act II of 1852) which says that a trust is an obligation annexed to the ownership of property and arising out of a confidence reposed in and accepted by the owner or declared and accepted by him, for the benefit of another, or of another and the owner,

(8) 13 Ind. Cas. 304; 34 A. 63; 16 O. W. N. 97; 11 M. L. T. 6; 9 A. L. J. 37; (1912) M. W. N. 32; 15 O. L. J. 68; 14 Bom. L. R. 1; 21 M. L. J. 1158; 39 I. A. 7 (P. O.).

But here before the adoption the widow was not the absolute owner of the property capable of creating any trust, nor had the property then vested in the defendant. If Rs. 15,000 are to be treated as trust money, is the obligation annexed to the ownership of it or the estate? If the widow had no power to impose an obligation on the adopted son she could not annex an obligation to the ownership of the property which was to vest in Data Ram. It is, therefore, very difficult to hold either that the money was a trust money or that Data Ram was a trustee or that the plaintiffs were beneficiaries of the trust.

Lindsay, J., has agreed with the Subordinate Judge that the agreement does not create a charge on the immoveable property which vested in the defendant. The deed does not purport to create any such charge expressly. It specifies no property by name. It is called an *ikrarnama* (agreement) and is written on a stamp paper of the value of eight annas. Had it been intended to create a charge on some property it would under s. 2, sub-cl. (17) of the Indian Stamp Act have been treated as a mortgage-deed and a stamp paper of much larger value would have been used. It merely records the agreement of the defendant that he would abide by all the conditions specified in the deed dated the 12th of December 1918, as well as in the Will dated the 13th of December 1918. The last document has not been produced by either party. As the first document is merely a Will the last one was necessarily the more important one if it in any way purported to modify the provisions of the former. In the agreement there is no express mention that the persons to whom the money is to be paid would have a right to enforce a charge or realise their money *by sale of any specified property*. All that it says is that they may have the terms enforced by the Court. It is true that in the Will to which the deed refers there is a provision that in the case of non-payment the payees will have power to realise the amount through a competent Court by causing the property of the executant (*Musammât Manohri Bibi*) to be sold at auction or by any other way they like. I have already mentioned that *Musammât Manohri* was not the owner of the property capable of creating a charge which would enure for the benefit of the charge-holder beyond her lifetime. It was she who purported to

create a charge but in view of her inability to do so her doing so could not be efficacious. Data Ram accepted the conditions but did not himself purport to create any charge on his estate. Furthermore, it is the plaintiffs' case that the oral agreement was completed before the adoption was made. If that is so then at that time the property had not even vested in Data Ram. As to the document executed by *Musammât Manohri* it was in the nature of a Will which did not come into effect on the date of the agreement by Data Ram but would be operative after *Musammât Manohri's* death. A charge is defined in s. 100 of the Transfer of Property Act as being created on immoveable property of one person when that property is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage. It is very difficult to say that the defendant created a charge on his estate and made it security for the payment of the promised amount.

In this view of the matter it is unnecessary for me to express any definite opinion whether, when a charge is created on property in favour of a third person and the contract is not even a settlement on marriage or a compromise of doubtful rights between the members of the same family as referred to in s. 23 of the Specific Relief Act, the beneficiary even though a stranger to agreement, can enforce the contract.

I accordingly hold that the plaintiffs, not being a party to the contract are not entitled to enforce the agreement and their suit is liable to be dismissed with costs in all Courts.

By the Court.—The decree of the Court below is set aside and the plaintiffs' suit is dismissed. The result is that Letters Patent Appeal No. 39 of 1925 preferred by the defendant would be allowed and the Letters Patent Appeal No. 30 of 1925 filed by the plaintiffs dismissed. The plaintiffs will have to pay the costs of the defendant in all Courts including in this Court fees on the Higher scale.

z. k.

*Appeal No. 39 allowed;
Appeal No 30 dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 17 of 1924.

May 8, 1925.

Present:—Mr. Kennedy, J. C., and

Mr. Aston, A. J. C.

SIDIK HAJI YACUB—DEFENDANT—
APPELLANT

versus

MAHOMED FARUQ AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 144—Transfer of Property Act (IV of 1882), ss. 105, 111 (g)—Landlord and tenant—Tenant-at-will—Adverse possession, ingredients of—Limitation, commencement of.

It is possible for a tenant-at-will without first surrendering his tenancy and without effecting a new forcible entry on the land to set up a claim to hold by afflux of time so that his claim so to do may be ultimately uncontested. To such cases the period of limitation applicable is that provided in Art. 144 of Sch. I to the Limitation Act and the time from which the period of limitation begins to run is the date when the possession of the defendant becomes adverse to the plaintiff. [p. 1008, col. 1.]

As a general rule failure to pay rent by a tenant-at-will is apt to be regarded as the starting point of limitation, because that in itself amounts to a forfeiture of the tenure and if the tenant refuses to pay the rent the landlord has unmistakably notice and an opportunity if he wishes to eject the tenant and if he does not eject the tenant and allows him to remain in possession limitation begins to run against him. Mere failure, however, on the part of the landlord to exact from the tenant the rent due would not enable the tenant to assert that he was holding adversely. In a case in which the tenant is by virtue of his agreement with the landlord not liable to pay any rent, the mere failure to pay rent cannot form the starting point of limitation. [p. 1008, cols. 1 & 2.]

The fact that a tenant-at-will has made structural alterations on the land of his tenancy to the knowledge of the owner does not convert the possession of the tenant into adverse possession, inasmuch as such construction or alteration by even a tenant-at-will is not necessarily wholly incompatible with his position as a tenant. [p. 1008, col. 2.]

The entry of the name of a tenant as owner of the land of his tenancy in the Municipal records is not necessarily by itself such a proceeding as to amount to clear manifestation of the intention of the tenant to set up his own title to the land. Such an entry might well be made with the permission of the landlord on grounds of convenience. [ibid.]

An assertion in a public circular, however, by a person in permissive occupation of land and not paying rent or rendering services to the landlord, to the effect that the land belongs to him amounts to an assertion of adverse title and converts his possession into adverse possession and limitation begins to run against the landlord from the date of such assertion. [p. 1008, col. 2; p. 1009, col. 1.]

Per Aston, A. J. C.—Section 111 (g) of the Transfer of Property Act has no application to a permissive tenancy which does not fall within the purview of s. 105 of the Act. [p. 1010, col. 1.]

In the case of a monthly tenant or a tenant from year to year something more than a mere assertion of adversity would be required to determine the ten-

ancy. Such an assertion merely gives the landlord the option to evict the tenant and the tenant must still prove some act on the part of the landlord indicating that the tenancy has been determined before he can claim that his possession was not that of a tenant but was adverse. [ibid.]

In the case of a permissive tenancy or a tenancy-at-will, however, it is an ingredient of the tenancy that it is terminable on the will either of the landlord or the tenant and in such a case the possession of the tenant becomes adverse to the landlord when he sets up a title of ownership in the property. [p. 1010, cols. 1 & 2.]

Appeal against the judgment and decree of Mr. Rupchand Bilaram, A. J. C., dated the 22nd January 1924, printed as 79 Ind. Cas. 59, in Suit No. 707 of 1921.

Mr. Dipchand Chandumal, for the Appellant.

Mr. E. V. Castillino, for the Respondents.

JUDGMENT.

Kennedy, J. C.—The facts as found in the present appeal are the following:—

The appellant Haji Yacub was the owner of a certain house which was divided into two parts. About the year 1890 one Haji Jan who was a *Pir* came from Las Bella and settled in Karachi, and entered into occupation of the house in suit which was then apparently demarcated from the rest of the building. Haji Yacub remained in possession of the other half of the building where boat accessories and fishing nets were stored. It is not ascertained precisely in what capacity Haji Jan was allowed to remain. It has been assumed all through that he was a lessee but perhaps his position is rather that of a licensee. This point, is however, not very material as the legal question would be the same in both the cases. It was set up that he had been paying rent monthly to Haji Yacub but that has been held not proved by the Trial Court and there was also an assertion by the present respondent that there had been a sale by Haji Yacub to Haji Jan Mahomed but this sale also has been held not proved. The position, therefore, of Haji Jan Mahomed at the time of his death in 1900 was that of a permissive occupant whether called a tenant-at-will or a licensee. On the death of Haji Jan Mahomed the present plaintiff Mahomed Faruq continued to be in possession of the property. By that time he was residing in the adjoining house as his own. About 1917, disputes arose between Sidik, the son of Haji Yacub, and Mahomed Faruq, son of Haji Jan Mahomed, who is the present plaintiff and Sidik took civil and criminal proceedings by which he re-gained

possession of the property. It would appear that up to 1917 the possession was of Mahomed Faruq who had continued to be in possession of the plaintiff property. This was an action brought by Mahomed Faruq to re-gain possession of the property inasmuch as he had been ousted by a decree in a summary suit under the Specific Relief Act.

It would seem from the facts as found by the Trial Court that the question merely is whether by 1917, Mahomed Faruq had succeeded in obtaining title by adverse possession. There is no doubt that there is a certain amount of conflict of authorities as to what is necessary for a tenant to do in order that limitation might start against his landlord.

It seems generally admitted that it is possible for a tenant without first surrendering his tenancy and without effecting a new forcible entry on the land to set up a claim to hold by efflux of time so that his claim so to do may be ultimately uncontested. It would appear that in such cases the correct Article of the Indian Limitation Act that applies is Art. 144 and the time from which period of limitation begins to run is the date when the possession of the defendant becomes adverse to the plaintiff. That is to say, if before the bringing of the summary suit the possession of Mahomed Faruq had become adverse to Yacub and that possession had matured into a full title then inasmuch as he has been ousted by a summary decree he is entitled to lay claim to recover possession as being the person who is entitled by reason of his title to possession of property. The question, therefore, is what act was there which gave a starting point for adverse possession.

As a general rule, failure to pay rent is apt to be regarded as starting point of limitation because that in itself is forfeiture of tenure and as a general rule if a tenant refuses to pay rent the landlord has unmistakable notice and an opportunity if he wishes to eject the tenant and if he does not eject the tenant but allows the contumacious tenant to remain in possession, the limitation begins to run. But on the authorities it would appear that mere failure on the part of the landlord to exact rent due would not enable the tenant to assert that he was holding adversely. Further this contingency is not capable of arising in the present case because whe-

ther Mahomed Faruq was a mere permissive tenant or a licensee no rent was due to Haji Yacub under any agreement. Therefore, mere failure to pay rent obviously could not form the starting point of limitation. Nor again does the fact of the making of the structural alterations on the plot by plaintiff or his father to the knowledge of the owner Haji Yacub form such a point of departure, because such construction or such alteration by a tenant even a tenant-at-will is not necessarily wholly incompatible with his position as a tenant, although such action if permitted may give rise to certain equities between the landlord and the tenant but they do not amount to a notice that the tenancy is at an end.

Similarly the entry of Haji Jan Mahomed and his son as owners in the Municipal records is not necessarily by itself such a proceeding as to amount as to clear manifestation of the intention of the occupant to set up his own title. Such an entry might well be made with the permission of the real owner for convenience.

But all these things taken into consideration with another circumstance, with which I will presently deal seem to point unmistakably to the assertion of adverse title to the knowledge of the original owner. It appears that in 1904 a mortgage-decree was passed against Haji Yacub. There was an order by the Court that the house should be sold to satisfy the decree. At that point the plaintiff filed an application Ex. 6 setting up his ownership, claiming to be a purchaser. Further at the time of the auction-sale, the plaintiff circulated a notice stating that he was the owner of the land and that the judgment-debtor in that case, namely, Haji Yacub had no right in it. The result of which was that no purchasers came forth to bid for the property. It is not shown in any way that Haji Jan Mahomed was a party to the proceedings or that the objection to the order of sale was made for his benefit. The notification was certainly an intimation to Haji Yacub that the plaintiff was then claiming by title to the land. It seems to me that if such an open and public declaration communicated to the landlord is not to be held to amount to a starting point of limitation by a person in permissive occupation and not paying rent or rendering services claiming adversely to be an owner it would be impossible in these cases that limitations should ever

have any effect to extinguish stale titles. It is to be observed that the Transfer of Property Act was extended to Sind on 1st January 1915, and it would be difficult to apply the provisions of s. 111, cl. (g) to circumstances which took place in 1904. In the present case there being no rent payable and no services to be rendered by the occupant what was due from the occupant to the landlord was the acknowledgment of permissive occupation and if it was repudiated the whole residue of the rights of the owner was repudiated in full and the owner could there and then have taken steps to establish his own title and to eject the occupant.

It is thus proper to take 1904 as the date from which adverse possession was made to run against Haji Yacub. That being so he is entitled to maintain a suit to re-gain the property, his dispossession of which took place in 1917. That is to say by that time the title of the present plaintiff by adverse possession was full and matured. That being so the plaintiff as found by the lower Court is entitled to recover possession.

We, therefore, dismiss this appeal with costs.

Aston, A. J. C.—I agree. The tenancy in the present suit which arose on the death of Pir Haji Jan was not a regular tenancy within the definition contained in s. 105 of the Transfer of Property Act. The learned Additional Judicial Commissioner has held that the plaintiff being the heir of Pir Haji Jan, continued in possession as a permissive tenant.

Had the plaintiff been a tenant under a tenancy to which the provisions of s. 111 (g) of the Transfer of Property Act applied, I am of opinion on the principle a *verbis legis non est recedendum* that something more could have been required to terminate the tenancy than the non-payment of rent by the tenant, or the renunciation by the tenant of his character as such, by setting up an adverse title. Section 111 (g) clearly provides that in order to terminate the tenancy there must also be some act on the part of the lessor or his transferee showing his intention to determine the lease. See the case of *Srinivasa Ayyar v. Muthusami Pillai* (1), where it was held that a tenant repudiating the title of his landlord becomes liable to immediate

eviction but that until the landlord indicates that he intends to exercise his option the tenancy subsists. See also *Seshamma Shettati v. Chickoya Hegade* (2), where it was held that a person who has lawfully come into possession of land as tenant from year to year or for a term of years cannot, by setting up during the continuance of such relation any title adverse to the landlord inconsistent with the legal relation between them and that, however notoriously and to the knowledge of the other party, acquire by the operation of the law of limitation title as owner or any other title inconsistent with that under which he was let into possession. This ruling was followed in *Rajah of Venkatagiri v. Mukku Narasaya* (3): see also the case of *Ittapan v. Manavikrama* (4), where Shepherd, J., pointed out that the landlord is not bound to insist on a forfeiture when the occasion arises and unless he selects to do so the tenancy remains unaffected. The ruling of the Bombay High Court in *Maidin Saiba v. Nagapa* (5) is clearly distinguishable, for there the tenant (so-called) was a trespasser, who was setting up a pretended tenancy which the landlord denied throughout the case, therefore, (*sic*) was to be regarded as one against a trespasser. *Budesab v. Hanmanta* (6) does not conflict with the Madras decisions above referred to, for there the landlord did an act showing his intention to determine the tenancy, *viz.*, by filing a suit. The case of *Thakore Fatesinghji v. Bamanji Dalal* (7) is also distinguishable for there the tenant agreed to go into possession under rules, which would give him a permanent tenancy and ever since he went into possession, he claimed to be in as a permanent tenant and he was in adverse possession as a permanent tenant for more than the statutory period. In *Beni Prashad Koeri v. Dudhnath Roy* (8), their Lordships of the Privy Council held that the possession of a tenant for life is not rendered adverse within the meaning of Act XV of 1877 by a notice from the tenant that he claims to be holding on a

(2) 25 M. 507; 12 M. L. J. 119.

(3) 7 Ind. Cas. 202; 37 M. 1; 8 M. L. T. 258; (1910) M. W. N. 369.

(4) 21 M. 153 at p. 160; 8 M. L. J. 92; 7 Ind. Dec. (N. S.) 465.

(5) 7 B. 96; 4 Ind. Dec. (N. S.) 64.

(6) 21 B. 509; 11 Ind. Dec. (N. S.) 341.

(7) 27 B. 515; 5 Bom. L. R. 274.

(8) 27 C. 156; 26 I. A. 216; 4 C. W. N. 274; 7 Sar. P. C. J. 580; 14 Ind. Dec. (N. S.) 103 (P. C.).

(1) 24 M. 246; 10 M. L. J. 415.

perpetual or a hereditary tenure. *Madhava v. Narayana* (9) is clearly distinguishable from the facts of the present case for in that case as in *Maidin Saiba v. Nagapa* (5), there was no question of the defendant determining a tenancy by an adverse claim. He entered into possession under a *kanom* alleged to be valid. Hutchens, J., there held that they were either trespassers or *kanamdars* and that their possession for the statutory period in either capacity adversely to the family was as bar to their ejection. On the other hand the Bombay High Court in *Rambhat v. Bababhat* (10) held that the mere fact that a tenant treated land as *khalsat* and paid assessment to Government and no rent to plaintiff for 26 years the plaintiff merely protesting at the surrender to Government could not affect the relations of landlord and tenant which admittedly existed in 1863.

Section 111 (g), however, has no application to the facts of the present case for the tenancy was not a tenancy within the meaning of s. 105 of the Transfer of Property Act, but a mere permissive tenancy.

The contention that s. 111 (g) did not apply because the provisions of that section had not been applied to Sind, until the year 1915 was not pressed by Mr. Castillino. No doubt the express provisions of the section would not be applicable but the section as pointed out by the Madras High Court in *Srinivasa Ayyar v. Mithusami Pillai* (1) contains an exposition of the general law which is applicable.

Had it been established that the plaintiff was a monthly tenant or a tenant from year to year in 1904 when by his application dated 18th July 1904, and by public notice issued by his Pleaders he claimed the property as his own, I would have held that the tenancy was not determined but that the plaintiff's acts merely gave the landlord the option to evict him and that the plaintiff had still to prove some act on the part of the landlord indicating an intention to exercise his option before he could claim that his possession was not that of a tenant but adverse.

But the plaintiff was a mere permissive tenant or tenant-at-will. Now it is an ingredient of a tenancy-at-will that the tenancy is terminable at the will of either the landlord or the tenant : see Halsbury's

Laws of England, Vol. XVIII, page 484, para. 899.

In *Ittapan v. Manavikrama* (4), it was conceded by Shepherd, J., that in the case of a tenancy-at-will disobedience on the part of the tenant might afford evidence of the determination of the tenancy.

In *Krishnaji Ramchandra v. Antaji Pandurang* (11) the Bombay High Court held that the tenancy of the defendants whose possession was permissive became adverse when they set up a title of ownership in the property. In *Gobind Lall Seal v. Debendranath Mullick* (12), where the facts were somewhat similar to those in the present case, the Calcutta High Court held that Art. 144 of the Limitation Act applied to cases where occupation was permissive and that limitation would operate from the time when possession first became adverse.

I am of opinion in the circumstances that the suit was rightly decided by the learned Additional Judicial Commissioner and agree that the appeal should be dismissed with costs.

Z. K.

Appeal dismissed.

(11) 18 B. 256; 9 Ind. Dec. (N. S.) 679.

(12) 6 C. 311; 7 C. L. R. 181; 3 Ind. Dec. (N. S.) 203.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES

Nos. 1741 to 1745 of 1922.

May 8, 1925.

Present :—Mr. Justice Cuming and Mr. Justice Panton.

ANDORU AKANDA AND OTHERS—
DEFENDANTS —APPELLANTS

versus

NASIR AKANDA AND OTHERS—PLAINTIFFS
AND OTHERS—REMAINING DEFENDANTS—
RESPONDENTS.

Bengal Alluvion and Diluvion Regulation (XI of 1825), s. 1—Bed of small and shallow river belonging to private individual—Regulation, applicability of.

The first part of s. 1 of the Bengal Alluvion and Diluvion Regulation XI of 1825 has no application to land forming the bed of a small and shallow river which is recognized as the property of a private individual.

[Case-law discussed.]

Appeals against the decrees of the Officiating Subordinate Judge, Bogra, dated the 30th March 1922, modifying those of the Munsif Additional Court at Bogra, dated the 31st of July 1920,

(9) 9 M 244; 10 Ind. Jur. 61; 3 Ind. Dec. (N. S.) 567.

(10) 18 B. 250; 9 Ind. Dec. (N. S.) 675.

Babu Gunada Chandra Sen (with him Babu Prosanta Bhusan Gupta), for the Appellants.

Babu Atul Chandra Gupta (with him Babu Radhica Ranjan Guha), for the Respondents.

JUDGMENT.

Panton, J.—The only question for decision in these second appeals is whether the first part of s. 1 of Regulation XI of 1825 applies to land forming from the bed of a small and shallow river where bed is recognized as the property of an individual.

The learned Munsif found that it did; in appeal the learned Subordinate Judge has expressed the contrary opinion.

The form in which the question presents itself in the present case is that the appellants are the owners of occupancy holdings to which holdings the disputed land has accreted: the respondents are lessees of the *zemindar* to whom the bed of the river belongs. It is important to notice that the appellants do not pretend that the land in dispute was at any time part of their holdings before its recent emergence. The principle, then which applies to the case is the same as that which would apply in a contest between the "recognized proprietor" of the bed of the river on the one hand and a different riparian proprietor.

For the answer to the present question it is not really necessary to go further than to the judgment of their Lordships of the Judicial Committee in *Lopez v. Muddun Mohun Thakoor* (1). Bearing in mind what was then said, it is hard to see why a *zemindar* who holds the bed of a river embordered by any Subordinate tenure should be deprived of the full enjoyment of his property when the land in question emerges from the river.

The distinction in respect to the application of Regulation XI of 1825 between small and shallow rivers, such as are dealt with in s. 4 and rivers not small and shallow where the ownership of individuals in the beds has not been recognized was pointed out in *Chunder Monee Chawdhurani v. Sreemuttee Chowdhurani* (2). In *Jugdish Chunder Biswas v. Chowdhury Zuhoorul Huq* (3), Markby, J., observed: "If it be decided that it 'the bed of a river' was the

property of a private individual.....then there is an end of the matter & consequently in that case the Regulation XI of 1825 has no application at all." The same view was expressed by Holmwood and Chapman, JJ., in *Ramjan Ali v. Maharam Ali Khondkar* (4).

But the latter decision was dissented from by Fletcher, J., (Huda, J., concurring) in *Gobinda Hota v. Kristapada Singha Babu* (5). With all respect to the learned Judges we are not, however, pressed by this decision. The earlier cases I have mentioned were not referred to and it proceeded upon the footing that the decision in *Ramjan Ali v. Maharam Ali Khondkar* (4) was opposed to the view taken by a Full Bench of this Court in *Gourhari Kaiburto v. Bhola Kaiburto* (6). But there is nothing in the report to indicate that the latter case related to land formed in a "small and shallow river", nor does this condition appear to have been present in any of the earlier decisions the correctness of which was affirmed. The judgment proceeds upon the assumption that Regulation XI of 1825 applied to the land in suit and on that assumption decided that an occupancy *raiyyat* was entitled to share in the benefits which s. (1) provides. It does not purport to decide to what land the Regulation does or does not apply.

In my opinion the decision of the learned Subordinate Judge is correct and these appeals must be dismissed with costs.

Cuming, J.—I agree.

Z. K.

Appeals dismissed.

(4) 26 Ind. Cas. 406.

(5) 45 Ind. Cas. 929.

(6) 21 C. 233; 10 Ind. Dec. (N. S.) 787.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 205 of 1923.

April 23, 1925.

Present:—Mr. Justice Rutledge and Mr. Justice Brown.

A. T. A. R. M. M. CHETTY FIRM
—DEFENDANT—APPELLANT

versus

M. A. M. MAHOMED KASIM AND
OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 134—Mortgage—Transfer by mortgagee—Suit by mortgagor to recover possession of mortgaged property—Limitation commencement of—Mortgagee put in possession—Allegation

(1) 13 M. I. A. 467; 14 W. R. P. [C. 11; 5 B. L. R. 521; 2 Suth. P. C. J. 336; 2 Sar. P. C. J. 594; 20 E. R. 625.

(2) 4 W. R. 54.

(3) 24 W. R. 317.

tion of absolute transfer in favour of mortgagee—
Burden of proof.

Article 134 of Sch. I to the Limitation Act cannot be pleaded in defence to a suit to recover possession of mortgaged property unless the person pleading it has had 12 years' possession of the property in suit. The Article refers to cases in which the subsequent transfer has been with possession and applies only to suits to recover possession of immoveable property. [p. 1083, col. 2.]

Where land is mortgaged without possession and possession of it subsequently passes to the mortgagee the burden of proving that the transfer in which possession was given was an outright sale lies on the person alleging it. [p. 1014, col. 2.]

First appeal against a decree of the District Court, Myaungmya, in Civil Regular No. 20 of 1922.

Mr. Jeejeebhoy, for the Appellant.

Messrs. Chari and Moore, for the Respondents.

JUDGMENT.—The land in suit was originally owned by two Karen Christians, Maung Aung Tha and Ma Pa Dit, who were husband and wife. In the year 1901 by registered mortgage-deed they executed a simple mortgage on the land in favour of the respondent Nadir Shah for Rs. 1,450. The mortgagors at first remained in possession of the mortgaged property, but in the year 1904, after the death of Maung Aung Tha, Ma Pa Dit made over possession of the land to Nadir Shah. On the 2nd August 1905, Nadir Shah executed a mortgage in favour of a Firm of K. A. L. T. Annamalai Chettiar. The property mortgaged consisted of altogether 18 items of which the land in suit formed one. The mortgage was without possession. On the 6th July 1906, the Chetty firm instituted a suit on this mortgage for sale of the mortgaged properties. They obtained a decree but considerable delay ensued before the decree was executed. Finally the property now in suit was sold in execution of the mortgage decree on the 13th September 1915. The purchaser at the auction sale was one V. T. A. L. Swaminathan Chettiar and the appellants A. T. R. M. M. Firm have subsequently acquired the rights of the auction-purchaser. The suit out of which this appeal has arisen was filed by one M. A. M. Kasim. The plaintiff claimed that when possession of the land was made over to Nadir Shah in 1904, Nadir Shah continued to be merely a mortgagee of the land, and that the right of redemption still remained with the original owners. In the year 1912 Ma Pa Dit executed a registered deed of sale whereby she purported to sell her interest in the land to one Kya Gaing. In the year

1915 a further registered sale-deed with regard to the land was executed. In this deed Ma Pa Dit and her two sons Maung San Dwa and Maung Tun, and the purchaser of 1912 Maung Kya Gaing, are shown as vendors, and Maung Po Chet as the vendee. Subsequently Maung Po Chet has sold his rights to Kasim. The present suit was filed by Kasim for redemption of the mortgage made by Ma Pa Dit and her deceased husband in the year 1901.

The appellants contended that the land was made over outright to Nadir Shah in the year 1904, and that Ma Pa Dit, and her sons, therefore, had no rights in the land to transfer to Po Chet, and Kasim has no right to redeem. They further contend that the suit is barred by limitation. The Trial Court has found that Nadir Shah obtained possession as a mortgagee and not as an outright purchaser and that the suit is not barred by limitation. Kasim has been given a decree for redemption on the payment of Rs. 2,755.

The appellants attack this decree mainly on two grounds. They contend that the suit is barred by limitation, and that, if not so barred, the finding on fact by the Trial Court ought to have been that the land was made over to Nadir Shah outright in the year 1904.

The persons from whom it is now sought to redeem the land are not the original mortgagees, and it is contended that Art. 134 of the Limitation Act is applicable, and that the period of limitation begins to run from the date of the mortgage by Nadir Shah to the K. A. T. L. Firm, that is from the year 1905. If this contention is correct then the suit is clearly barred by limitation. There was at one time some doubt as to whether Art. 134 applied to a case where, as in the present case, the subsequent transfer was by way of mortgage and not by way of sale. But these doubts were set at rest by the amendment of the Article which was made in 1908. As the Article now reads it is worded "property..... afterwards transferred by the trustee or mortgagee for valuable consideration," and these words are, in our opinion, clearly wide enough to include a transfer by way of mortgage. If the mortgage in 1905 had been a mortgage with possession, there would have been no difficulty in the matter, and the suit which was filed on the 3rd April 1922, would clearly have been barred by limitation.

But possession was not given in 1905, and Nadir Shah appears to have remained in possession until 1915. The question for decision is, therefore, whether Art. 134 bars the bringing of a suit in a case in which the transfer of possession to the defendant was made less than 12 years before the suit, but the original transfer by way of mortgage to his predecessor-in-interest was made more than 12 years before. The exact meaning of the Article has been the subject of discussion in a number of reported cases of the High Courts in India. In the case of *Ramachandra Vithal Rajadhiksh v. Sheikh Mohidin* (1), it was held that Art. 134 applied only to cases where there had been a transfer of possession, and that the transferee could claim the benefit of the Law of Limitation only when he had enjoyed 12 years' possession. A number of cases were referred to in which the Article had been held applicable, and in all those cases the purchasers or mortgagees had had possession. In the case of *Hussaini Khanam v. Hussain Khan* (2), a Bench of the Allahabad High Court stated that they were disposed to think that the Article was applicable only to cases in which a purchaser whether his purchase be absolute or merely *sub modo*, has obtained and held possession for 12 years or upwards. This expression of opinion was an *obiter dictum* as it was held that in the case in question, possession for 12 years had been made out. The whole question was discussed at length by a Full Bench of the High Court of Madras consisting of five Judges in the case of *Mulla Vittil Seeti Kutti v. Kunhi Pathumma* (3). The learned Judges who decided the reference in that case were divided in opinion. Wallis, C. J., and Coutts-Trotter, J., were of opinion that the word transfer in Art. 134 could not be read as transfer with possession, that the Article applied whether at the time of the transfer, possession did or did not pass and that, if possession passed subsequent to the transfer, limitation began to run from the date of transfer and not from the date of possession. The other three learned Judges took a contrary view. They were all of opinion that the Article does not apply to cases where there has

been a transfer without possession being taken by the transferee. Abdur Rahim, J., and Seshagiri Ayyar, J., were, however, of opinion that if possession did subsequently pass then the Article would apply but limitation would run from the date when the transfer was completed by delivery of possession. Srinivasa Ayyangar, J., was of opinion that in such cases the Article would have no application at all. The balance of judicial authority, therefore, appears to be in favour of the view that Art. 134 of the Limitation Act cannot be pleaded in defence unless the person pleading it has had 12 years' possession of the property in suit. The opinions of the late Chief Justice and the present Chief Justice of the High Court of Madras are entitled to great weight, but we nevertheless think that the view of the majority of the Bench of that Court which is the view taken by the High Court of Bombay and Allahabad was correct. The opinion of Wallis, C. J., is founded largely on the fact that Art. 134 is based on s. 25 of the English Real Property Act of 1834. But it seems to us that if the three columns of Art. 134 of the Limitation Act be read together, and the other provisions of the same Act whereby title can be acquired by 12 years' adverse possession are considered, the only reasonable interpretation of the Article, as it stands, is that it refers to cases in which the subsequent transfer has been with possession. The Article applies only in suits to recover possession of immoveable property. It would obviously not apply to a suit for the redemption of a usufructuary mortgage brought against the original mortgagee. A suit for redemption of a usufructuary mortgage from the original mortgagee could not, in our opinion, be a suit within the meaning of Art. 134 of the Act. Such a suit would be founded on the original contract of mortgage between the mortgagor and mortgagee, and as between them it cannot have been the intention of the Legislature that the mortgagee should be able to shorten the period of limitation by the mere process of creating a charge of mortgage of his rights in favour of some third person. The Article can in such a case be applicable only when the suit in question is being brought against the subsequent transferee. But it is obviously a *sine qua non* that before such a suit could be brought against the subsequent transferee, that transferee must be in possession. A mere transfer of certain

(1) 22 B. 614 ; 1 Bom. L. R. 120; 12 Ind. Dec. (N. S.) 410.

(2) 20 A. 471 ; A. W. N. (1907) 133 ; 4 A. L. J. 375.

(3) 43 Ind. Cas. 31; 40 M. 1040; 33 M. L. J. 320 ; (1917) M. W. N. 609; 22 M. L. T. 236 ; 6 L. W. 461.

mortgage rights in the land without delivery of possession can give no right of suit whatever under this section, nor in such a case would the original mortgagor have any right of suit against the subsequent transferee. And it cannot have been the intention of the Legislature to provide a period of limitation for suits which do not lie. The result of such an interpretation of the law would be to give no remedy whatever to a mortgagor who had mortgaged his land with possession when his mortgagee created a non-usufructuary mortgage of his rights, and then more than 12 years later delivered possession of the land to the person in whose favour he had created the non-usufructuary mortgage. So long as the second mortgage was non-usufructuary, the original mortgagor would have no right of suit whatever against the subsequent transferee and when his right of suit against him did arise it would already be barred by limitation. We find it impossible to hold that the Legislature intended this to be the case. Nor does it appear to us that it is an undue extension of the wording of the Article to hold that in the case of a subsequent mortgage by the original usufructuary mortgagee, the Article only applies when there has been actual delivery of possession. The Article applies to a suit to "recover possession of immoveable property . . . mortgaged, and afterwards transferred by the mortgagee for a valuable consideration." It appears to us reasonable to hold that a transfer in such a case means a transfer of such a nature that the original mortgagor cannot enforce his rights to the land against the original mortgagee. A subsequent non-usufructuary mortgage by the original mortgagee to a third person would clearly not have this effect. It would be a transfer of certain rights of the mortgagee, but would not be a transfer in any way affecting the original rights of the owner of the land and would give him no right of action against the third person. We are of opinion that the mere mortgage of his own rights in the land by Nadir Shah in 1905 was not a transfer of the property within the meaning of Art. 134 of the Limitation Act and that the present suit was not, therefore, barred by limitation.

There remains for decision the question whether the transfer to Nadir Shah in 1904 was an outright transfer or merely a mortgage. It was held in the case of *Ma Dun v. Lu*

O (4), that when land is mortgaged without possession and possession subsequently passes to the mortgagee the burden of proving that the transfer in which possession was given was an outright sale lay on the person alleging it. The burden of proof in this case, therefore, in the first instance lies on the appellants. But in considering whether that burden has been discharged all the circumstances of the case must be borne in mind including the conduct of the parties. Unfortunately the original mortgagee has no further interest in the land. Shortly before the sale of the land in execution of the mortgage-decree he stated that his rights over the land were those of a mortgagee only and that he was not the absolute owner. Some stress has been laid on this fact by the learned District Judge. It is true that at the time that he made the statement he still had an interest in the property. This statement was, therefore, admissible in evidence as an admission against the present appellants. But it was by no means conclusive and in view of the circumstances in which it was made it is of very little value. There had at the time Nadir Shah made the admission been lengthy litigation between him and the decree-holder. Nadir Shah had denied the decree-holder's right to a decree, and had attempted to delay execution. And the sale did not, as a matter of fact, take place until many years after the decree had been passed in favour of the decree-holder. It does not appear that Nadir Shah really stood to lose or gain much by a finding that he was not the outright owner of the property in suit. He made the allegation at about the time that the original owner of the land was executing the sale-deed in favour of Po Chet and there is strong ground for suspecting that at the time he was acting in collusion with Ma Pa Dit and Po Chet. His statement is, therefore, of very little value. He has not himself given evidence in the present case. The appellant has called three witnesses U Aung Myat, U Lon and San Maung, who give direct evidence as to the transaction of 1904 being a sale and not a mortgage. Their evidence has been rejected as unreliable by the Trial Court and it is obvious that oral evidence of this sort after so many years is not by itself very convincing. Ma Pa Dit is dead, and her evidence has not, therefore, been

procurable. But two of her sons Maung San Dwa and Maung Tun have given evidence in the case. Maung San Dwa was called as a witness for the original plaintiff, and stated definitely that his mother had made over the land outright to Nadir Shah. Maung Tun was called originally by the plaintiff but was not examined by him. He was subsequently examined as a witness for the appellant. After making two or three contradictory statements on the point he finally stated that the land had not been made over outright. It would obviously be to the interest of these two witnesses to claim that the rights of redemption still remained with their mother or with them, and the evidence of Maung San Dwa to the contrary effect is, therefore, of special value.

There is no oral evidence adduced by the plaintiff as to the terms of the transaction of 1904. The actions of Ma Pa Dit, and the persons who subsequently brought from her do, as contended on behalf of the appellants, suggest that Ma Pa Dit had, in the first instance, no real claim to the land, and that she entered into these transactions of sale speculatively. The suit for a mortgage decree was filed in 1906. But no claim of any kind appears to have been made by Ma Pa Dit until 1912. She then executed a sale-deed of the land in favour of Kya Gaing but made no mention whatever of the mortgage to Nadir Shah in that deed. This transaction appears to have been infructuous as three years later we find her executing another sale deed in conjunction with Kya Gaing for the same land in favour of Po Chet. In this deed the mortgage is mentioned. By the time the deed of 1912 was executed a decree had already been passed in favour of the Chetty firm against Nadir Shah. In the judgment in that case reference was made to the land now in dispute, and it was stated that the decree affected only the equity of redemption of that land. (This was clearly not correct. If Nadir Shah had only a limited right in the land as against Ma Pa Dit it was clearly not the equity of redemption). This entry was apparently made in the judgment on account of the fact that Nadir Shah was shown as mortgagee in the revenue maps. And it was not till after this statement appeared in the judgment that Ma Pa Dit made any claim to the land at all. She does not appear to have made any claim at all when the suit was filed. Her

dealing with the land in this way at so late a stage of the proceedings does not in any way increase the probability of her having any rights left in the land. And in the present case the transaction of 1905 was not between two Burmans. It was a transaction between a Karen on the one hand and an Indian on the other. The Indian appears to have been a trader and not a cultivator, and the presumption in favour of a mortgage if it can be drawn at all must be very much weaker than in the case of a transaction between Burman cultivators. It is true that the revenue map for the year 1907 shows Nadir Shah as a mortgagee only. But that is the only fact which really tells in favour of the plaintiff, and the map of 1919-20 is in plaintiff's favour. In spite of the various sale transactions no really serious effort to enforce Ma Pa Dit's right to redeem was made until the filing of this suit in 1922. Maung Po Chet did file a suit to redeem but he subsequently withdrew it, and it was not till seven years later that the present suit was filed and Ma Pa Dit is now dead. The evidence given by the only surviving representatives of Ma Pa Dit such as it is decidedly in favour of the appellant's claim. The oral evidence brought as to the outright sale though not conclusive in itself is all that could be expected to be procurable in the circumstances. There is a clause in the original mortgage-deed of 1901 to the effect that on the failure of the mortgagor to pay principal and interest as stipulated, the mortgagee might do what he liked with the land. And the appellants or their predecessors-in-title have been in undisturbed possession for 18 years before the filing of the suit. In our opinion the circumstances all point to the transfer to Nadir Shah having been an outright transfer. It has been suggested that as Ma Pa Dit and her deceased husband were Christians, Ma Pa Dit had no right to transfer the land outright. The suggestion curiously enough was first made on behalf of the appellants. The contention was that no right to the property of the deceased U Aung Tha could pass without Letters of Administration under the provisions of s. 190 of the Indian Succession Act and that, therefore, the plaintiff has acquired no right to the property in suit. But it has been enacted by Act VII of 1901 that section 190 of the Succession Act does not apply to the cases of native Christians. There was no bar, therefore, to a transfer of title here. Ma Pa

Dit would not, as in the case of a Burman Buddhist be the sole heir of her husband. But that is not a matter of great importance, so far as the plaintiff is concerned. The right to redeem a mortgage lies with any person who has an interest in the property (s. 91 of the Transfer of Property Act). The limits to the power of Ma Pa Dit would be damaging if at all rather to the appellant's than to the plaintiff's case. For the complete transfer after the death of her husband the consent of all the heirs would be necessary. But if it be believed that Ma Pa Dit made over the land outright it may safely be presumed in the circumstances that she did so as manager of the property and with the consent of the other children, her heirs. In any case as one of the original mortgagors she had the right to redeem the mortgage, and the result of her action in making over the land would be to put an end to the mortgage. Her action would, therefore, be effectual in defeating any claim the present plaintiff might have to the land. A suit for possession not based on the mortgage would clearly be barred by limitation.

We are of opinion that the mortgage on which the suit was based is no longer in existence, and that the plaintiff was not, therefore, entitled to a decree.

We set aside the decree of the Trial Court and pass a decree dismissing the suit of the plaintiffs-respondents with costs in both Courts.

Z. K.

*Decree set aside;
Suit dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 601 OF 1921.

April 17, 1924.

Present:—Mr. Justice Phillips and
Mr. Justice Madhavan Nair.

PEDDI REDDI JOGI REDDI—
DEFENDANT No. 3—APPELLANT

versus

PANEEN CHINNABIREDDI AND
OTHERS—PLAINTIFF AND DEFENDANTS

NOS. 2 TO 4 AND 7—RESPONDENTS.

*Registration Act (XVI of 1908), ss. 17, 49—Partition
karar—Registration, whether necessary—Part-per-
formance, doctrine of, applicability of—Contract Act
(IX of 1872), ss. 239, 253—Property managed jointly
—Co-ownership—Partnership—Agreement, implied, to
share equally.*

A division settlement *karar* between members of a family by which certain immoveable properties are exclusively given to one member for his enjoyment and certain other properties are awarded to other members creates rights in immoveable property and is inadmissible in evidence without registration. [p. 1017, col. 2.]

The doctrine of part-performance is irrelevant in considering the question of admissibility of documents. [*ibid.*]

Narayanan Chetty v. Muthiah Servi, 8 Ind. Cas. 520; 35 M. 63; 9 M. L. T. 142; 21 M. L. J. 44; (1910) M. W. N. 743, relied on.

Vizagapatam Sugar Development Company v. Muthuramareddi, 76 Ind. Cas. 886; 46 M. 919; 45 M. L. J. 528; (1924) M. W. N. 14; (1924) A. I. R. (M.) 271; 33 M. L. T. 53, distinguished.

Three Hindu brothers constituting a joint family lived as one family with a Christian relation who owned considerable property. The brothers managed the property of the Christian relation along with the family properties and fresh acquisitions were made to the family from the income of the properties and by the joint labour and skill of all the members:

Held, (1) that although the parties had combined their properties, labour and skill, the combination did not go beyond the mere stage of co-ownership, and did not amount to a partnership within the meaning of s. 239 of the Contract Act; [p. 1018, col. 1.]

(2) that even if the parties constituted a partnership their relationship would be regulated by the provisions of s. 253 of the Contract Act only in the absence of a contract to the contrary; [*ibid.*]

(3) that the fact that all the properties were treated as the common property of the whole family implied an agreement among the members that they were all to share the properties alike. [*ibid.*]

Second appeal against a decree of the Court of the Temporary Subordinate Judge, Cuddapah, in A. S. No. 93 of 1920, (A. S. No. 132 of 1919, on the file of the District Court, Cuddapah), preferred against that of the Court of the District Munsif, Proddatur, in O. S. No. 543 of 1917).

Messrs. A. Krishnaswami Iyer and B. Somayya, for the Appellant.

Mr. S. Varadachariar, for the Respondant.

JUDGMENT.

Madhavan Nair, J.—This second appeal arises out of a suit instituted by the plaintiff for a declaration that he and defendants Nos. 1 to 3 are each entitled to one-fourth of the plaint schedule, moveable and immoveable properties including debts, for the recovery of the plaintiff's one-fourth share of these properties making him liable for one-fourth of the debts mentioned in Schedule D and for a declaration that certain alienations are not binding on him.

The facts of the case are not seriously disputed. The plaintiff, defendants Nos. 1 and 2 with their deceased brother Bali Reddi formed members of a joint Hindu family. Jogi Reddi, the 3rd defendant, who,

is the appellant before us, is the son of their sister Sanjamma, who married a Christian. On the death of his father, Jogi Reddi and his mother lived with his uncles as members of one house-hold. It is admitted that when Jogi Reddi came to live in the family he had considerable properties. All these properties were managed by his uncles along with the family properties and fresh acquisitions were made to the family properties from the income of these properties and also by the joint labours and skill of the plaintiff, defendants Nos. 1 and 2, and Jogi Reddi. In course of time, Jogi Reddi though a Christian married his Hindu cousin, the daughter of the deceased Bali Reddi. This family composed of the Hindus and a Christian lived together in peace for a quarter of a century when the plaintiff demanded partition. A partition *karar* was, therefore, entered into between the various parties to the suit, but the attempt to divide the moveables, immoveables and the debts proving abortive, the plaintiff instituted the suit for partition which has given rise to this second appeal.

Briefly stated, the 3rd defendant's contentions were that the properties standing in his name which are admittedly large should be treated as his own properties that he should be given a share in the family properties or in any event the parties to the suit are bound by the partition arrangement entered into between them in April 1916. On these contentions the lower Appellate Court held that the partition *karar* being an unregistered document was inadmissible in evidence, that there is absolutely no satisfactory evidence to show that the family intended to keep the properties of Jogi Reddi separate, that all the properties were treated as the common properties of the whole family of which the 3rd defendant was a member and by a combination of those properties, and the labour and skill of all the members the family eventually became wealthy. The lower Appellate Court, therefore, gave a decree for the plaintiff substantially as asked for after declaring some of the alienations not binding on the plaintiff.

In second appeal the learned Vakil for the appellant has argued two points (1) that the learned Subordinate Judge is wrong in holding the partition *karar* inadmissible in evidence for want of registration; and (2) that the Subordinate Judge's finding that

the plaintiff is entitled to one-fourth of the family properties is wrong in law and is not warranted by the legal character of the relationship of the parties to the suit which only shows a "partnership". The document in question is called a division settlement *karar*. Under this document certain properties were exclusively given to Jogi Reddi for his enjoyment and he was given one-fourth share of the debts, outstandings, and other moveables. Then a provision was made for the maintenance of Ellamma, the wife of Pedda Bali Reddi, and a land was given to Sanjeeva Reddi. The remaining properties moveables and immoveables were allotted in equal shares to the other three members. As this document creates rights in immovable property admittedly worth more than Rs. 100, it has got to be registered and as it has not been registered it cannot be received in evidence of any transaction affecting immovable property. It has been argued that there has been part-performance of the *karar* agreement but there is no evidence to support it. The Full Bench decision in *Vizagapatam Sugar Development Company v. Muthurama Reddi* (1) does not at all deal with the admissibility in evidence of an unregistered document requiring registration. It is no doubt true that it was held in *Konduri Srinivasa Charyulu v. Gottumukkalu Venkataraju* (2) that in a suit for specific performance of a contract to grant a lease, an unregistered deed containing the alleged agreement is admissible in evidence for the purpose of proving the contract for the breach of which the suit was brought; but this decision must be considered to be overruled by the Full Bench decision in *Narayanan Chetty v. Muthiah Servi* (3), the principle of which exactly applies to the argument now under consideration. In my opinion, the principle of this decision in *Narayanan Chetty v. Muthiah Servi* (3), is not in any way shaken by the decision of the Privy Council in *Varada Pillai v. Jeervarathnammal* (4). I, therefore, hold that the Courts below were right in refusing to admit this

(1) 76 Ind. Cas. 886; 46 M. 919; 45 M. L. J. 528; (1924) M. W. N. 14; (1924) A. I. R. (M.) 271; 33 M. L. T. 53.

(2) 17 M. L. J. 218.

(3) 8 Ind. Cas. 520; 35 M. 63; 9 M. L. T. 142; 21 M. L. J. 44; (1910) M. W. N. 743.

(4) 53 Ind. Cas. 901; 43 M. 244; (1919) M. W. N. 724; 10 L. W. 679; 24 O. W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274; 46 I. A. 285; 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R. 444 (P. C.).

document in evidence. As regards the second point, the argument has been put in this way by the learned Vakil. The family of the kind mentioned in this case is unknown to Hindu Law. At most, it can only amount to what may be called a partnership between these various members and if so, the division of the property should be made according to the provisions of s. 253 (1) of the Indian Contract Act. If this principle is accepted, the 3rd defendant will get for his share all the properties which originally stood in his name. There are two objections to the acceptance of this view. In the first place, it is not quite clear whether the relationship of the parties comes strictly within the definition of a partnership as given in s. 239 of the Indian Contract Act. It may be that the parties in this case might have combined their properties, labour or skill, but their combination cannot be said to have gone beyond the mere stage of the co-ownership, and, even if it has, the relationship of partners is regulated by s. 253 only in the absence of any contract to the contrary. The lower Courts have found that there was no intention to keep the various properties separate and that all the properties were treated as the common property of the whole family which necessarily implied an agreement between the members that they were all to share the properties alike and appellant was a party to the agreement. Accepting this finding, I overrule this argument.

In the result, the second appeal fails and is dismissed with costs.

Phillips, J.—I agree.

V. N. V.

Z. K.

Appeal dismissed.

LAHORE HIGH COURT.

CIVIL REFERENCE No. 25 OF 1924.

February 17, 1925.

Present:—Mr. Justice Harrison and
Mr. Justice Campbell.

BANJI LAL—PETITIONER

versus

EMPEROR—RESPONDENT.

Income Tax Act (XI of 1922), s. 66 (2)—Reference to High Court—Application presented more than one month after date of order—Jurisdiction to make reference.

Where an application to the Commissioner of Income Tax to make a reference to the High Court under s. 66 (2) of the Income Tax Act, is made more than a month after the date of the order which has given

rise to the application, the Commissioner has no jurisdiction to make the reference and a reference made by the Commissioner in such a case will not be acted upon by the High Court.

Reference made by the Chief Commissioner, Delhi, with his No. 5202, dated the 11th September 1924, for orders of the High Court.

Lala Moti Sagar, R.S., for the Petitioner.

Kunwar Dalip Singh, Government Advocate, for the Respondent.

ORDER.—This is a reference, under s. 66 (2) of the Income Tax Act of 1922, made by the Chief Commissioner of Delhi to this Court.

Mr. Dalip Singh takes a preliminary objection that the reference is not competent inasmuch as the application upon which it is based was presented more than a month after the order had been passed which gave rise to that application, the actual dates being the 11th of July and the 25th of August 1924, respectively. In addition to several other points the question of whether this bars the reference has also been referred by the Chief Commissioner, though he says he does not wish to press it unless it is in itself fatal.

It is clear, in our opinion, that the delay in presenting the application robs the Chief Commissioner of all jurisdiction, and, therefore, the reference made by him under s. 66 (2) was not competent. This view has been taken by a Division Bench of this Court in Civil Miscellaneous No. 497 of 1923*, [*Murlidhar v. Secretary of State*] and there is ample authority of the English Courts to the same effect. The Indian Income Tax Act reproduces the Law of England on this point, and we find that the preliminary objection is fatal to the determination of the reference on its merits, and we, therefore, answer the reference accordingly.

The costs of the respondent will be paid by the petitioner.

Z. K.

Reference rejected.

*The following is the Order of Abdul Raoof and Harrison, JJ., dated the 12th March 1924, in Civil Miscellaneous No. 497 of 1923:—

"This is an application which purports to be made under s. 66 (3) of the Income Tax Act in consequence of an alleged refusal by the Income Tax Commissioner to refer a question of law to this Court. Whether or not there was such a refusal, the application itself under s. 66 (2) was made two months after the order of the Assistant Commissioner, dated 12th December 1923, under s. 31 of the Income Tax Act. It was, therefore, clearly barred, as is the further remedy under s. 66 (3) of the Income Tax Act.

We dismiss the application with costs."

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 674 OF 1924.

January 27, 1925.

Present:—Mr. Justice Madhavan Nair.

ACHRATLAL KESAVALAL METHA

& Co.—DEFENDANTS—PETITIONERS

versus

VIJAYAM & Co., BY PROPRIETOR.

G. VIJAYARAGHAVACHARIAR—

PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 28—Contract providing for suit to be brought in one of two Courts having jurisdiction, validity of.

Where there are two Courts both of which would normally have jurisdiction to try a suit relating to a dispute arising out of a contract the parties are entitled to agree among themselves that a suit relating to such a dispute should be brought in one of those Courts and not in the other. Such an agreement does not contravene the provisions of s. 28 of the Contract Act, inasmuch as the plaintiff is not thereby restricted absolutely from enforcing his rights under or in respect of the contract by the usual legal proceedings in the ordinary Tribunals, as the restriction is only partial. [p. 1020, col. 1.]

Where a contract between a vendor and purchaser of goods provided that "in all legal disputes arising out of the contract, A will be understood as the place where the cause of action arose":

Held, that the clause did not offend against s. 23 of the Contract Act as being in restraint of legal proceedings and was valid and must be given effect to. [p. 1020, col. 2.]

Crawley v. Luchmee Ram, 1 Agra H. C. R. 129, distinguished.

Petition, under ss. 115 of Act V of 1908 and 107 of the Government of India Act, praying the High Court to revise an order of the Presidency Court of Small Causes, Madras, dated the 17th January 1924, in New Trial Application No. 111 of 1923, in S. C. S. No. 8979 of 1921.

Mr. K. P. Mahadeva Iyer, for the Petitioners.

Mr. A. Rajanatha Rao, for the Respondents.

JUDGMENT.—This revision petition arises out of a suit instituted in the Madras Small Causes Court, and the only question raised is whether the suit can be entertained by the Madras Court.

The plaintiffs are a firm of merchants at Madras and the defendants are residents of Ahmedabad. The defendants' firm was engaged by the plaintiffs as their *Adat* agents for the purpose of purchasing 80 bales of Ahmedabad *dhoties* from the manufacturers at Ahmedabad and sending them to Madras. Exhibit I is the deed of agreement which regulated their relationships *inter se*. The suit is for the recovery of the amount

alleged to be due to the plaintiffs in respect of the several dealings between the parties.

The defendants besides denying the plaintiffs' allegations on the merits also set up the plea that the suit should not be entertained by the Small Causes Court at Madras and that it should be instituted at Ahmedabad. They relied for this purpose on cl. 8 of Ex. I, the deed of agreement mentioned above, which runs as follows:—"In all legal disputes arising out of this contract, Ahmedabad will be understood as the place where the cause of action arose."

The learned Trial Judge interpreted the above clause to mean that the parties thereby stipulated that all suits in respect of the contract should be instituted at Ahmedabad. He held that this agreement did not offend against the provision in s. 28 of the Indian Contract Act, because no party thereto is restricted *absolutely* from enforcing his rights under or in respect of the contract, by usual legal proceedings in the ordinary Tribunals, inasmuch as the restriction is only partial. He accordingly decided that the agreement was valid and must be given effect to and that the suit should therefore, be brought in the Ahmedabad Court and in that view dismissed the suit.

On application by the plaintiffs, the Full Bench of the Small Causes Court consisting of all the three Judges considered the question again; they agreed with the Trial Judge in his interpretation of the above clause, but the majority of the Judges held that the agreement is void because it ousts the jurisdiction of the Madras Court. They, therefore, remanded the suit to the Trial Judge for enquiry as to whether the cause of action arose either in whole or in part within the local limits of the jurisdiction of the Madras Court and directed him to proceed with the suit if he finds that it did so arise, or to return the plaint (under s. 19 (a) of the Presidency Small Cause Courts Act) for presentation to the proper Court if he holds that it did not. The defendants have filed this revision petition against the decision of the Full Bench.

In the first place, I do not think it is right to construe cl. 8 of Ex. I so as to mean that no suit in respect of the contract shall be brought in the Madras Court at all under any circumstances. Supposing, for instance, the defendants at the time of the institution of the suit happened to reside or carry on business at Madras, that clause which deals

with the question as to where the cause of action shall be deemed to have arisen—even if given full effect to, could not obviously stand in the way of the suit being instituted at Madras. It is, therefore, not strictly correct to say that the agreement by itself has the effect of ousting the jurisdiction of the Madras Court. But, even assuming that it has that effect, that is to say, that the agreement means that all suits in respect of the contracts should be brought at Ahmedabad only and not at Madras, I do not think that it is void, because the Ahmedabad Court is also a Court which would normally have jurisdiction to entertain those suits. I am, of course, assuming for the purpose that part of the cause of action in this case has arisen at Madras as well, so that the Madras Court would but for such agreement have jurisdiction to entertain the suit. Where there are two Courts both of which would normally have jurisdiction to try the suit, I do not see why the parties should not be allowed to agree among themselves that a suit should be brought in one of those Courts and not, in the other. Such an agreement does not, in my opinion, contravene the provision in s. 28 of the Indian Contract Act, because the plaintiff is not thereby restricted *absolutely* from enforcing his rights under or in respect of the contract by the usual legal proceedings in the ordinary Tribunals as the restriction is only partial. The case of *Crawley v. Luchmee Ram* (1) relied on by the Full Bench is clearly distinguishable. In that case it was held that a clause in a Bill of Lading whereby it was agreed that the questions arising on the bill should be heard by the High Court of Calcutta instead of the Court at Mirzapur which was the proper Tribunal to try the questions was void and could not be pleaded in bar of a suit brought in the Mirzapur Court. There, the Calcutta High Court had no jurisdiction to try the suit; the only Court having jurisdiction being the Mirzapur Court. The case was decided before the Indian Contract Act came into force, but, I think, the decision would be the same even under s. 28 of the Act; for, as no amount of consent by the parties would confer jurisdiction on the Calcutta High Court and as the Mirzapur Court was the only Court having jurisdiction, the agreement has the effect of absolutely restricting the parties thereto from enforcing their

rights under the contract contained in the Bill of Lading by the usual legal proceedings in ordinary Tribunals. In the present case, as stated above, the agreement has not this effect.

I would, therefore, hold that the agreement between the parties embodied in cl. 8 of Ex. I is valid and must be given effect to. It is not, therefore, open to the Madras Court of Small Causes to entertain the present suit. The plaint should be returned for presentation to the proper Court and I direct accordingly.

The defendants will get their costs upto date.

v. N. v. *Plaint returned for presentation to proper Court.*
z. K.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 78 OF 1924.

March 31, 1925.

Present:—Mr. Justice Odgers.

SUBRAMANIA IYER—DEFENDANT

—APPELLANT

versus

NARAYANASWAMI IYER—PLAINTIFF

—RESPONDENT.

Evidence Act (I of 1872), s. 92, proviso 3—Pro-note payable on demand—Oral agreement postponing enforceability of pro-note—Admissibility in evidence.

Where a promissory note, on the face of it, purports to be payable on demand, parol evidence is not admissible, under proviso 3 of s. 92, Evidence Act, to show that at the time of making it, it was agreed that it should not be payable till a particular event happens. [p. 1022, col. 1.]

Ramjibun Serowgy v. Oghore Nath Chatterjee, 25 C 401; 2 C. W. N. 188; 13 Ind. Dec. (N. S.) 266, *Vishnu Ramchandra v. Ganesh Krishna*, 63 Ind. Cas. 673, 45 B. 1155; 23 Bom. L. R. 488, *Moseley v. Hanford*, (1830) 10 B. & C. 729; 8 L. J. K. B. (O. S.) 261; 109 E. R. 621, *Rawson v. Walker*, (1815) 1 Stark. 361 and *Woodbridge v. Spooner*, (1819) 3 B. & Ald. 233; 106 E. R. 647; 1 Chitty 661; 22 R. R. 365, relied on.

Second appeal against a decree of the District Court, East Tanjore at Negapatam, in A. S. No. 188 of 1923, preferred against that of the Court of the Subordinate Judge, Mayavaram, in O. S. No. 85 of 1922.

Mr. L. S. Veeraraghava Iyer, for the Appellant.

Mr. K. V. Sesha Iyengar, for the Respondent.

JUDGMENT.—This is a suit on a promissory note executed by the defendant in favour of the plaintiff on the 13th February 1921 for Rs. 3,000 being the price of

(1) 1 Agra H. C. R. 129.

the plaintiff's house and some building materials with interest at 10 annas per cent. per annum. The plaint alleges that the defendant took possession of the house but refused to fulfil his obligation on the note. The question argued before me is that the defendant should be allowed to give evidence of an oral condition which would obviate or suspend the obligation evidenced by the promissory note. It is argued before me that the putting of the defendant into possession of this house was a condition precedent to the arising of an obligation under the note. It is thus extremely important to find out, if it is possible to do so, from the very prolix written statement put in by the defendant, what exactly his position was at the earliest possible moment in the case. In para. 5 of his written statement he says "As the plaintiff did not find it convenient to deliver possession of the said house to the defendant, the plaintiff told the defendant that he would purchase the house of one Rajagopala Iyer and go and reside there and that thereafter he would deliver possession of his own house and the building materials to the defendant and then receive the said sale amount of Rs. 3,000 in cash and that till then he would not enforce the said note"; and again in the same paragraph; "the suit pro-note was executed and delivered to the plaintiff subject to the condition precedent, that as a condition precedent to payment of the said sale amount, etc., he should deliver possession etc.". At the end of the same paragraph: "The suit promissory note was executed on the understanding and in the belief that the plaintiff should not claim the amount under the suit note before he put the defendant in possession of the said house, bricks, etc.". Again in para. 9: "The plaintiff has not delivered possession as per contract as a condition precedent to the suit promissory note coming into operation". Paragraph 10: "The plaintiff's suit is premature". Then that is explained in para. 11: "Though the plaintiff was well aware of the fact of the defendant's preparedness to make such payment, yet without putting the defendant in possession of any such thing, the suit has been filed, etc". It seems to me that on best consideration one can give to this somewhat rambling written statement that the agreement set up was that the promissory note should not be enforced until possession was

delivered. Both the lower Courts have come to the conclusion that the defendant is not in law entitled to give evidence of any such oral agreement. The question is, are they right? Section 92, proviso 3 of the Indian Evidence Act would apply if what is sought to be established is a condition precedent to the attaching of any obligation under the promissory note. Reference has been made to *Ramjibun Serowgy v. Aghore Nath Chatterjee* (1), where it is distinctly laid down, though by a Single Judge, that an oral agreement purporting to provide that the promise to pay on demand in a promissory note, though absolute in its terms, was not to be enforceable by suit till the happening of a particular event, i.e., that the legal obligation to perform the promise was to be postponed, is not such an agreement as falls within the proviso 3 to s. 92 of the Evidence Act and in *Vishnu Ramchandra v. Ganesh Krishna* (2), the learned Judges held that an oral agreement whereby plaintiff is said to have agreed that he would not present the note till certain events have happened cannot be brought within the terms of the proviso. Much stress had been laid on *Ahmed Saheb Bapu Saheb Kafre v. Ubhaiya Harsi* (3) not reported in the authorised series. There the question is raised as to whether the promissory note was given by way of indemnity for a contingent liability and there seems to be some doubt on the pleadings as to whether that was what the defendant had raised. But assuming it was so, the learned Judges came to the conclusion that the defendant was entitled to establish his plea under proviso 3. The learned Judges in that case seem to have been in some doubt as to whether the evidence should be admitted. But I think having regard to the cases in *Ramjibun Serowgy v. Oghore Nath Chatterjee* (1) and *Vishnu Ramchandra v. Ganesh Krishna* (2), there is no doubt in my mind that the law does not allow oral evidence to be given of such an agreement under s. 92, proviso 3 of the Evidence Act. The English Law is to the same effect, as can be seen in *Moseley v. Hanford* (4), *Rawson v. Walker* (5) and *Woodbridge v.*

(1) 25 C. 401; 2 C. W. N. 188; 13 Ind. Dec. (N. S.) 266.

(2) 63 Ind. Cas. 673; 45 B. 1155; 23 Bom. L. R. 488.

(3) 87 Ind. Cas. 37; 25 Bom. L. R. 867; (1924) A. I. R. (B.) 44.

(4) (1830) 10 B. & C. 729; 8 L. J. K. B. (o. s.) 261; 109 E. R. 621.

(5) (1815) 1 Stark. 361.

Spooner (6). In the latter case, the law is thus expressed; "where a promissory note, on the face of it, purported to be payable on demand, parol evidence is not admissible to show that at the time of making it, it was agreed that it should not be payable till after the decease of the maker". It is further remarkable that in this case on the grounds of appeal to the lower Appellate Court, the defendant having failed in the first Court, no suggestion of this plea under proviso 3 appears. The only definite ground that is raised is ground No. 11 as to failure of consideration. It is further difficult to see that the ground has been specifically raised in the grounds of appeal to this Court, though there is a general ground under s. 92. The sale-deed which bears the same date as the promissory note further recites that the plaintiff has delivered possession of the house to the defendant. On all these grounds I am of opinion that the judgment of the lower Appellate Court must be upheld and that the defendant is not entitled in law to give oral evidence of this condition by which he says it was agreed to postpone the enforcement of the promissory note. The second appeal must be dismissed with costs.

V. N. V. *Appeal dismissed.*

S. D.

(6) (1819) 3 B. & Ald. 233; 106 E. R. 647; 1 Chitty 661; 22 R. R. 365.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 1254 OF 1921.

April 15, 1925.

Present :—Mr. Justice Broadway and
Mr. Justice Jai Lal.

CHIRAGH DIN AND OTHERS—PLAINTIFFS—
APPELLANTS
versus

ABDULLAH AND OTHERS—DEFENDANTS—
RESPONDENTS.

Limitation Act (IX of 1908), ss. 6, 9, Sch. I, Art. 120
—Custom—Alienation by widow—Declaration, suit for
—Limitation, commencement of—After-born reversioner, rights of—Minority, effect of.

Under the Customary Law of the Punjab the right to sue for a declaratory decree that a certain alienation shall not affect the rights of the reversioners is vested in the whole body of reversioners in existence at the time of alienation jointly and severally and begins to run simultaneously against them all and no subsequent disability of any of the reversioners stops the running of limitation. Time in such suits begins to run from the date of alienation and a reversioner born subsequent to the date of alienation

cannot avail himself of an extension of time under s. 6 of the Limitation Act. [p. 1024, col. 1.]

Bhagwanta v. Sukhi, 22 A. 33; A. W. N. (1899) 159; 9 Ind. Dec. (N. S.) 1054 (F. B.), dissented from.

Challagundla Varamma v. Madala Gopaladasayya, 46 Ind. Cas. 202; 41 M. 659; 35 M. L. J. 57; 24 M. L. T. 115; 8 L. W. 62; (1918) M. W. N. 461, *Mohan Singh v. Dewa Singh*, 21 P. W. R. 1907 and *Umra v. Ghulam*, 22 P. R. 1907; 27 P. L. R. 1908; 89 P. W. R. 1907, relied on.

First appeal from a decree of the Senior Subordinate Judge, Lyallpur, dated the 9th March 1921.

Messrs. B. D. Qureshi, Barkat Ali and Gulab Din, for the Appellants.

Dr. Muhammad Alam and Lala Shamair Chand for Mr. Abdul Qadir, for the Respondents.

JUDGMENT.—By a sale-deed dated the 17th of September 1906, *Musammât Bhag Bhari*, widow of *Ilahi Bakhsh*, sold the land in suit to *Abdullah* and *Imam Din*, the former being her son-in-law and the latter a collateral. Three-fourths of the land was sold to *Abdullah* and 1-4th to *Imam Din*. The plaintiffs, who are the three sons of *Imam Din*, instituted a suit on the 20th of February 1920 praying for a declaration that the sale in question should not affect their reversionary rights. A pedigree table is to be found at page 32 of the printed book which shows the relationship of the various persons concerned. It appears that after *Imam Din* the plaintiffs are the only male reversioners of *Musammât Bhag Bhari*; another person alleged by the plaintiffs to be competent to sue to have the alienation set aside is one *Musammât Bhagan*, widow of *Karim Bakhsh*. This lady, it is alleged, is a preferential heir to the plaintiffs, but being old and infirm has not cared to sue. *Musammât Bhag Bhari*, it seems, died about seven years before the institution of the suit.

On behalf of the defendants various pleas were taken, the most important being that the plaintiffs had no right to sue because they were not born at the date of the sale. The plaintiffs claimed that they had a right to sue as a person competent to contest the alienation, e. g., *Musammât Bhagan* was alive at the date of the alienation. The defendants denied that *Musammât Bhagan* was entitled to succeed collaterally to the estate of *Musammât Bhag Bhari* and averred that in any case she being a female heir was not competent to sue to contest an alienation made by another female-holder of a life interest. Another plea that was taken on behalf of the defendants was that the suit was barred by limitation. The learned Sub-

ordinate Judge found in favour of the defendants on all these points and dismissed the plaintiffs' suit. The plaintiffs have presented this appeal from the decree of the learned Subordinate Judge.

We will take the question of limitation first. The learned Subordinate Judge held that the suit was governed by Art. 120 of the Limitation Act and that as the limitation commenced from the date of the alienation, the suit instituted on the 20th of February 1920, more than six years after the accrual of the cause of action, was clearly barred by limitation. The learned Counsel for the plaintiffs has attacked this finding on the ground that all the plaintiffs were minors at the date of the suit and as the limitation began on their birth, therefore, by virtue of s. 6 of the Indian Limitation Act, their suit was within time. The learned Counsel on behalf of the defendants-respondents on the other hand contended that, even if it be held that the plaintiffs had a right to sue by virtue of the existence of a reversioner, the time must run from the date of the alienation, and that once time has begun to run no subsequent disability would prevent its running. He relied on s. 9 of the Indian Limitation Act. He further contended that on the face of it the suit was barred by limitation and no ground for exemption having been mentioned in the plaint it was liable to be rejected as required by O. VII, r. 11 of the C. P. C. These contentions follow the reasoning of the learned Subordinate Judge.

We will, therefore, proceed to examine the grounds on which the suit has been dismissed by the Court below. The learned Judge has held that the present suit which was one for declaration in respect of an alienation by a widow was governed by Art. 120 of the Indian Limitation Act. This proposition was not contested by the learned Counsel for the appellants. The important question is from what date the time began to run. A suit governed by Art. 120 must be brought within six years from the day when the right to sue accrues. The question then is when the plaintiffs' right to sue accrued. It will be on this question that the decision of the appeal will depend.

Section 6, Indian Limitation Act, provides that where a person entitled to institute a suit is, at the time from which the period of limitation is to be reckoned, a minor, he may institute the suit within the same period after the cessation of minority as

would have otherwise been allowed from the time prescribed for such suit in the third column of the First Schedule. This extension is subject to a maximum of three years from the cessation of the disability by virtue of s. 8 of the same Act.

Section 9 of the Act provides that where once time has begun to run no subsequent disability or inability to sue would stop it.

It would thus be observed that if in the case before us, the time began to run from the date of the alienation then by virtue of s. 9 of the Indian Limitation Act, the suit would be barred by limitation, the time having begun to run before the disability or inability of the plaintiffs to sue commenced. On the other hand, if the time began to run from the births of the respective plaintiffs as claimed by their Counsel, then s. 6 would govern the case and the suit would be within limitation.

The only authority supporting the contention of the appellants that we have been able to discover is a Full Bench ruling of the Allahabad High Court, namely, *Bhagwanta v. Sukhi* (1), where it was held that a minor plaintiff instituting a suit which falls under Art. 120, Second Schedule, Indian Limitation Act, is not excluded from the benefit of s. 7 merely because the right of some other person through whom he does not claim to sue, has for some reason become time-barred. It was further held that this right to sue means the right to sue of the plaintiff and the period of limitation mentioned in s. 7 means the period of limitation for the suit which the plaintiff or some one through whom he claims is entitled to institute. Section 7 referred to therein is of the Act of 1877 which is analogous to s. 6 of the present Act. This case, it might be mentioned, related to parties governed by Hindu Law and that might also be a point of distinction between this and the case before us.

A contrary view was taken by a Full Bench of the Madras High Court in *Challagundla Varamma v. Madala Gopaladasayya* (2), where it was held that a suit by one reversioner to set aside an alienation by a Hindu widow is a representative suit on behalf of all the reversioners, and that all of them have but a single cause of action which arises on the date of the alienation. There-

(1) 22 A. 33; A. W. N. (1899) 159; 9 Ind. Dec. (N. S.) 1051 (F. B.).

(2) 46 Ind. Cas. 202; 41 M. 659; 35 M. L. J. 57; 24 M. L. T. 115; 8 L. W. 62; (1918) M. W. N. 461. (F. B.)

fore, if the remedy of the existing reversioners becomes barred by limitation, reversioners thereafter born are equally barred.

In Civil Appeal No. 190 of 1906, *Mohan Singh v. Dewa Singh* (3), a Division Bench of the Chief Court of the Punjab held that the right to sue for a declaratory decree is vested in the whole body of reversioners in existence at the time of alienation jointly and severally and begins to run simultaneously against them all and no subsequent disability stops it. The Allahabad judgment referred to above was not considered to be good law, it being held that the time began to run from the date of the alienation and that by virtue of s. 9 of the Limitation Act an after-born reversioner would be barred if the ordinary period of limitation reckoned from the date of the alienation had expired.

In *Umra v. Ghulam* (4), the same view was expressed, it being held that time in such suits begins to run from the date of the alienation and that a reversioner born subsequent to the date of the alienation cannot avail himself of an extension of time under s. 7 of the Indian Limitation Act of 1877.

This exhausts the important case-law on the subject that we have been able to discover. In our opinion, the view of the Chief Court of the Punjab which we must follow, is the correct one and consequently the decree of the learned Subordinate Judge dismissing the plaintiffs' suit as barred by limitation must be confirmed. We, therefore, dismiss this appeal with costs.

Z. K.

Appeal dismissed.

(3) 21 P. W. R. 1907.

(4) 22 P. R. 1907; 27 P. L. R. 1908; 89 P. W. R. 1907.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 396 OF 1922.

February 17, 1925.

Present:—Mr. Justice Venkatasubba Rao and Mr. Justice Madhavan Nair.

SIVA SUBRAMANIA PILLAI

AND ANOTHER—APPELLANTS

versus

PIRAMU AMMAL—PETITIONER—

RESPONDENT.

Hindu Law—Widow—Surrender—Bona fides, finding as to.

A surrender by a Hindu widow of her estate to the nearest reversioner of her husband is not rendered

invalid by the mere fact that some provision is made for the benefit of the surrenderer. [p. 1025, col. 1.]

Angamuthu Chetti v. Varatharajulu Chetti, 53 Ind. Cas. 386; 42 M. 854; 37 M. L. J. 384; 26 M. L. T. 301; (1919) M. W. N. 716; 11 L. W. 11 (F. B.), *Bhagwat Koer v. Dhanukdari Prashad Singh*, 53 Ind. Cas. 347; 47 C. 466; 46 I. A. 259; 37 M. L. J. 513; 17 A. L. J. 1036; (1919) M. W. N. 860; 1 P. L. T. 1; 2 U. P. L. R. (P. C.) 27; 22 Bom. L. R. 477; 24 C. W. N. 274; 12 L. W. 105 (P. C.) and *Sureshwar Misser v. Maheshwari Misra*, 57 Ind. Cas. 325; 48 C. 100; (1920) M. W. N. 472; 39 M. L. J. 161; 28 M. L. T. 154; 2 U. P. L. R. (P. C.) 128; 12 L. W. 461; 18 A. L. J. 1069; 47 I. A. 233; 25 C. W. N. 194; 41 C. L. J. 433 (P. C.), relied on.

A surrender by a Hindu widow to be valid must be *bona fide* and not merely a device to divide the estate with the reversioner. A finding that the transaction was not a device to divide the estate with the reversioner, does not necessarily involve the conclusion that the surrender was *bona fide*, since want of good faith may be evidenced by other circumstances. [p. 1025, col. 2.]

Rangasami Gounden v. Nachiappa Gounden, 50 Ind. Cas. 498; 46 I. A. 72; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 42 M. 523; 26 M. L. T. 5; 10 L. W. 105; 1 U. P. L. R. (P. C.) 66 (P. C.), explained.

Appeal against an order of the District Court, Tinnevely, in I. A. No. 441 of 1919, in Compensation Reference No. 15 of 1915.

Mr. T. L. Venkatrama Iyer, for the Appellants.

Mr. P. V. Krishnaswami Iyer, for the Respondent.

JUDGMENT.—The Bench which heard C.M. No. 322 of 1919, decided that the surrender by Subbammal in favour of the appellant, if *bona fide*, would have the effect of divesting the respondent of her right to the property. Having taken this view of the law (we are not at present concerned with deciding whether this view is correct or not), the learned Judges remanded the case for the further question being determined whether the surrender was *bona fide* or not. The District Judge who has heard the case has recorded a finding that the surrender was not *bona fide*. This finding is attacked before us in this appeal.

The effect of the learned Judge's judgment is this. Subbammal executed a surrender in favour of the appellant who was her son. As part of the arrangement, the appellant undertook to pay and did pay his sister, that is Subbammal's daughter Arumugathammal a sum of Rs. 4,000. The District Judge mainly from this fact concludes that the surrender was not made in good faith. To use his own words, "Legally this amounts to a partition of the estate between the surrenderer and surrenderee."

The first question we have to determine in this appeal is:—Does the surrender become inoperative by reason of the fact that a provision in favour of Subbammal's daughter was made. If nothing further appeared than that a sum of Rs. 4,000 was paid to Arumugathammal, we would not be disposed to hold that the surrender is not valid. It is now authoritatively settled that the mere fact that some provision is made for the benefit of the surrenderer does not render the surrender invalid: see *Angamuthu Chetti v. Varatharajulu Chetti* (1), *Bhagwat Koer v. Dhanukdari Prashad Singh* (2) and *Sureshwar Misser v. Mahesh-rani Misrain* (3). In this connection it is necessary to observe that the case put forward by the appellant was not that in fact Rs. 4,000 was paid to his sister as a part of the arrangement and that that payment would not render the settlement bad, but on the contrary he wished to maintain that a debt having been due to the lady, it was discharged by payment of Rs. 4,000 at the time of the surrender. This contention is palpably false and we do not think it is necessary to add to the reasons that have been given by the District Judge in support of his finding. The evidence of Draviyam Pillai as has been observed by the learned Judge is utterly unreliable and we cannot act upon it. The very fact that this false contention was put forward indicates to some extent that the appellant did not regard the surrender as a *bona fide* surrender for his desire to conceal the true facts must in part be due to his conviction that the transaction was not above board. What then are the circumstances which induce us to take the view that the surrender is not *bona fide*? Before dealing with this question, we shall just refer to a passage in the judgment of the Judicial Committee in *Bhagwat Koer v. Dhanukdari Prashad Singh* (2) already referred to. This is how their Lordships state the law:—

"This voluntary self-effacement is sometimes referred to as a surrender, sometimes

(1) 53 Ind. Cas. 386; 42 M. 854; 37 M. L. J. 384; 26 M. L. T. 301; (1919) M. W. N. 716; 11 L. W. 11 (F. B.).

(2) 53 Ind. Cas. 347; 47 C. 466; 46 I. A. 259; 37 M. L. J. 513; 17 A. L. J. 1036; (1919) M. W. N. 860; 1 P. L. T. 1; 2 U. P. L. R. (P. C.) 27; 22 Bom. L. R. 477; 24. C. W. N. 274; 12 L. W. 105 (P. C.).

(3) 57 Ind. Cas. 325; 48 O. 100; (1920) M. W. N. 472; 39 M. L. J. 161; 28 M. L. T. 154; 2 U. P. L. R. (P. C.) 128; 12 L. W. 461; 18 A. L. J. 1069; 47 I. A. 233; 25 C. W. N. 194; 41 C. L. J. 433 (P. C.).

as a relinquishment or abandonment of her rights; and it may be effected by any process having that effect, provided that there is a *bona fide* and total renunciation of the widow's right to hold the property." The ultimate question, therefore, to be decided in each case, is, was the surrender *bona fide* or was it not? But great stress was laid by the appellant's learned Vakil upon another passage in another judgment of the Judicial Committee in *Rangasami Goundan v. Nachiappa Gounden* (4). That passage runs thus:—

"But the surrender must be a *bona fide* surrender, not a device to divide the estate with the reversioner."

It is contended that if the Court is satisfied that the transaction is not a device to divide the estate with the reversioner, it necessarily follows that the surrender is a *bona fide* surrender. We cannot agree with this contention. If the transaction is a device to divide the estate the surrender is clearly not *bona fide*; but the converse is not necessarily true, for want of good faith may be evidenced by other circumstances. Having made these observations, let us now examine the facts of the case in order to ascertain whether the surrender was *bona fide* or was not. At the date of this transaction Subbammal was about 75 years old, whereas the age of the appellant was only about 55. Subbammal, her son and her daughter were then living together as members of one family. Subsequent to the surrender, it does not appear that the appellant exercised any act of exclusive ownership from which unequivocal enjoyment or possession can be inferred. Subbammal was very old and in the ordinary course on her death the appellant would take the property. This event has since actually happened. What necessity was there for this surrender to come into existence? Subbammal was more anxious that her daughter should be provided for than that her son should take immediate possession of the estate and it was fairly certain that on her death the appellant would not carry out her wishes. It was not her intention that she should forthwith divest herself of the estate or that the surrenderee should enter into pos-

(4) 50 Ind. Cas. 498; 46 I. A. 72; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 42 M. 523; 26 M. L. T. 5; 10 L. W. 105; 1 U. P. L. R. (P. C.) 66 (P. C.).

session. There is still another circumstance. The compensation money was paid by the Government into Court, and on the 1st of May 1919, the respondent claimed that money. To defeat her right to that amount and to get immediate possession of the corpus, these objects could be achieved by a surrender. A deed was accordingly executed on the 23rd of May 1919; and it was followed by an application by the appellant, dated 15th July 1919, for the payment of this money. We are prepared to draw from these circumstances the inference that the surrender was not *bona fide*. On the whole, we think the District Judge has come to a correct conclusion and we affirm his judgment and dismiss the appeal with costs.

V. N. V.

Z. K.

Appeal dismissed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2204 OF 1922.

April 30, 1925.

Present:—Sir Shadi Lal, Kt., Chief Justice,
and Mr. Justice LeRossignol.

SECRETARY OF STATE FOR INDIA IN
COUNCIL—DEFENDANT—APPELLANT

versus

GOKAL CHAND AND OTHERS—

PLAINTIFFS—RESPONDENTS.

Fatal Accidents Act (XIII of 1855), ss. 1, 2—Death caused by collision on Railway—Damages, suit for—Remote damages, whether can be recovered—Money carried by deceased, loss of—Railway, liability of.

The Fatal Accidents Act is primarily intended to give the legal representatives of a person whose death has been caused by the wrongful act, neglect or default of another person, a right to recover compensation from the latter for the pecuniary loss resulting from the death to the deceased's children or other relatives enumerated in the first section of the Act. The second section of the Statute also allows the legal representatives to include in their action a claim for "any pecuniary loss to the estate of the deceased occasioned by such wrongful act, neglect or default." The Act contemplates two sorts of damages: pecuniary loss to the estate of the deceased resulting from the accident and pecuniary loss sustained by the members of his family through his death. [p. 1027, col. 1.]

The cardinal principle in cases of this character is whether the damage claimed is the natural and reasonable result of the defendant's act. A damage will assume this character if it can be shown to be such a consequence as, in the ordinary course of things, would flow from the act. The damage will be remote when, although arising out of the cause of action, it does not so immediately and necessarily flow from it that the offending party may be made responsible

for it; for instance, when it results from the wrongful act of a third party such as could not be naturally contemplated as likely to spring from the defendant's conduct. [p. 1027, cols. 1 & 2; p. 1028, col. 1.]

Every cause leads to an infinite sequence of effects but the author of the initial cause cannot be made responsible for all the effects in the series. He is liable only for those which immediately flow out of his wrongful act. [p. 1027, col. 2.]

If any personal injury is caused to a passenger by the negligence of a Railway Company, not only the immediate pain and expense caused by the accident, but also any consequent incapacity to attend to business would be a natural sequence of the wrongful act. If any loss is caused to his business by reason of the injured man's incapacity to attend to it, it is a loss to the estate and can be recovered by the injured person if he is alive and by his representatives if he dies. [*ibid.*]

Where a person is killed as the result of a Railway collision which is due to the negligence of Railway servants, his legal representatives are entitled to recover damages caused to them or to the estate of the deceased by the death of the deceased, but they are not entitled to claim from the Railway Company a sum of money which the deceased was carrying on his person at the time of the collision and which was not found on his person after the collision, unless it can be proved that the loss of the money was due directly to the collision. [p. 1028, col. 1.]

First appeal from a decree of the Senior Subordinate Judge, Delhi, dated the 31st May 1922.

Kunwar Dalip Singh, Government Advocate, and Mr. Ram Lal, for the Appellant.

Messrs. Dev Raj Sawhney and M. L. Puri, for the Respondents.

JUDGMENT.

Shadi Lal, C. J.—The facts of this case relevant to the question of law debated before us are simple and do not admit of any dispute. On the night between the 28th and 29th June 1919, one Bansi Lal, who was travelling in a train belonging to the North-Western Railway, sustained serious injuries in consequence of that train colliding with another train of the same Railway Administration; and the wounded man succumbed to his injuries shortly afterwards. His legal representatives have brought the present action for the recovery of damages for the pecuniary loss, which resulted from his death, to the members of his family, and have also included in the action a claim for Rs. 1,300 on the ground that the deceased was carrying with him currency-notes of that amount, and that the notes were lost by reason of the negligence of the Railway Administration.

The Trial Judge has passed a decree in favour of the plaintiffs, and the dispute in this appeal preferred by the Railway Administration is confined to the question as

to whether the plaintiffs are entitled to recover Rs. 1,300, the value of the currency notes lost by the deceased.

Now, the Subordinate Judge finds, and his finding has not been impeached by the learned Government Advocate, that the deceased Bansilal had with him Rs. 1,300 in currency-notes on the night in question, and that the notes were not mentioned in the list of the property found at the place of the accident. The evidence on the record gives no indication as to how the loss took place or whether any person stole the notes.

Now, the Fatal Accidents Act XIII of 1855, is primarily intended to give the legal representatives of a person, whose death has been caused by the wrongful act, neglect or default of another person, a right to recover compensation from the latter for the pecuniary loss resulting from the death to the deceased's children or other relatives enumerated in the first section of the Act. The second section of the Statute also allows the legal representatives to include in their action brought for the purpose mentioned above a claim for "any pecuniary loss to the estate of the deceased occasioned by such wrongful act, neglect or default." The law contemplates two sorts of damages: the one is the pecuniary loss to the estate of the deceased resulting from the accident; the other is the pecuniary loss sustained by the members of his family through his death. The action for the latter is brought by the legal representatives, not for the estate, but as trustees for the relatives beneficially entitled; while the damages for the loss caused to the estate are claimed on behalf of the estate and when recovered form part of the assets of the estate. The loss to the estate had accrued during the lifetime of the deceased and could have been recovered by him.

Now, the disappearance of the currency notes in the present case undoubtedly caused pecuniary loss to the estate of Bansilal; but the loss was not occasioned by any act, neglect or default of the defendant. The cardinal principle in cases of this character is whether the damage claimed is the natural and reasonable result of the defendant's act, and according to the rule repeatedly adopted by the English Courts a damage will assume the character if it can be shown to be such a consequence as, in the ordinary course of things, would

flow from the act. The damage is held to be remote when, although arising out of the cause of action, it does not so immediately and necessarily flow from it, that the offending party can be made responsible for it.

Now, the loss of the notes is not a necessary consequence, not even a probable consequence, of a person being injured in a Railway collision. There can be no doubt that, if any personal injury is caused to a passenger by the negligence of a Railway Company, not only the immediate pain and expense caused by the accident, but also any consequent incapacity to attend to business, would be a natural consequence of the wrongful act. If any loss is caused to his business by reason of the injured person's incapacity to attend to it, it is obviously a loss to the estate and can be recovered, by the injured person if he is alive, and by his representatives if he dies. I do not think that Bansilal, had he been alive, could have succeeded in an action against the Railway for the loss of the currency-notes. The loss of the notes was only a remote, and not an immediate, result of the accident; and damages can be awarded only for the immediate result of the defendant's wrongful act. Every cause leads to an infinite sequence of effects, but the author of the initial cause cannot be made responsible for all the effects in the series. He is liable only for those which immediately flow out of his wrongful act.

I will make my meaning clear by citing, as an illustration, the facts of the English case, *Sharp v. Powell* (1). In that case, the defendant, in breach of a Police Act, washed a van in a public street and allowed the waste water to run down the gutter to a grating about 25 yards off from which, in the ordinary state of things, it would have drained into the sewer. In consequence of a hard frost the grating was obstructed by ice, and the water in consequence flowed over the pavement and froze. There was no evidence that the defendant knew of the grating being obstructed. The plaintiff's horse slipped on the ice and broke its leg. It was sought to recover from the defendant the value of the horse, but it was held that the damage was too remote, not being one which he could fairly be expected to anticipate as likely to ensue from his act.

(1) (1872) 7 C. P. 253; 41 L. J. C. P. 95; 26 L. T. 436; 20 W. R. 584.

It must be remembered that the evidence in this case does not show who took away the notes. If some person stole them, while the injured person was lying unconscious or dead, surely the Railway cannot be held liable for the act of the thief. And it has been repeatedly held that the damage is too remote if it results from the wrongful act of a third party such as could not naturally be contemplated as likely to spring from the defendant's conduct.

The learned Counsel for the respondents invites our attention to the word "occasioned" used by the Legislature in respect of the loss caused to the estate, and contends that this expression is different from, and wider in scope than, the term "caused" which is used in the first section of the Statute in connection with the death of the injured person. Now, I have two observations to make with respect to this argument. In the first place, I do not think that the Legislature intended to draw any distinction between the two words and to alter the rule against the award of remote damages by the mere use of the term "occasioned". In the second place, the Statute by enacting the rule allowing the legal representatives to include in their suit a claim for the loss to the estate does not create any fresh liability but merely recognises what already existed under the Common Law and prescribes only the procedure for enforcing it.

I accordingly hold that the loss of the currency-notes was only a remote consequence of the defendant's negligence, and that the plaintiffs are not entitled to recover from the defendant compensation for that loss. In this view of the defendant's liability I consider it unnecessary to pronounce any opinion on the question that s. 74 of the Indian Railways Act exempts the Railway Administration from responsibility for the loss of the notes because no Railway servant had booked them and given a receipt therefor. The result is that I accept the appeal and reduce the amount awarded to the plaintiffs by Rs. 1,300. I would, however, leave the parties to bear their own costs in both the Courts in so far as this claim is concerned.

Le-Rossignol, J.—I concur with the learned Chief Justice. The question whether a result is sufficiently proximate to the alleged cause is very often very difficult to resolve, but on the facts established in this case I hesitate to hold that the loss of the notes was a natural consequence of

the collision. Had the direct connection between the collision and the loss of the notes been established, I do not think that s. 74 of the Indian Railways Act would have operated to protect the appellant Railway, regarded not as a carrier, but as a tort-feasor.

Z. K.

Appeal accepted.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 92 OF 1923.

November 12, 1924.

Present:—Sir Victor Murray Coutts-Trotter, Kt., Chief Justice, and Mr. Justice Srinivasa Iyengar.

ARJEE PRABAPPA CHETTY—

APPELLANT

versus

KONETI DESIKACHARI—

RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 183—Execution of decree—Decree-holder, death of—Legal representative, substitution of, whether necessary—"Payment", whether must be by judgment-debtor or his agent—Limitation.

On the death of a decree-holder, it is not necessary that his legal representative should bring himself on the record in the place of the deceased before applying to execute the decree. No such process is contemplated by the procedure laid down either in the Procedure Code or in the rules on the Original Side. All that is necessary is that the person who becomes by operation of law entitled to have execution should make an application for execution [p. 1029, col. 1.]

A payment to save limitation and give rise to a fresh starting point under Art. 183 of Sch. I to the Limitation Act must be for the judgment-debtor or on his account. It is not necessary that it should be either by the debtor himself or by some person acting on his behalf. [p. 1029, col. 2.]

Where the holder of a decree on the Original Side of the High Court died without drawing from the Court a sum of money ordered to be paid to him and on his death the Administrator-General, as Administrator *pendente lite* in an Administration suit relating to the estate of the deceased, applied for payment out of the amount and the Court directed the payment and within 12 years therefrom an assignee of the decree applied to execute the decree:

Held, that the application was not time-barred under Art. 183 of Sch. I to the Limitation Act. [*ibid.*]

(Per Srinivasa Iyengar, J.)—*Quære*.—Whether a Court of Law can be deemed to be an agent duly authorised on behalf of a debtor to make any such payment as would save limitation. [*ibid.*]

Appeal from the judgment of Mr. Justice Kumaraswami Sastri, dated the 30th August 1923, passed in the exercise of the Ordinary Original Civil Jurisdiction

of the High Court, in Civil Suit No. 188 of 1903, printed as 78 Ind. Cas. 832.

Mr. T. Krishnaswami Aiyangar, for the Appellant.

Mr. M. Sundaram, for the Respondent.

JUDGMENT.

Srinivasa Iyengar, J.—This an appeal from an order of Kumaraswami Sastri, J., ordering execution on an execution application made by the assignee of a decree. Objection was taken to the execution application on the ground that it was barred by limitation. The Article applicable to the application in question for execution is Art. 183 because it was in respect of a decree passed on the Original Side of this Court. Under that Article, the decree-holder has 12 years not only from the date on which he becomes entitled to enforce the decree but also 12 years from the date on which some part of the principal money secured thereby or some interest on such money has been paid. In this case, we find that M. Sabapathy Chetty, the original decree-holder died without drawing from the Court the sum of Rs. 24,000 and odd ordered to be paid to him by order, dated 6th October 1909. Subsequently, the Administrator-General of Madras, I believe, as Administrator-General *pendente lite* in the Administration suit relating to Sabapathy's estate applied to the Court for the payment to him of the entire sum of Rs. 25,932 standing on that date to the credit of the suit, and Wallis, J., passed an order directing such payment on the 9th January 1912. The present application for execution is within 12 years from that date and *a fortiori* is within 12 years from the date on which the payment was made out from the Court.

It has been sought to be argued by the learned Vakil for the appellant that it was not a proper application by the Administrator-General, because, previous to that application, he had not brought himself on the record in the place of the deceased decree-holder. No such process is contemplated by the procedure laid down either in the Procedure Code or in the rules on the Original Side and all that is necessary is that the person who becomes by operation of law entitled to have execution is required only to make an application for execution.

It has, next, been argued that the payment referred to in Art. 183 must have been a payment either by the judgment-debtor himself or by some duly constituted

agent or some person acting on his behalf. In s. 20 of the Limitation Act, where a part payment is referred to as giving rise to a further starting of limitation, it is significant that it is prescribed that, for the purpose of saving limitation part of the principal of a debt should be paid by the debtor or by his agent duly authorised in that behalf, but, in Art. 183 there are no such words to be found after the words "some part of the principal money secured thereby or some interest on such money has been paid."

The payment is not, therefore, required to be made either by the debtor or by some person acting on his behalf. The difference in the wording is significant, and, I cannot help thinking, fully intended. It, therefore, follows that, even if payment is for the judgment-debtor or on his account, it would be a payment that will save limitation giving rise to a fresh starting point.

In this view, it is unnecessary to consider the decision in the case of *Gorindasami Pillai v. Desai Goundan* (1) that was under Art. 182 of the Limitation Act and had reference to the special terms of s. 20 of the Limitation Act. It is, therefore, unnecessary to consider whether, a Court of Law can be deemed to be an agent duly authorised on behalf a debtor to make any such payment as would save limitation.

The execution application is, therefore, not barred by the Law of Limitation and the learned Judge was right in ordering execution. The appeal, therefore, fails and is dismissed with costs.

Coutts-Trotter, C. J.—I am of the same opinion. No doubt if the matter has to be considered one might find that it was necessary to put some qualification on the latitude of the language of Art. 183 to obviate the contingency referred to by Lord Westbury in *Chinnery v. Evans* (2) and by the learned Judges in the Irish case, *Brew v. Brew* (3). That contingency is the possibility of a payment made by a mere volunteer being sought in aid to affect adversely the rights of third parties. But we need not consider it here, because it cannot be suggested that either the Court or the

(1) 68 Ind. Cas. 100; 41 M. L. J. 423; 14 L. W. 320; (1921) M. W. N. 683; 44 M. 971.

(2) (1864) 11 H. L. C. 115; 4 N. R. 520; 10 Jur. (N. S.) 855; 11 L. T. 68; 13 W. R. 20; 11 E. R. 1274; 45 R. R. 79.

(3) (1898) 2 Ir. Rep. 163; 33 Ir. L. T. R. 22; 4 Ir. L. R. 705.

Administrator-General were not people who were dealing with the estate of the deceased, not as volunteers but clothed in the defined functions in regard to it.

I agree that the appeal fails and must be dismissed with costs.

V. N. V.

Z. K.

Appeal dismissed.

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 52 OF 1925.

July 22, 1925.

Present:—Mr. Justice Abdul Raoof and Mr. Justice Addison.

GOPI CHAND—PLAINTIFF—APPELLANT
versus

KIRPA RAM—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XVI, r. 1
—Witnesses not served—Fresh summonses, issue of—*Procedure.*

Where certain witnesses, whom a party wishes to produce in support of his case, are not present on the date of hearing owing to the fact that summonses have not been served upon them, the Court ought to issue fresh summonses for service upon the witnesses and is not justified in depriving the party who wishes to produce them, of his right to have the evidence of those witnesses taken. [p. 1030, col. 2.]

First appeal against a decree of the Sub-Judge, First Class, Ferozepur, dated the 15th December 1924.

Messrs. Shamair Chand and Dev Raj Sahwney, for the Appellant.

Lala Durga Das and Mr. Sagar Chand, for the Respondent.

JUDGMENT.—The plaintiff brought the suit for a declaration that half of the property attached in execution of the decree of defendant No. 3 against the defendants Nos. 1 and 2 belonged to him and, therefore, was not saleable in execution of the decree against defendants Nos. 1 and 2. This claim was based upon the main ground that after the separation of the sons of Durbari Mal, a re-union had taken place between Raman Mal and Udham Mal and that the properties, though standing in the name of one or the other, were owned jointly by them. To support his claim he relied both upon documentary and oral evidence. On the 13th of November the evidence of four witnesses was recorded. Jaimal witness, who was summoned for that date, had not turned up as service of summons had not been effected upon him. The Court made the following order:—

"Orders relating to him will be passed

to-morrow. Adjourned to to-morrow for further proceedings."

On the 14th of November 1924 warrants were directed to be issued to Gokal and Nand Lal witnesses who had absented themselves in spite of personal service of summonses upon them. The warrants were sent to Hissar and were received on the 24th of November. They were handed to the bailiff on the 6th of December 1924. The next date for hearing was fixed for the 12th of December 1924. Thus there were six days during which the warrants could have been executed, but the bailiff refused to act on the ground that the distance of the place where the witnesses resided from Hissar was 35 miles and that the service could not be effected. Jaimal, Jiwan Singh, Kirpa Ram, and Hira Lal witnesses had not been served.

The Court, therefore, made the following order:

"Jaimal Singh, Jiwan Singh, Kirpa Ram and Hira Lal have not been served. The plaintiff himself admits that he did not take any step to get them served. Such being the case he has forfeited his right to get fresh processes issued to these persons. He can himself bring them to Court on the next hearing. Case adjourned to 12th December 1924 for remaining evidence of the plaintiff and rebuttal evidence of the defendant. No other opportunity shall be given to the parties for evidence."

This order was made on the 14th of November 1924. Of the two witnesses against whom warrants had been issued Gokal appeared and was examined as a witness. Of the witnesses whom the plaintiff was directed to bring into Court on the date fixed for hearing the plaintiff succeeded in bringing Jaimal, Jiwan Singh and Kirpa Ram whose evidence was recorded but Hira Lal did not come, for the summons had not been served upon Hira Lal. The Court ought to have issued fresh summonses for service and it was not justified in depriving the plaintiff of his right to have the evidence of this witness taken.

The suit of the plaintiff has been dismissed, and in appeal it has been contended before us that the decision has gone against the plaintiff-appellant because the case has been decided upon an incomplete record. Having regard to the circumstances referred to above we are constrained to hold that the Court below did not act properly in refusing to enforce the attendance of these witnesses. Under ordinary circumstances

we would have set aside the decree of the Court below and remanded the case for trial *de novo* after recording the evidence of the two witnesses mentioned above; but as the parties are anxious that the case be decided speedily, acting under O. XLI, r. 28, C. P. C., we direct the Court below to procure the attendance of Nand Lal and Hira Lal, record their evidence and send it to this Court after it has been recorded with as little delay as possible.

Z. K.

*Decree set aside;
Case remanded.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 132 OF 1922.

April 15, 1925.

Present:—Mr. Justice Phillips.

CHINNATHAMBI CHETTI AND OTHERS

—DEFENDANTS NOS. 4 AND 5—APPELLANTS

versus

APPAVOO CHETTY *alias* ARDHANARI

CHETTY AND OTHERS—PLAINTIFFS—

DEFENDANTS NOS. 1 TO 3 AND 6 TO 9—

RESPONDENTS.

*Minor—Guardian, alienation by, of minor's property
—Discharge of money-decree against both guardian and
minor—Benefit, extent of.*

Where for the purpose of discharging a money-decree obtained against a minor and his guardian jointly and severally, the guardian mortgaged the properties solely belonging to the minor, in a suit to enforce the mortgage:

Held, (1) that the ultimate liability of the minor under the money-decree was only in respect of half of the decree amount; [p. 1031, col. 2]

(2) that the minor received benefit only as to half the amount and the mortgage was binding only to that extent. [*ibid.*]

Kali Rai v. Karu Singh, 42 Ind. Cas. 462; 3 P. L. J. 78; 3 P. L. W. 210, relied on.

Second appeal against a decree of the District Court, Salem, in A. S. No. 87 of 1919, preferred against the decree of the Court of the Temporary Subordinate Judge, Salem, in O. S. No. 18 of 1919.

Messrs. C. S. Venkatachariar and V. N. Venkatavaradachari, for the Appellants.

Mr. K. Sankara Sastry, for the Respondents.

JUDGMENT.—The facts of this case are as follows:—One Ponnappa Chetty and his brother Periyanna Chetty executed a promissory note. After Periyanna Chetty's death, a decree was obtained against Ponnappa Chetty and Periyanna Chetty's sons, defendants Nos. 1, 4 and 5. In execution of

this decree Ponnappa Chetty was arrested. He borrowed money from another brother, the present plaintiff, to pay off the amount, undertaking to execute a mortgage in his favour; shortly afterwards he executed the plaintiff mortgage-deed, Ex. A, in which he mortgaged the property of defendants Nos. 1, 4 and 5 as their guardian. The present suit has been brought upon this mortgage-deed and it is sought to recover the whole amount lent thereunder from the property of the minors, defendants Nos. 1, 4 and 5. The consideration was Rs. 1,468 paid towards a decree debt and Rs. 532 paid for cultivation expenses, etc., the lower Courts have found that this amount of Rs. 532 is not binding upon the minors and have given a decree for the other item after deducting a small amount therefrom. Defendants Nos. 4 and 5 now appeal and contend that their properties are only liable for half of the amount of the decree-debt discharged by Ponnappa Chetty out of the mortgage-money. The decree was originally passed against them and Ponnappa Chetty jointly and severally; but in the absence of any evidence to the contrary, each would be liable to pay half the amount, subject to the decree-holder's rights to execute the decree against any one of the judgment-debtors. The District Judge has held that under this decree the minor defendants were liable to the decree-holder for the whole amount, and, therefore, as the decree could have been executed against them for the whole amount, their property is liable for that sum. In coming to this conclusion he has omitted to notice that the ultimate liability of the minors is only half of the decree amount, for even if they were compelled to pay the whole by the decree-holder they could recover half from their co-judgment-debtor, and consequently their real liability is only one-half. In support of this view I may refer to a case reported as *Kali Rai v. Karu Singh* (1). In that case, which goes further than is necessary for the present case, it was held that even when the property of a minor was about to be sold in execution of a decree in which he and another co-tenant were judgment-debtors, yet the mortgage was only binding to the extent of the minor's liability for that decree, namely, one-half of the amount. In the present case we have not got the

(1) 42 Ind. Cas. 462; 3 P. L. J. 78; 3 P. L. W. 210.

additional circumstance that the minor's property was going to be sold, for when the mortgage was actually executed the decree had been satisfied, and it can make no difference that Ponnappa Chetty, the guardian of the minors, is the mortgagor. It cannot be said that the minors were liable for the whole decree amount. If the decree had been looked at, it would have been at once apparent that the liability was joint, the minors' liability being only the half share for which their father was liable. It must also be remembered that the mortgagee is the brother of Ponnappa Chetty and the uncle of the minors, and he was in a position to know all these facts. In these circumstances it certainly cannot be said that the mortgage amount was borrowed wholly for the benefit of the minors; for they are only liable for one-half of the decree-debt and only received benefit to that extent.

A contention is raised on behalf of the respondent that really the property mortgaged belonged jointly to the minors and to their uncle, Ponnappa Chetty, it being alleged that they formed members of an undivided family. The plaintiff himself admits that Ponnappa Chetty and his brother, Periyanna Chetty, and three other brothers were all divided; and, although he says that Ponnappa and his nephews were living as one family, he does not allege that there was any re-union. In fact it is clear from the plaint that it was not part of the plaintiff's case that Ponnappa had mortgaged his own property, as is apparent from paras. 3 and 3 (a). The question was not raised in the lower Court because the plaintiff proceeded on the assumption that Ponnappa Chetty had no interest. That being so, this argument is of no avail. The appeal must, therefore, be allowed and the decree modified by altering the amount recoverable to Rs. 734, being half of the decree amount and proportionate costs. Time for payment three months.

The other points raised in the memorandum of appeal have not been argued and consequently, in so far as the appellants have failed, they are liable to pay the proportionate costs of the respondents. Parties will, therefore, pay and receive proportionate costs in this appeal.

V. N. V.

N. H.

*Appeal allowed.***LAHORE HIGH COURT.**

SECOND CIVIL APPEAL No. 2885 of 1924.

April 20, 1925.

*Present:—Mr. Justice Harrison.*SUNDAR SINGH AND OTHERS—DEFENDANTS
— APPELLANTS*versus*

BHAN SINGH—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 115—Attestation of document in token of consent—Estoppel.

Where a document recites that a certain person has put his thumb impression thereto in token of his consent and it appears that the document was read over to such person at the time of registration and that he again put his thumb impression to the document, this is not a mere attestation of the document but amounts to distinct and clear acquiescence which binds the person so thumb-marking the document and estops him from questioning its validity. [p. 1033, col. 1.]

Second appeal from a decree of the District Judge, Jullundur, dated the 28th July 1924, affirming that of the Subordinate Judge, Fourth Class, Jullundur, dated the 26th February 1923.

Lala Faqir Chand, for the Appellants.

Lala Mehr Chand Mahajan for Kunwar Dalip Singh, for the Respondent.

JUDGMENT.—The plaintiff in this case, one Bhan Singh, brought a suit based on a Will alleged to have been executed by his mother's brother Wazir Singh in his favour. The defendants were the four collaterals of Wazir Singh who in the ordinary course of events would have succeeded him. The suit has been decreed as regards three and as regards the fourth it has been dismissed, the reason being that whereas all the three attested the Will the fourth did not. Two of three collaterals have appealed.

A second suit was instituted to recover the value of the crop admittedly sown by the late Wazir Singh and alleged to have been cultivated by the plaintiff and seized on maturity by the four defendants. A decree was given for one-half only, the finding being that these allegations were established and as no appeal was presented by the plaintiff to the District Judge, this decree stands so far as he is concerned. The collaterals have appealed and this judgment will dispose both of that appeal and of the appeal in the main case.

A third suit was instituted by two of the reversioners for a declaration that their thumb-marks on the Will had been obtained by fraud and also for a declaration that they were entitled to their share of Wazir Singh's estate. This suit was dismissed and no appeal preferred.

I take first the appeal of the three reversioners. Counsel urges that a mere attestation of a document is not in itself sufficient to constitute acquiescence. He further contends that even if there was acquiescence inasmuch as the Will was in favour of a relation who normally was not entitled to succeed, that acquiescence must be ignored. He quotes and relies on *Udai Bhan Singh v. Gajendra Singh* (1) in which an appeal was dismissed as concluded by a finding of fact by the District Judge. This does not help him as here also there is a finding of fact against the appellant. He also relies on *Pandurang Krishnaji v. Markandeya Tukaram* (2) for his main proposition and he wishes to draw an analogy from the Hindu Law where the position is as explained in *Chuni Lal v. Nanda* (3) that unless all the reversioners agree to an alienation by a Hindu widow the whole of the alienation is bad. The facts of this case are wholly different. Wazir Singh wishing to benefit his sister's son executed this Will and it is recited in the clearest possible terms that the reversioners, defendants Nos. 2 to 4 have given their consent:—*"Barazi warsan jaddi Hardit Singh, Pal Singh wa Santas Singh yeh wasiyat tahrir kar dihai jinke nishanat angusht bhi sabat hain."* The endorsement shows that the Sub-Registrar read out and explained the document to the testator in the presence of two out of these three reversioners and had thereupon attached their thumb-marks for a second time. This, in my opinion, is not a mere attestation in the sense in which the words are used in *Pandurang Krishnaji v. Markandeya Tukaram* (2) but is a distinct and clear acquiescence which binds these three reversioners and estops them from questioning the validity of the Will. The other point has no force, in my opinion, and there would be no meaning in acquiescence or in estoppel, if at a later stage it was possible to upset that acquiescence by showing that it affected the course of events. Mr. Fakir Chand's argument as I understand it is that the only form of acquiescence which can be given is to recognise

the inheritance of the natural heir. I, therefore, dismiss this appeal with costs.

As regards the second appeal about the crop it is urged in the first place that the suit should have been tried by a Revenue Court, but this has been definitely dropped. The second point is that the suit is clearly one for damages for wrongful occupation. This was also dropped and the only point urged by Mr. Fakir Chand is that Sundar Singh has succeeded in the main suit as he did not acquiesce and, therefore, no decree should have been passed against him. The finding is that the crop was sown by the late Wazir Singh and cultivated by the plaintiff and this finding being based on evidence I do not see how the question of title arises. All that has been decreed is that one-half of the value of the crop seized by the collaterals is to be paid to the plaintiff who on the findings is entitled to the whole. I dismiss this appeal also with costs.

Z. K.

*Appeal dismissed.***MADRAS HIGH COURT.**

CIVIL APPEAL No. 389 OF 1919.

January 8, 1925.

Present:—Mr. Justice Phillips and
Mr. Justice Krishnan.P. M. A. MUTHIA CHETTIAR AND OTHERS
—DEFENDANTS—APPELLANTS

versus

VENKATASUBBARAYULU NAIDU
AND OTHERS—PLAINTIFF AND DEFENDANTS

Nos. 1, 3 TO 5, 9 TO 21, 24 AND 25—

RESPONDENTS.

*Limitation Act (IX of 1908), Sch. I, Art. 132—
Mortgage—Mortgage amount payable on fixed date—
Option to enforce payment on default of payment of
interest—Suit to enforce mortgage—Limitation.*

Where a mortgage-deed, by which the principal amount was to be paid on a fixed date, provided that if the mortgagor should fail to pay the interest on the due date, the mortgagee would be at liberty to recover the whole amount together with principal and interest:

Held, on a construction of the document, that an option was reserved to the mortgagee to enforce the clause at his pleasure, and that the period of limitation for a suit to enforce the mortgage under Art. 132 of Sch. I to the Limitation Act started to run not on the date of default in the payment of interest but when the money became due under the terms of the main contract. [p. 1034, col. 1.]

Narna v. Ammani Ammal, 35 Ind. Cas. 418; 39 M. 981; 4 L. W. 77; 20 M. L. T. 174; (1916) 2 M. W. N. 125; 31 M. L. J. 865, *Ramadh Bibi Ammal v. Kan*

(1) 70 Ind. Cas. 815; (1923) A. I. R. (A.) 28.

(2) 65 Ind. Cas. 954; 49 C. 334; 26 C. W. N. 201; 3 U. P. L. R. (P. C.) 85; 20 A. L. J. 305; 42 M. L. J. 436; 15 L. W. 486; 30 M. L. T. 249; 35 C. L. J. 409; 24 Bom. L. R. 557; 18 N. L. R. 1; (1922) A. I. R. (P. C.) 20; 49 I. A. 16 (P. C.).

(3) 174 P. R. 1888.

dasami Pillai, 51 Ind. Cas. 724; 9 L. W. 479; (1919) M. W. N. 82; 25 M. L. T. 154, *Lachakkammal v. Sokkayya Naick*, 48 Ind. Cas. 191; (1918) M. W. N. 586, *Kaliappa Nadar v. Sami Iyer*, 62 Ind. Cas. 762; (1921) M. W. N. 384 and *Bitragunta Appayya v. Addanki Venkataramanayya*, 82 Ind. Cas. 864; 20 L. W. 620; (1925) A. I. R. (M.) 150, followed.

Gaya Din v. Jhuman Lal, 28 Ind. Cas. 910; 37 A. 400; 13 A. L. J. 510, *Nathi v. Tursi*, 63 Ind. Cas. 886; 43 A. 671; 19 A. L. J. 712 and *Collector of Jaunpur v. Jamna Prasad*, 66 Ind. Cas. 171; 44 A. 360; 20 A. L. J. 149; 4 U. P. L. R. (A.) 50; (1922) A. I. R. (A.) 37, not followed.

Appeal against a decree of the Temporary Subordinate Judge, Velore, in O. S. No. 18 of 1918.

Mr. A. Ramachandra Iyer, for the Appellants.

Messrs. A. Krishnaswami Iyer and T. Kumarasamiah, for the Respondents.

JUDGMENT.—The only question that arises in this appeal is one of limitation. The suit is brought on a mortgage-deed, dated 20th September 1890, in 1916 the mortgage-money not being payable under the deed until 1904. There is also a clause in the deed that in default of payment of interest the whole amount, principal and interest, up to that date should become due. It is argued before us in the first place that the default clause leaves no option to the mortgagee as to whether he shall or shall not enforce it; but on a consideration of the language of the document which is translated in this Court as follows:—"If I should fail to pay.....you shall be at liberty to recover", it is clear that the option is reserved with the mortgagee to enforce this clause at his pleasure. That being so, the question is whether the period of limitation started to run on the date of default, or when the money became due under the terms of the main contract, namely, 1904, under Art. 132 of the Limitation Act. The view that the money becomes due within the meaning of this Article at the date of the first default has been adopted by the Allahabad High Court in *Gaya Din v. Jhuman Lal* (1) and that decision has been followed in two subsequent cases in *Nathi v. Tursi* (2) and *Collector of Jaunpur v. Jamna Prasad* (3). The case of *Gaya Din v. Jhuman Lal* (1) has been considered by this Court in *Narna v. Ammani Amma* (4) in

which a Division Bench took a view different from that of the Allahabad High Court and that view has subsequently been followed in *Ramadh Bibi Ammal v. Kandasami Pillai* (5), *Lachakkammal v. Sokkayya Naick* (6), *Kalippa Nadar v. Sami Iyer* (7) and *Bitragunta Appayya v. Addanki Venkataramanayya* (8) and to one or other of these cases we both have been parties. There is no definite pronouncement of the Privy Council on this point, although there is a dictum in support of the view taken in this Court in *Juneswar Das v. Mahabeer Singh* (9), the other cases of the Privy Council cited before us, namely, *Kishan Narain v. Pal Mal* (10) and *Muhammad Hafiz v. Muhammad Zakariya* (11) are decisions under O. II, r. 2, of the C. P. C., and are not authorities on this point. In this state of affairs we prefer to follow the course of decisions in this Court in preference to the view of the Allahabad High Court, and consequently, this appeal must fail and is dismissed with costs of plaintiff and 3rd respondent.

In this view it is unnecessary to decide the further point upon which the lower Court relies, namely, that the limitation was saved by reason of the acknowledgment of the debt.

The balance of Rs. 50 due to the Court guardian will be paid by the appellant.

V. N. V.

Z. K.

Appeal dismissed.

(5) 51 Ind. Cas. 724; 9 L. W. 479; (1919) M. W. N. 82; 25 M. L. T. 154.

(6) 48 Ind. Cas. 191; (1918) M. W. N. 586.

(7) 62 Ind. Cas. 762; (1921) M. W. N. 384.

(8) 82 Ind. Cas. 864; 20 L. W. 620; (1925) A. I. R. (M.) 150.

(9) 1 C. 163; 25 W. R. 84; 3 I. A. 1; 3 Sar. P. C. J. 58; 3 Suth. P. C. J. 222; 1 Ind. Dec. (N. S.) 105 (P. C.).

(10) 72 Ind. Cas. 187; 44 M. L. J. 123; (1922) A. I. R. (P. C.) 412; 25 Bom. L. R. 220; 32 M. L. T. 41; 4 L. 32; 27 C. W. N. 802; 18 L. W. 341; 50 C. 126; 6 P. W. R. 1923; 9 O. & A. L. R. 488; 50 I. A. 115 (P. C.).

(11) 65 Ind. Cas. 79; 44 A. 121; 20 A. L. J. 17; 26 C. W. N. 297; (1922) M. W. N. 89; 35 C. L. J. 126; 42 M. L. J. 248; 15 L. W. 377; 24 Bom. L. R. 341; 30 M. L. T. 224; 3 P. L. T. 279; 1 P. W. R. 1922; (1922) A. I. R. (P. C.) 23; 49 I. A. 9 (P. C.).

(1) 28 Ind. Cas. 910; 37 A. 400; 13 A. L. J. 510.

(2) 63 Ind. Cas. 886; 43 A. 671; 19 A. L. J. 712.

(3) 66 Ind. Cas. 171; 44 A. 360; 20 A. L. J. 140; 4 U. P. L. R. (A.) 50; (1922) A. I. R. (A.) 37.

(4) 35 Ind. Cas. 418; 39 M. 981; 4 L. W. 77; 20 M. L. T. 174; (1916) 2 M. W. N. 125; 31 M. L. J. 865.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 303 OF 1921.

May 7, 1925.

Present:—Sir Shadi Lal, Kt., Chief Justice,
and Mr. Justice Addison.

TEGH INDAR SINGH AND OTHERS—

DEFENDANTS—APPELLANTS

versus

HARNAM SINGH—PLAINTIFF—

RESPONDENT.

*Hindu Law—Mitakshara—Partition—Step-mother,
whether entitled to share.*

Under the Mitakshara School of Hindu Law a step-mother is entitled, on partition of her deceased husband's estate, to a share in the estate equal to that of a son. [p. 1036, col. 1.]

[Case-law referred to.]

Second appeal from a decree of the District Judge, Amritsar, dated the 25th October 1920, modifying that of the Subordinate Judge, Second Class, Amritsar, dated the 17th March 1920.

Bakhshi Tek Chand, for the Appellants.

Mr. Man Singh, for the Respondent.

JUDGMENT.

Shadi Lal, C. J.—This second appeal arises out of an action brought by the plaintiff Harnam Singh for the partition of the estate left by his father, who died in July 1916 leaving a widow *Musammatt Bhagwanti* and three sons, namely, the plaintiff and his two step-brothers, who with their mother *Musammatt Bhagwanti* are defendants in the case. It is not disputed that the parties are governed by the Mitakshara School of the Hindu Law, and the question for determination is whether *Musammatt Bhagwanti*, who is the step-mother of the plaintiff, is entitled to a share on partition equal to that of a son.

The learned Vakil for the plaintiff, while conceding the mother's right to a share on a partition between her sons, contends that a step-mother does not occupy the same position as a mother, and that she is not entitled to any share out of the joint estate. This distinction is, no doubt, recognised by the Dayabhaga School of the Hindu Law which does not allow any share to a sonless step-mother on a partition between her step-sons; but the doctrine adopted by the leading authorities of the Mitakshara School is to the effect that a mother and a step-mother are equal sharers with the sons.

This proposition was laid down as long ago as 1882 by a Division Bench of the Calcutta High Court in *Damoodur Misser v. Senabuttu Misra* (1); and the same view

(1) 8 C. 537; 6 Ind. Jur. 584; 10 C. L. R. 401; 4 Ind. Dec. (N. S.) 346.

has since been affirmed by the Bombay High Court in *Damodardas Maneklal v. Uttamram Maneklal* (2) and *Vithal Ramkrishna v. Prahlad Ramkrishna* (3), by the Allahabad High Court in *Harnarain v. Bishambar Nath* (4), and by the Patna High Court in *Suba Raut v. Manla Rautain* (5). The learned Vakil for the plaintiff places his reliance upon the judgment of the Punjab Chief Court in *Bishen Das v. Mansa Devi* (6) which enunciates the rule that a step-son is not bound to contribute to his step-mother's maintenance after the joint property has been partitioned between the step-son and her own son. It is true that the judgment contains some observations to the effect that there is no difference between the two systems of the Hindu Law, the Dayabhaga and the Mitakshara, as to the position and rights of a step-mother; but the question whether on a partition of the joint property a step-mother is entitled under the Mitakshara Law to a share was not before the learned Judges, and the general observations relating to the step-mother's position *qua* her step-son can be regarded as mere *obiter dicta*. With all respect to the learned Judges I am unable to endorse the view that the doctrine of the Mitakshara School on the subject of the step-mother's right to a share is identical with that followed by the Dayabhaga School.

Mr. Man Singh for the plaintiff frankly admits that, with the exception of the observations in *Bishen Das v. Mansa Devi* (6), there is not a single judicial authority in support of his contention; but he invites our attention to the original text and urges that the word '*mata*' used therein means only a mother and does not include a step-mother. This contention runs counter to all the authorities on the subject, the jurists of the Mitakshara School as well as the judicial decisions, and I have no hesitation in rejecting it. The commentaries including the Mitakshara are unanimous that the word '*mata*' used by Yajnavalkya in the text, which speaks of the share of a mother on the occasion of the partition of the property among sons after the decease of their father, included a step-mother; and it would be presumptuous to impeach the

(2) 17 B. 271; 9 Ind. Dec. (N. S.) 177.

(3) 28 Ind. Cas. 967; 39 B. 373; 17 Bom. L. R. 361.

(4) 31 Ind. Cas. 907; 38 A. 83; 13 A. L. J. 1129.

(5) 47 Ind. Cas. 204.

(6) 23 Ind. Cas. 536; 47 P. R. 1914; 60 P. L. R. 1914.

correctness of the interpretation adopted by all the jurists.

Mr. Man Singh also urges that, even if *Musammatt Bhagwanti* is entitled to a share in the estate, the value of the *stridhan* received by her from her husband should be deducted from that share. The determination of this question depends upon facts and, as the point was not raised in either of the Courts below, it cannot be agitated for the first time in second appeal.

I accordingly hold that *Musammatt Bhagwanti* is entitled to a share equal to that of each of the sons, and that the plaintiff cannot get more than one-fourth of the estate. The result is that I accept the appeal and grant him a decree for possession by partition of one-fourth of the immoveable property specified in the plaint. The respondent must pay the costs incurred by the appellants in this Court.

Addison, J.—I concur.

Z. K.

Appeal accepted.

ODDH JUDICIAL COMMISSIONER'S COURT.

SMALL CAUSE COURT APPLICATION No. 27
OF 1925.

July 16, 1925.

Present:—Mr. Simpson, A. J. C.

RAM HAKH—DEFENDANT—APPLICANT
versus

RAM AUTAR AND OTHERS—PLAINTIFFS,
Babu BISHUN NARAYAN—DEFENDANT
—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 25, Sch. II, Art. 41—Joint decree against sharers—Payment by one of several sharers—Suit for contribution—Costs.

The rights of the co-sharers *inter se* merge in their rights and liabilities as co-judgment-debtors in regard to the decree and a suit for contribution being between judgment-debtors does not fall under Art. 41 of the Second Schedule of the Provincial Small Cause Courts Act.

Suraj Baksh Singh v. Raghubar Singh, 24 Ind. Cas. 28; 1 O. L. J. 244; 4 O. & A. L. R. 240 and *Bhagwati Prasad Singh v. Muhammad Abul Hasan Khan*, 45 Ind. Cas. 236; 5 O. L. J. 109, referred to.

Ordinarily the Court of the Judicial Commissioner will not make use of its powers under s. 25 of the Provincial Small Cause Courts Act to upset an order of the Small Cause Court as to costs.

Application against an order of the Additional Subordinate Judge, Gonda, dated the 11th December 1924.

Mr. S. M. Ahmad for Mr. H. N. Das, for the Applicant.

Mr. H. D. Chandra, for Opposite Party Nos. 1 and 2.

ORDER.—This is an application under s. 25 of the Provincial Small Cause Courts Act. The facts are that Babu Bishun Narayan, who figures as opposite party No. 3, brought a suit in the Rent Court against a number of under-proprietors, and obtained a joint decree against them. In execution of this decree he obtained a sum of Rs. 186-9-0 from two of the judgment-debtors, Ram Autar and Bhaggan, who now figure as opposite party Nos. 1 and 2. As this amount was in excess of what they were due to pay, they brought a suit for contribution against a number of the other judgment-debtors. Ultimately, only one of these defendants contested the suit. That was the present applicant, Ram Hakh. A decree was passed against various defendants for various amounts. As regards Ram Hakh, the decree against him was for Rs. 25-5-6 but he was also saddled with the entire costs of the suit which amounted to about Rs. 35.

He applies to this Court on two grounds. The first is that the Small Cause Court had no jurisdiction, because the suit was one such as is described in Art. 41 of the Second Schedule for contribution by a sharer against a co-sharer. This contention is wrong. This exact point was decided in *Suraj Baksh Singh v. Raghubar Singh* (1). The true doctrine is that the rights of the co-sharers, *inter se*, merge in their rights and liabilities as co-judgment-debtors in regard to the decree, and a suit for contribution being between judgment-debtors, does not fall under Art. 41. The ruling I have quoted is that of a Single Judge, but, it was upheld by a Bench of this Court in *Bhagwati Prasad Singh v. Muhammad Abdul Hasan Khan* (2). That decision is binding on me. I may add that I agree with it.

The second point is that the applicant ought not to be saddled with the whole of the costs. But orders with regard to costs are discretionary orders and this Court will not ordinarily make use of its powers, under s. 25, to upset an order of the Small Cause Court as to costs. The applicant prolonged the proceedings, after all the other defendants had admitted the justice

(1) 24 Ind. Cas. 28; 1 O. L. J. 244; 4 O. & A. L. R. 240.

(2) 45 Ind. Cas. 236; 5 O. L. J. 109.

of the plaintiff's claim, and it may very well be that he was rightly saddled with costs.

The application is dismissed with costs.
S. D. Application dismissed.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1964
OF 1922.

February 16, 1925.

Present:—Justice Sir Henry Scott-Smith,
Kt., and Mr. Justice Martineau.

HAYAT MUHAMMAD—VENDEE—

APPELLANT

versus

BHAWANI DAS AND OTHERS—CREDITORS—
RESPONDENTS.

*Provincial Insolvency Act (III of 1907), s. 36—
Transfer by insolvent—Transfer by transferee of
insolvent—Annulment of transfer.*

Section 36 of the Provincial Insolvency Act of 1907 does not apply to a transfer made by an insolvent subsequent to his adjudication, but applies only to transfers made by him previous thereto. Nor does the section in terms apply to a transfer made by a transferee of the insolvent.

Miscellaneous first appeal from an order of the District Judge, Lyallpur, dated the 31st May 1922.

Lala Ram Chand Manchanda and Lala Jagan Nath Bhandari, for the Appellant.

JUDGMENT.—Bakhu applied to be declared insolvent on the 12th February 1918 and was adjudicated insolvent on the 13th March 1918. On the 2nd October 1918 Bakhu sold part of his land to Massu. On the 31st March 1919, Massu sold this land and some of his own land to Hussain Bakhsh and Sardar Khan. On the 18th June 1919 the latter vendees sold the land to Hayat Muhammad. On the 10th December 1921 the Insolvency Court annulled the sales in favour of Massu and in favour of Hussain Bakhsh and Sardar Khan. On the 31st May 1922 the sale in favour of Hayat Muhammad was annulled. Hayat Muhammad has appealed to this Court.

It is contended that s. 36 of the Provincial Insolvency Act does not apply to transfers made by an insolvent subsequent to his adjudication but only to transfers made by him previous thereto. Moreover it does not in terms apply to transfers made by an insolvent's transferee. The transfer to Hayat Muhammad was not made by the

insolvent himself. The section, therefore, does not apply to the original transfer made by Bakhu insolvent, much less to subsequent ones. Whether these transfers are binding on the Official Receiver is another question which we are not at present called upon to decide.

We, therefore, accept the appeal and set aside the order of the Court below annulling the transfer in favour of Hayat Muhammad. The appellant will receive his costs out of the insolvent estate.

Z. K.

Appeal accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 110 OF 1922.

March 16, 1925.

Present:—Mr. Justice Phillips and
Mr. Justice Odgers.

V. RENGANATHA IYER—PLAINTIFF

—APPELLANT

versus

SRINIVASA IYENGAR AND OTHERS—

DEFENDANTS NOS. 1, 3 AND 4—

RESPONDENTS.

*Adverse possession—Attachment, whether sufficient to interrupt adverse possession—Symbolical delivery—
Effect on possession of persons not parties to suit.*

An attachment does not interrupt adverse possession or rather possession which is ripening into adverse possession. [p. 1038, col. 2.]

Seetharami Reddi v. Venku Reddi, 11 M. L. J. 344, followed.

Pankaj Mohan Bal v. Bipin Behary Chakladar, 76 Ind. Cas. 511; 38 C. L. J. 220; (1924) A. I. R. (C.) 118, *Singaravelu Mudaliar v. Chokka Mudaliar*, 70 Ind. Cas. 994; 46 M. 525; 16 L. W. 514; 31 M. L. T. 298; (1922) M. W. N. 676; 43 M. L. J. 737; (1923) A. I. R. (M.) 88 and *Subbaiya Pandaram v. Muhamad Mustapha Maracayar*, 71 Ind. Cas. 492; 46 M. 751; 21 A. L. J. 730; (1923) A. I. R. (P. C.) 175; 45 M. L. J. 588; 25 Bom. L. R. 1275; 18 L. W. 903; (1924) M. W. N. 65; 28 C. W. N. 493; 2 Pat. L. R. 104; 33 M. L. T. 285; 50 I. A. 295; 40 C. L. J. 20 (P. C.), relied on.

Rajah of Venkatagiri v. Isakapalli Subbiah, 26 M. 410 and *Sarat Chandra Maiti v. Bibhabati Debi*, 66 Ind. Cas. 433; 34 C. L. J. 302, distinguished.

Per Phillips, J.—*Obiter dicta*.—Adverse possession is not disturbed except by actual ouster. [p. 1039, col. 1.]

An attachment under Ch. XII of the Cr. P. C. implies an actual taking possession of the property by the Magistrate or by some one under his orders. [p. 1039, col. 2.]

Per Odgers, J.—Symbolical possession is sufficient to interrupt adverse possession when the adverse pos-

essor is a party to the execution proceedings in which the symbolical possession is given. But as regards persons not so parties, only actual dispossession can interrupt their adverse possession. [p. 1040, col. 2.]

Kocherlakota Venkatakrishna Row v. Vadrevu Venkappa, 27 M. 262, *Radha Krishna Chanderji v. Ram Bahadur*, 43 Ind. Cas. 268; 34 M. L. J. 97; 27 C. L. J. 191; 16 A. L. J. 33; 23 M. L. T. 26; 4 P. L. W. 9; 7 L. W. 149; 22 C. W. N. 330; (1918) M. W. N. 163; 20 Bom. L. R. 502 (P. C.), and *Jobeda Khatun v. Tulsi Charan Das*, 77 Ind. Cas. 564; 36 C. L. J. 472; (1923) A. I. R. (C.) 82, relied on.

An attachment does not physically interrupt the possession of persons already on the property and it cannot be said even theoretically to do so.

Second appeal against a decree of the District Court, East Tanjore at Nagapatam, in A. S. No. 6 of 1921, preferred against that of the Court of the Principal District Munsif, Tiruvalur, in O. S. No. 367 of 1918.

Messrs. T. R. Ramachandra Iyer and S. Srinivasa Iyengar, for the Appellant.

Mr. S. T. Srinivasa Gopalachari, for the Respondents.

JUDGMENT.

Phillips, J.—The suit house originally belonged to the 1st defendant's father Narayana Iyengar and his brother the 2nd defendant Alagasinga Iyengar. A partition was effected between the brothers in 1881, but not by metes and bounds. Narayana's share was sold to one Dikshitar on 1st May 1905. Alagasinga's share was sold to the plaintiff on 10th March 1906. On 30th March 1906, Narayana's share was delivered to Dikshitar by symbolical delivery. On 25th March 1907, Dikshitar sold this share to Alagasinga's son the 3rd defendant. On 3rd July 1917, the plaintiff attached Alagasinga's share in execution of a decree. On 4th March 1918, Narayana put in a claim petition. On 10th June 1918 the claim was allowed and on 19th August 1918 the present suit was brought under O. XXI, r. 63. Meanwhile, on 3rd April 1918, Alagasinga had brought a suit to recover possession of his share, a suit which has been dismissed.

The lower Courts have found that there has been adverse possession by Narayana's son the 1st defendant for 12 years before suit, and now in this second appeal two questions arise: (1) whether the attachment by the plaintiff on 3rd July 1917 puts an end to the adverse possession of the 1st defendant that is, whether the possession of the 1st defendant from that date till this suit was filed, continued to be adverse, and uninterrupted, (2) whether the symbolical delivery of 30th March 1906 put an end to the

1st defendant's adverse possession or not. The decree in which symbolical delivery was given was against Narayana alone and 1st defendant, his son, was not a party to it.

The first point has been expressly decided in *Seetharami Reddi v. Venku Reddi* (1). In that case, the defendants had been in possession for less than 12 years at the time of attachment, but continued in possession until the suit was brought more than 12 years after their possession commenced. It was held in this Court that the attachment could not have the effect of arresting the running of time against defendants. If that ruling is adopted, it is clear that the plaintiff's suit is barred by limitation. But it is urged for the appellant that the decision in *Pandiyan Pillai v. Vellayappa Rowther* (2) is authority to the contrary, and this contention appears to have some force, for, in that case, the facts were very similar and it was decided against the parties claiming adverse possession. Reference is made in the judgment to *Seetharama Reddi v. Venku Reddi* (1) and it is not dissented from nor criticised in any way, apparently because it was held that no question of interruption of possession or of its continuance despite the attachment arose. Although, therefore, the decision appears to be in direct contravention of the decision in *Seetharama Reddi v. Venku Reddi* (1) it is based on other grounds, which are not too clear, because in the judgment the facts do not appear to be correctly set out owing to the apparent transposition of the words "plaintiff" and "defendant" in two places. Reliance is also placed on *Vasudeo Atmaram Joshi v. Eknath Balkrishna Thite* (3) and that, no doubt, is an authority directly in favour of the appellant, for it was there held that in such a suit, namely, under s. 283 of the old C. P. C., it must be proved "that on the date of attachment which was subsequently raised by order of the Court on the application of the 1st respondent, their judgment-debtors had a subsisting right to the property." For this proposition *Harishankar Jebhai v. Naran Karsan* (4) is relied on, but a reference to the latter shows that in that case the date of the order on the claim petition was treated as the date on which the adverse possession ceased. If that date

(1) 11 M. L. J. 344.

(2) 42 Ind. Cas. 438; 33 M. L. J. 316; 6 L. W. 588.

(3) 8 Ind. Cas. 639; 35 B. 79; 12 Bom. L. R. 956.

(4) 18 B. 269; 9 Ind. Dec. (N. S.) 651.

is taken in the present case, namely, 10th June 1918, the plaintiff's suit is barred by limitation. This latter proposition is supported by the authority of the Calcutta High Court in *Phal Kumari v. Ghanshyam Misra* (5), where it was held that the order of the Court was the basis of the subsequent suit. We have not been referred to any other authority than *Vasudeo Atmaram Joshi v. Eknath Balkrishna Thite* (3) which is directly in point and inasmuch as that case purports to be based on a prior decision which was not so to the same effect, there is no argument in the judgment which goes to show that the decision in *Seetharami Reddi v. Venku Reddi* (1) is incorrect.

It is suggested that we should refer this point for the decision of a Full Bench, but I do not think it is necessary in view of the following circumstances. In the first place, the decision in *Seetharami Reddi v. Venku Reddi* (1) has never been dissented from, although it was given so long ago as 1901, and on the merits I respectfully agree with the conclusion. Attachment or immoveable property is effected by an order prohibiting the judgment-debtor from transferring or charging the property in any way and all persons from taking any benefit from such transfer or charge. (Order XXI, r. 54, C. P. C.) It has always been held that an attachment does not confer any interest in the property, and it is difficult to see how a mere attachment can disturb the continuance of physical possession of the holder at the time. There are many authorities for holding that adverse possession is not disturbed except by actual ouster. For instance, in *Pankaj Mohan Bal v. Bipin Behary Chakladar* (6), where the Court ordered the property to be put in possession of a Receiver but possession was not actually given, it was held that possession was not disturbed. Again in *Singaravelu Mudaliar v. Chokka Mudaliar* (7), it was held that a declaration that the party in possession had no title has not the effect of interrupting the continuity of his adverse possession. At page 751* of the same volume

in *Subhaiya Pandaram v. Muhamad Mustapha Maracayar* (8), it was held that a decree which was not executed did not disturb possession. In view of these decisions it is difficult to hold that a mere attachment, under which possession is in no way disturbed, can affect the continuity of adverse possession. Appellant relies on two cases reported as *Rajah of Venkatagiri v. Isakapalli Subbiah* (9) and *Sarat Chandra Maiti v. Bibbabati Debi* (10), but in both these cases, the attachment was not one made under the C. P. C., but was made by a Magistrate in proceedings under Ch. XII, of the Cr. P. C., and must be distinguished on the ground that an attachment under that Chapter implies an actual taking possession of the property by the Magistrate or by some one under his orders. I am, therefore, of the opinion that the decision in *Seetharami Reddi v. Venku Reddi* (1) is correct and see no necessity for referring the case to a Full Bench as there is no actual conflict of opinion in this Court. In this view, it is unnecessary to decide the second point raised which was not raised in the lower Courts. The appeal is accordingly dismissed with costs.

Odgers, J.—Two points have been raised in this appeal: (1) Is symbolical possession, i. e., delivery by the Court of immoveable property in the execution of a decree sufficient to interrupt adverse possession? and (2) Does an attachment of immoveable property serve to interrupt adverse possession?

The plaintiff who brings the suit under O. XXI, r. 63 after the disposal of a claim petition in favour of defendant's father pleaded that since the 10th of March 1906 the plaintiff's father and himself had been in possession of a moiety of the immoveable property in question and he brought the suit for a declaration that the other moiety belongs to the 3rd defendant or to defendants Nos. 2 to 4 and that it was liable to be attached in execution of the decree in O. S. No. 54 of 1912. The first defendant who is the only contesting defendant pleaded that he and his father had been in adverse possession to the plaintiff

(5) 35 C. 202; 7 C. L. J. 36; 35 I. A. 22; 12 C. W. N. 169; 10 Bom. L. R. 1; 17 M. L. J. 618; 2 M. L. T. 506; 14 Bur. L. R. 41; 5 A. L. J. 10 (P. C.).

(6) 76 Ind. Cas. 511; 38 C. L. J. 220; (1924) A. I. R. (C.) 118.

(7) 70 Ind. Cas. 994; 46 M. 625; 16 L. W. 514; 31 M. L. T. 298; (1922) M. W. N. 676; 43 M. L. J. 737; (1923) A. I. R. (M.) 88.

(8) 74 Ind. Cas. 492; 46 M. 751; 21 A. L. J. 730; (1923) A. I. R. (P. C.) 175; 45 M. L. J. 588; 25 Bom. L. 1275; 18 L. W. 903; (1924) M. W. N. 65; 28 C. W. N. 493; 2 Pat. L. R. 104; 33 M. L. T. 285; 50 I. A. 295; 40 C. L. J. 20 (P. C.).

(9) 26 M. 410.

(10) 66 Ind. Cas. 433; 31 C. L. J. 302

and the other defendants of the whole of the property in question for a period of over 25 years. The dates material to the points set out are:—On the 8th of June 1881 there was a partition between the 1st defendant's father and his co-parcener Alagasinga of the property in question; on the 1st of May 1905 there was a Court auction sale of the 1st defendant's share to one Dikshitar. On the 30th of March 1906 there was symbolical delivery of 1st defendant's share to Dikshitar. On the 25th of March 1907 there was a private sale by Dikshitar to the son of Alagasinga who was the 1st defendant's co-parcener above referred to and previously on the 10th of March 1906 there was a private sale of Alagasinga's share to the plaintiff's father. On the 3rd of July 1917 there was an attachment by the plaintiff of Alagasinga's share. On the 4th of March 1918 there was a claim petition by the 1st defendant's father who was in possession. On the 3rd of April 1918 the plaint in Second Appeal No. 109 was presented by Alagasinga. On the 10th of June 1918 the claim of the 1st defendant was allowed and the attachment was raised; and on the 19th of August 1918 the plaint in the present second appeal was presented by the plaintiff.

It will be observed that both the plaints are more than 12 years from the date of the symbolical delivery of the plaintiff's share to Dikshitar but the attachment by the plaintiff on the 3rd of July 1917 is within 12 years.

Now as to the first point reliance is placed by the appellant on the case reported as *Kocherlakota Venkatakrishna Rao v. Vadrevu Venkappa* (11) and *Radha Krishna Chanderji v. Ram Bahadur* (12). In the first case it was held that the effect of symbolical delivery was in the case of the judgment-debtor himself absolute; but where the judgment-debtor is not the party in possession adversely to a third party (as here), delivery made in the absence of that third party and not hostilely to him cannot by itself affect his possession nor amount to an ouster or dispossession of him and his possession will continue uninterrupted but if he was present and the delivery

takes place adversely to the claim of such third party, it may be equally operative as against him. It was contended that the present is the case of a stranger resisting the suit, not of a stranger trying to recover as defendant No. 1 was not a party to the suit. In *Radha Krishna Chanderji v. Ram Bahadur* (12), it was held that symbolical possession will avail to dispossess defendants sufficiently because they were parties to the proceedings, in which it was ordered and given: *Juggobundhu Mukerjee v. Ram Chunder Bysack* (13) affirmed.

The case in *Jobeda Khatun v. Tulsi Charan Das* (14) was also relied on. The learned Judges there say that the decisions show that symbolical possession does not in any way affect the possession of or give start to a fresh period of limitation against persons who are not parties to the suit or execution proceedings. The learned Judges refer to a Privy Council case reported as *Radha Krishna Chanderji v. Ram Bahadur* (12), where their Lordships say that "symbolical possession is sufficient to interrupt adverse possession when the adverse possessor is a party to the execution proceedings in which the symbolical possession is given; as regards persons not so parties, only actual dispossession can interrupt their adverse possession". This, in my opinion, is sufficient to dispose of the point adversely to the appellant, if we can assume that defendants Nos. 1 was no party to the execution proceedings.

A greater part however of the argument before us has been centered on the second point, viz., as to the effect of attachment as interrupting adverse possession. There being no doubt, as already pointed out, that on the date of the suit the period requisite to establish adverse possession had elapsed. It is said that there are two cases—neither of them reported in the authorised reports—on each side of the line.

For the appellant it is frankly admitted that the case reported as *Seetharami Reddi v. Venku Reddi* (1) is against his position. There the learned Judges distinctly and in so many words lay down that attachment could not have the effect of arresting adverse possession by strangers holding adversely when the properties were attach-

(11) 27 M. 262.

(12) 43 Ind. Cas. 268; 34 M. L. J. 97; 27 C. L. J. 191; 16 A. L. J. 33; 23 M. L. T. 26; 4 P. L. W. 9; 7 L. W. 159; 22 C. W. N. 330; (1918) M. W. N. 163; 20 Bom. L. R. 502 (P. C.).

(13) 5 C. 584; 5 C. L. R. 548; 3 Shome L. R. 68; 2 Ind. Dec. (N. S.) 979.

(14) 77 Ind. Cas. 564; 36 C. L. J. 472; (1923) A. I. R. (C.) 82.

ed by the plaintiff as belonging to certain of the defendants in the case against whom the strangers were holding. It is said that the case in *Pandiyar Pillai v. Vellayappa Rowther* (2) is diametrically opposed to this, and the head-note certainly gives some colour to this view. The learned Judges, however, dispose of the case in another manner. The decision in *Seetharami Reddi v. Venku Reddi* (1) was brought to their notice, but they merely remark: "An old decision of this Court, not reported in the authorised reports, namely, *Seetharami Reddi v. Venku Reddi* (1) supports Mr. Devadoss." They proceed to dispose of the case on a different ground, namely, "that a decision in a regular suit instituted to contest the order in the claim proceedings places the parties in *status quo ante* either by vacating the order made in the said proceedings, or by confirming it. The result is the plaintiff is directed not to interpose obstacles in carrying out the further steps necessary to reap the fruits of the attachment. Both the parties are bound by that pronouncement. Consequently no question of interruption of possession or of its continuance despite the attachment arises." So far from intending to overrule or disapprove of the decision in *Seetharami Reddi v. Venku Reddi* (1), it appears to me from this last sentence quoted from the judgment that the learned Judges held that the question did not arise. In my opinion, therefore, as far as authorities have been brought to our notice the case in *Seetharami Reddi v. Venku Reddi* (1) stands uncontradicted. It is a case that has stood for over 23 years and it seems to me that it would be improper for us to decline to follow it unless there was some very cogent reason for doing so.

Now it has been constantly held that adverse possession is a question of fact. It has been argued for the appellant that the nature of an attachment is such that, on an attachment taking place, the Court receives the properties into its custody and what this means may be seen by the form of attachment given in Appendix E, Form 24, of the C. P. C. It only directs abstinence from transferring or charging the property by gift, sale or otherwise during the continuance of the attachment. It certainly does not physically interrupt the possession of persons already on the property and in my view it cannot be said

even theoretically to do so. If it were allowed to interrupt any possession, one can see that a wide door is opened to fraud and oppression.

The case in *Vasudeo Atmaram Joshi v. Eknath Balkrishna Thite* (3) supports the appellant. That was a suit to establish the appellant's right and sell the property in dispute as that of the judgment-debtors and it was held that the appellant must prove that on the date of the attachment, which was subsequently raised, the judgment-debtor had subsisting right to the property; and that the suit must, therefore, be tried as if it were a suit for possession by the judgment-debtors. The learned Judges add "So regarded, it is not the case here of the judgment-debtors having been dispossessed or having discontinued possession while in possession of the property." The learned Judges there specifically rely on *Harishankar Jobhai v. Naran Karsan* (4), where the critical date is taken to be that of the order of 11th August 1913 which directed the removal of the attachment. That date corresponds to 10th June 1918 in the present case and is conclusive of the present point as that date is more than 12 years from 30th March 1906. An old case in *Krishnama Rajah v. Narayanasamy Rajah* (15) lays down that the effect of an attachment does not change in any way the possession of the property so as to bring the case within 12 years' limitation.

A further point was taken, namely, that the suit as allowed by O. XXI, r. 63 although called a suit, was in fact nothing but a continuation of the claim proceedings; and the appellant relied on *Krishnappa Chetty v. Abdul Khader Sahib* (16). In that case the Privy Council decision in *Phul Kumari v. Ghanshyam Misra* (5) was referred to and in the opinion of Sadasiva Iyer, J., such suits have not any of the essential of original actions "but merely forms of appeal allowed by the C. P. C., to be brought in the guise of original suits." This judgment of their Lordships has, however, been commented upon by a Full Bench of this Court in *Ramaswami Chettiar v. Mallappa Keddiar* (17), where

(15) 4 M. H. C. R. 281.

(16) 25 Ind. Cas. 11; 38 M. 535 at p. 544; 26 M. L. J. 449.

(17) 59 Ind. Cas. 947; 43 M. 760 at p. 773; (1920) M. W. N. 572; 39 M. L. J. 350; 28 M. L. T. 170; 12 L. W. 475.

Wallis, C. J., said: "The Privy Council, no doubt, referred in one place to the suit under s. 283 to establish the right of the unsuccessful party to the claim petition as an 'action of appeal' and to the plaint in such a suit, as 'a plaint for review of a summary decision' but this language must be read, with reference to the question before them." Oldfield, J., in the same case points out that all their Lordships were concerned with was the question of Court-fee, in connection with which the character of the relief asked for by the plaintiff would be decisive.

For these reasons I am of opinion attachment does not interrupt adverse possession or rather possession which is ripening into adverse possession. This second point also fails and we must give effect to the decision in *Seetharami Reddi v. Venku Reddi* (1) above quoted. I agree with my learned brother that there being, in my opinion, good and sufficient authority against the proposition that adverse possession can be interrupted by attachment, there is no necessity for reference to a Full Bench. Consequently the second appeal must be dismissed with costs.

V. N. V.
S. D.

Appeal dismissed.

LAHORE HIGH COURT.

CIVIL REVISION No. 711 OF 1924.

February 20, 1925

Present:—Mr. Justice Campbell.

THE FIRM BHOGI LAL-TRIKAM
LAL—DEFENDANTS—PETITIONERS

versus

THE FIRM AMAR NATH-LAJPAT RAI
—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115—Jurisdiction, decision as to—Appeal—Revision, whether lies.

An appellate judgment deciding, even if erroneously, that a Court of first instance had jurisdiction to hear a suit, is not open to revision by the High Court.

Daulat Ram v. Asa Ram, 46 P. R. 1886, *Arur Singh v. Bua Ditta*, 9 Ind. Cas. 674; 4 P. R. 1911; 45 P. L. R. 1911; 26 P. W. R. 1911 and *Chhubu Mian v. Har Charan Das*, 18 Ind. Cas. 529; 119 P. R. 1912; 101 P. L. R. 1913; 48 P. W. R. 1913, followed.

Petition, under s. 44 of Act IX of 1919 for revision of an order of the District Judge,

Amritsar, dated the 13th October 1924, reversing that of the Subordinate Judge, Third Class, Amritsar, dated the 24th March 1923.

Lala Badri Das, R. B., for the Petitioners.

Mr. Jai Gopal Sethi, for the Respondents.

JUDGMENT.—The weight of authority in the Punjab is in favour of the view that an appellate judgment deciding (even if erroneously) that the Court of first instance had jurisdiction to hear the suit is not open to revision by the High Court, *vide Daulat Ram v. Asa Ram* (1), *Arur Singh v. Bua Ditta* (2) and *Chhubu Mian v. Har Charan Das* (3). I hold that on this preliminary objection the petition fails and I dismiss it with costs.

Z K. *Appeal dismissed.*

(1) 46 P. R. 1886.

(2) 9 Ind. Cas. 674; 4 P. R. 1911; 45 P. L. R. 1911; 26 P. W. R. 1911.

(3) 18 Ind. Cas. 529; 119 P. R. 1912; 101 P. L. R. 1913; 48 P. W. R. 1913.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 143 OF 1924.

April 8, 1925.

Present:—Mr. Justice Ramesam.

Syed MUHAMMAD SAHIB—DEFENDANT
No. 1—PETITIONER

versus

A. P. R. L. ALAGAPPA CHETTIAR
—COUNTER-PETITIONER—PLAINTIFF—

RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115, O. IX, r. 13—Ex parte decree, application to set aside—Matters for consideration—Good defence on merits, relevancy of—Defendant's knowledge of decree; nature of—Effect—Order without considering real question—Interference—Revision.

In an application under O. IX, r. 13, C.P. C., what the Court has to find is not whether the defendant has any good defence on the merits but whether there has been proper service, and if there is proper service whether there was sufficient cause for his non-appearance. Apart from the question of limitation the defendant's knowledge of the suit after a decree is irrelevant for any other purpose. [p. 1043, col. 2; p. 1044, col. 1.]

And even for the purposes of limitation, a vague knowledge that a decree had been passed by some Court is not enough. It must be found that the defendant had knowledge that a particular decree had been passed against him in a particular Court in favour of a particular person and for a particular sum. [p. 1044, col. 2.]

Bapurao Sakharan v. Sadhu Bhivba, 72 Ind. Cas. 130; 47 B. 485; 25 Bom. L. R. 74; (1923) A. I. R. (B.) 193, relied on.

Where the Courts below have not considered in such a case the real question, whether sufficient cause has been shown by the defendant for non-appearance, it is

an irregularity justifying the interference of the High Court in revision under s. 115, C. P. C. [p. 1044, col. 2.]

Where on summons being taken out in a suit the *amin* went to the village of the defendants and learnt that they had gone to another place and the time of their return was not known and there was no adult male member in their families and the summonses were then affixed to the outer-doors of their houses:

Held, that there was not merely substituted service but good service according to law. [p. 1044, col. 2; p. 1045, col. 1.]

Abraham Pillai v. Donald Smith, 29 M. 324, *Arunachala Aiyar v. Subbaramiah*, 68 Ind. Cas. 971; 46 M. 60; (1922) M. W. N. 600; 31 M. L. T. 257; 16 L. W. 583; 43 M. L. J. 632; (1923) A. I. R. (M.) 63 and *Likshminarayana v. Standard Oil Company of New York*, 72 Ind. Cas. 669; 17 L. W. 627; 44 M. L. J. 488; 32 M. L. T. 295; (1923) A. I. R. (M.) 581, followed.

Petition, under s. 115 of Act V of 1908, praying the High Court to revise the judgment and decree of the District Court, Coimbatore, in C. M. A. No. 70 of 1923, preferred against an order of the Court of the District Munsif, Tiruppur, in I. A. No. 1181 of 1923, in O. S. No. 1006 of 1922.

Mr. Watrap S. Subrahmanya Iyer, for the Petitioners.

Mr. S. Muthiah Mudaiyar, for the Respondents.

JUDGMENT.—The facts of this revision petition may be stated as follows. The respondent before me was the plaintiff in O. S. No. 1006 of 1922 on the file of the District Munsif of Tiruppur. He filed a suit to recover Rs. 797-9-6 due on a pro-note executed on 27th December 1919 by the two defendants. The 2nd defendant never appeared in the suit and we are not now concerned with him. The first defendant is the petitioner before me. The first summons to him was issued in April 1922. It was not personally served and a fresh service was ordered. Summons was taken out a second time in July 1922. The *amin* went to the village of the defendants on 7th July. He learnt that the defendants had gone to Satyamangalam and other places and the time of their return was not known and that there was no adult male member in their families. The summonses were then affixed to the outer-doors of their houses. These facts were sworn to by the *amin* before the Deputy Nazir and apparently also confirmed by the report of the village officer. This return of the *amin* was on the 10th July. The District Munsif ordered the suit to proceed *ex parte* and the case was taken up on the 19th July and decreed in favour of the plaintiff. The first defendant filed the present petition on the 7th of August 1923 with an

affidavit in which he states that he was not aware of the suit, that the notice in E. P. No. 2104 of 1923 (a petition filed for the execution of the decree) was served on him on 31st July 1923. He mentioned other facts going to show that there was collusion between the plaintiff and the 2nd defendant and referred to a mortgage obtained by the plaintiff's brother from the 2nd defendant. He afterwards applied for and obtained a copy of this mortgage and filed it before the District Munsif on the 19th of October 1923. The District Munsif said "No doubt there was no personal service but first defendant has apparently been aware of the decree and 2nd defendant's alleged partial adjustment of it. * * * * First defendant's defence on the merits seems to be very weak. * * * * I am not inclined to set aside the decree". In an application under O. IX, r. 13, C. P. C., what the Court has to find is not whether the defendant has any good defence on the merits but whether there is proper service and if there is proper service whether there was sufficient cause for his non-appearance. I presume that in this case there was service which was good service according to law, though I should think Courts ought not to proceed to the trial of a case, until at least three services have been taken upon the defendants which is the practice in the High Court and I would like this to be followed in the Courts below before the case is allowed to proceed *ex parte*, but as I said I will assume that there was some good service according to law. But even then a defendant may give a good reason for non-appearance. He may tell the Court that, as a matter of fact, he was unaware of the suit which means that he never saw any paper pasted on the outer-door of his house. If the Court believes him it follows that he could not be aware of the suit and in such a case though there was good service, there is sufficient cause for the non-appearance of the party, and in such a case the Court ought to set aside the *ex parte* decree.

In *Arunachala Aiyar v. Subbaramiah* (1), Schwabe, C. J., and Wallace, J., held that this ought to be the attitude of the Court in dealing with an application of this kind though no doubt there the facts were somewhat different. The same view was taken

(1) 68 Ind. Cas. 971; 46 M. 60; (1922) M. W. N. 600; 31 M. L. T. 257; 16 L. W. 583; 43 M. L. J. 632; (1923) A. I. R. (M.) 63.

by the same Bench in *Lakshminarayana v. Standard Oil Company of New York* (2), though again the facts are somewhat different. Whether the first defendant was aware of the decree after the passing of the decree and partial adjustment by the 2nd defendant is irrelevant except for the purpose of deciding whether the petition is barred by limitation. There is no finding by the District Munsif that the petitioner became aware of the decree on or before a particular date. It is, therefore, clear to me that the District Munsif did not refer to the mortgage document and the first defendant being aware of the decree for the purpose of limitation, the application for the copy of the mortgage itself was made after the filing of the petition. If it is not useful for the purpose of limitation, it is irrelevant for any other purpose. I, therefore, think the District Munsif has not addressed himself to the question that has to be decided in an application of this sort. On appeal the District Judge says:—"Appellant was twice affixed, his co-executant's (2nd defendant's) property was attached before judgment. * * * I cannot believe his statement that he had no knowledge of the suit until more than a year after the decree." The statement that the appellant was twice affixed only amounts to saying that there was service which was good according to law, a matter with which I agree. The next statement "his co-defendant's property was attached before judgment" seems to be irrelevant. Assuming that a man heard of the attachment of a co-defendant's property, it does not follow that he has evaded service or that he abstained from appearing without proper cause. It may be he was waiting for being served and never got the summons. The next statement of the District Judge that he cannot believe the petitioner's statement that he had no knowledge of the suit until more than a year after a decree again leads to no conclusion. Unless the District Judge finds positively that the petitioner was aware of the decree at a time which was more than a month before the petition, it is not barred by limitation. And apart from the limitation the knowledge of the suit after a decree is irrelevant for any other purpose. I, therefore, think the District Judge also has not addressed

himself to the proper question. The case of *Sankaralinga Mudali v. Ratnasabhapati Mudali* (3) only shows that an *amin* is justified in affixing the summons to the door if there is no prospect of his being able to serve the defendant within a reasonable time. I assume this point in favour of the respondent in this case. In *Abraham Pillai v. Donald Smith* (4), it was laid down that summons if possible must be served in person and that substituted service should be ordered only when reasonable grounds exist for believing that defendant is keeping out of the way to avoid service or for other reasons, he cannot be served in the ordinary way. Because these conditions are not fulfilled, the High Court interfered in revision. It is true the present case is not a case of substituted service and I have held that the service on the door by affixture was good service but still as the Courts below have not considered the question whether sufficient cause was shown by the defendant for non-appearance, I hold it is an irregularity justifying my interference in revision. In *Abraham Pillai v. Donald Smith* (4), the High Court itself set aside the *ex parte* decree. A similar view was taken in *Nagary Rasappa Setti v. Namburi Venkataratnam* (5), though I keep before my mind the fact that the revision petition in that case was a petition under s. 25 of the Small Cause Courts Act. Wallace, J., seems to have taken a similar view in Civil Revision Petition No. 745 of 1924. In *Bapurao Sakharam v. Sadhu Bhivba* (6), it was pointed out that even for the purposes of limitation, a vague knowledge that a decree had been passed by some Court is not enough. It must be found that the defendant had knowledge that a particular decree had been passed against him in a particular Court in favour of a particular person and for a particular sum. I agree with this view of Macleod, C. J., and Crump, J. A vague suspicion that the defendant must have heard of some decree is not enough to dismiss his petition on the ground that it is barred by limitation. It is true that the view in *Abraham Pillai v. Donald Smith* (4)

(3) 21 M. 324; 8 M. L. J. 58; 7 Ind. Dec. (N. S.) 585.

(4) 29 M. 324.

(5) 21 Ind. Cas. 922; (1913) M. W. N. 1028; 14 M. L. T. 535.

(6) 72 Ind. Cas. 130; 47 B. 485; 25 Bom. L. R. 74; (1923) A. I. R. (B.) 193.

(2) 72 Ind. Cas. 669; 17 L. W. 627; 44 M. L. J. 488; 32 M. L. T. 296; (1923) A. I. R. (M.) 581.

was not fully concurred in *Sitram Swami v. Kalandi Patra* (7), *Gontla Venkata Pitchayya v. Mahommad Abdul Kareem Beg* (8) and *Kasiriswanathan Chetty v. Somusundaram Chetty* (9). In *Sitram Swami v. Kalandi Patra* (7), the defendant left Bengal for the Madras Presidency. It was held there was good service but the question whether there was sufficient cause for non-appearance otherwise, was not discussed. The only point discussed is whether the *amin's* affixture of the summons was proper. This case was followed in *Gontla Venkata Pitchayya v. Mahommad Abdul Kareem Beg* (8). In *Kasiris Anathan Chetty v. Arunachalam Chetty* (10), the defendant had gone to a foreign territory. Substituted service was held to be proper and no other question was discussed. The same remarks apply to *Valluri Basavayya v. Peruri Kistna Brahman* (11). In *Bhai Chand Ful Chand v. Dawood Ayub* (12), the defendant had notice. The only question is whether he could not attend on account of illness and the High Court refused to interfere in revision. Following *Abraham Pillai v. Donald Smith* (4) and the principle laid down in *Arunachala Aiyar v. Subbaramiah* (1) and *Lakshmi Narayana v. Standard Oil Co. of New York* (2), I hold I am entitled to interfere in revision. I find that the defendant was not, as a matter of fact, aware of the suit and showed sufficient cause for non-appearance. I set aside the order of the Courts below and direct the District Munsif to proceed with the suit according to law only so far as first defendant is concerned. But as I have no desire to be unduly lenient to the petitioner, the costs in all the Courts will abide the result. The security already furnished by the petitioner will continue till the disposal of the suit.

V. N. V.

Order set aside.

(7) 13 Ind. Cas. 127; 17 C. W. N. 999.

(8) 23 Ind. Cas. 14; 26 M. L. J. 368; 15 M. L. T. 217; (1914) M. W. N. 253.

(9) 70 Ind. Cas. 611; 42 M. L. J. 422; (1922) M. W. N. 173; (1922) A. I. R. (M.) 93; 45 M. 875.

(10) 12 Ind. Cas. 420; 21 M. L. J. 976; 10 M. L. T. 566; (1911) 2 M. W. N. 357.

(11) 23 Ind. Cas. 219; 1 L. W. 351.

(12) 76 Ind. Cas. 60; (1924) I. A. R. (Pat.) 816.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 1554 OF 1923,

July 16, 1925.

Present:—Mr. Justice Abdul Raoof.

KHAZAN CHAND AND OTHERS—PLAINTIFFS
—APPELLANTS

versus

PARAS RAM AND OTHERS—DEFENDANTS—
RESPONDENTS*Hindu Law—Custom—Succession—Brahmans of Damun Chak, Tehsil Kharian, District Gujrat—Burden of proof.*

Brahmans are essentially Hindus and non-agriculturists and the burden of proving that they have in any particular departed from their personal law and have adopted rules prevailing among their agricultural neighbours rests upon those who make the assertion. [p. 1046, col. 1.]

Brij Lal v. Sarja Nand, 9 Ind. Cas. 829; 105 P. L. R. 1911; 68 P. W. R. 1911 and *Salig Ram v. Badhawa*, 73 Ind. Cas. 759; 4 L. 254; 5 L. L. J. 471; (1923) A. I. R. (L.) 591, followed.

Dat *Brahmans* of village Damun Chak in the Kharian Tehsil of Gujrat District are governed by Hindu Law in matters of succession. [p. 1045, col. 2.]

Second appeal against a decree of the District Judge, Jhelum, dated 19th March 1923, reversing that of the Sub-Judge, Fourth Class, Gujrat, dated the 26th February 1923.

Mr. D. C. Ralli, for the Appellants.

Mr. Shamair Chand, for the Respondents.

JUDGMENT.—This was a suit for the possession of 465 *kanals* 9 *marlas* of land and of a house situated at Damun Chak, Tehsil Kharian, District Gujrat. The pedigree-table given in the judgments of the Courts below shows the relationship between the parties. The land and the house claimed formed part of the estate of Devi Dial on whose death his widow *Musammam* Makhni succeeded to his estate. On the 8th July 1918 she executed a Will by which she divided the whole of the property to which she had succeeded in favour of *Musammam* Kartar Devi, her daughter and Paras Ram, the minor son of the latter. Mutation was effected in favour of Paras Ram. The plaintiffs claiming to be the collaterals of the deceased, instituted the present suit on the allegation that *Musammam* Makhni had no authority under the custom applicable to the parties to make the alienation. The suit was resisted on the main ground that the community of *Dat Brahman*s of the village Damun Chak, Tehsil Kharian, District Gujrat, were governed in matters of succession by their personal law and not by custom. The principal issue which arose for decision

was whether the parties were governed by custom or Hindu Law in matters of succession. The Trial Court, holding that they were governed by custom, decreed the plaintiffs' claim. An appeal was preferred to the lower Appellate Court which took a different view from that taken by the Trial Court, and holding that the parties were not governed by custom but by Hindu Law, dismissed the claim. Hence this second appeal.

The findings recorded by the lower Appellate Court may be summarised as below:—

(1) That Damun Chak is principally inhabited by *Dat Brahmans* which is a large body having a large area in their possession;

(2) that admittedly some of the members of the *Dat Brahmans* of the village cultivate their land, some by tenants and some by themselves;

(3) that a large number of them have taken to service;

(4) that most of them carry on trade, do the business of money-lending; and

(5) that they had not given up their priestly duties.

Mr. Ralli the learned Counsel for the appellants has frankly admitted that no instances showing the application of agricultural custom to *Dat Brahman* of the village have either been cited or proved by the oral or documentary evidence tendered on behalf of the plaintiffs. The defendants called witnesses to prove that *Dat Brahmans* of the village in matters of succession were governed by Hindu Law. Some of these witnesses have cited some instances also. However, no documentary proof of those instances was filed. The burden of proof lay upon the plaintiffs to prove affirmatively that the *Dat Brahmans* of the village were governed by custom and not by Hindu Law. In the case of *Brij Lal v Sarja Nand* (1), the rule laid down was that *Brahmans* were essentially Hindus and non-agriculturists and that the burden of proving that they had in any particular departed from their personal law and had adopted rules prevailing among their agricultural neighbours rested upon those who asserted it. The same rule has been recently laid down in the case of

Salig Ram v. Badhawa (2). The head-note* sums up the rule in the following words:—

"That the initial presumption in the case of *Brahmans* is that they are governed by their personal law, and that the mere fact that a family or tribe has departed from its personal law in one respect does not necessarily lead to the conclusion that it has adopted agricultural custom in other respects."

Mr. Ralli has relied upon the following rulings among others and has asked us to hold that, inasmuch as the *Dat Brahmans* of the village Damun Chak were shown to have formed a compact body and to have carried on cultivation they were governed by agricultural custom:—

(1) *Bishen Das v. Ram Dhan* (3). The ruling is distinguishable, because in that case the *Brahmans* had given up their priestly profession, while the contrary has been proved in this case.

2. *Devi Ditta Singh v. Dropti* (4). In this case instances of custom in the family were cited and proved.

3. *Jai Ram v. Sardar Singh* (5). In this case it was established that the *Brahmans* had given up their priestly profession and it was proved that daughters were excluded from succession.

4. *Tahl Das v. Malik Singh* (6). In this case the custom was not established and the collaterals' suit was dismissed. We fail to understand why the learned Counsel has relied upon this case.

The present case is fully governed by the recent ruling in the case of *Salig Ram v. Badhawa* (2). In our opinion the learned Judge of the Court below has arrived at a correct conclusion.

The appeal fails and is dismissed with costs.

Z. K.

Appeal dismissed.

(2) 73 Ind. Cas. 759; 4 L. 254; 5 L. L. J. 471; (1923) A. I. R. (L.) 501.

(3) 7 Ind. Cas. 483; 63 P. R. 1910; 100 P. W. R. 1910; 112 P. L. R. 1910.

(4) 2 Ind. Cas. 940; 56 P. R. 1909; 129 P. L. R. 1909; 96 P. W. R. 1909.

(5) 26 Ind. Cas. 512; 23 P. R. 1914; 195 P. L. R. 1914.

(6) 19 Ind. Cas. 855; 2 P. R. 1914; 138 P. W. R. 1913; 236 P. L. R. 1913.

*Head-note of 4 L.—[Ed.]

(1) 9 Ind. Cas. 829; 105 P. L. R. 1911; 68 P. W. R. 1911.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 464 OF 1923.

October 1, 1924.

Present:—Mr. Justice Ramesam and
Mr. Justice Jackson.SUBRAMANIA IYER—DEFENDANT—
APPELLANT

versus

A. SUBBAN CHETTIAR—PLAINTIFF—
RESPONDENT.*Negotiable Instruments Act (XXVI of 1881), s. 9—
Pro-note in favour of agent—Suit by principal with-
out endorsement, whether maintainable.*

Where a promissory note is executed in favour of a person as the agent of another, such other, as principal, is entitled to maintain a suit on the note without any endorsement from the agent.

Veerian Chettiar v. Ponnusawmi Chettiar, 12 Ind. Cas. 421; (1911) 2 M. W. N. 340; 10 M. L. T. 328; 36 M. 362; 24 M. L. J. 509, *Sowcar Lodd Govinda Doss v. Muneppa Naidu*, 31 M. 534; 4 M. L. T. 341 and *Ramanadhan Chetty v. Katha Velan*, 42 Ind. Cas. 934; 41 M. 353; 33 M. L. J. 627; 6 L. W. 753; (1917) M. W. N. 843; 22 M. L. T. 458, followed.

Appeal against an order of the Court of the Subordinate Judge, Tanjore, dated the 24th October 1923, in A. S. No. 115 of 1923, preferred against a decree of the Court of the District Munsif, Tanjore, in O. S. No. 570 of 1921.

FACTS.—The defendant executed a pro-note in favour of one Ramasami Naidu, who was described as "Ramaswami Naidu, Manager of Subban Chettiar & Co." The suit was brought by Subban Chettiar & Co., without any endorsement from Ramaswami Naidu. The defendant pleaded *inter alia* that the suit without endorsement from Ramaswami Naidu was not sustainable.Mr. E. Vinayaka Rao, for the Appellant.
Messrs. T. S. Ramaswami Iyer and V. Sundaram Iyer, for the Respondent.**JUDGMENT.**—This case is on all fours with *Veerian Chettiar v. Ponnusawmi Chettiar* (1) and is a stronger case than *Sowcar Lodd Govinda Doss v. Muneppa Naidu* (2), the remarks in which also support the view of the Court below. It is true that *Sowcar Lodd Govinda Doss v. Muneppa Naidu* (2) was disapproved in *Ulagappa Chetty v. Ramanathan Chetty* (3) but this latter decision was reversed in Letters Patent Appeal, in *Ramanadhan Chetty v. Katha Velan* (4). In *Reoti Lal v. Manna Kunwar* (5), the

(1) 12 Ind. Cas. 421; (1911) 2 M. W. N. 340; 10 M. L. T. 328; 36 M. 362; 24 M. L. J. 509.

(2) 31 M. 534; 4 M. L. T. 341.

(3) 32 Ind. Cas. 821; 3 L. W. 171.

(4) 42 Ind. Cas. 934; 41 M. 353; 33 M. L. J. 627; 6 L. W. 753; (1917) M. W. N. 843; 22 M. L. T. 458.

(5) 65 Ind. Cas. 785; 44 A. 290; 20 A. L. J. 126; (1922) A. I. R. (A.) 70.

principal's name was not disclosed. The passage from Dicey's Parties to an Action, page 134 (1870 Edition) apparently deals with a similar case, the only authority mentioned being Leake on Contracts, page 302. The view we are adopting is in accordance with Daniel's Negotiable Instruments, s. 1187, latter part. There is no section about payee like s. 28 of the Negotiable Instruments Act, in respect of maker and the general principles of the Law of Agency apply. The principal is disclosed in this case.

It is open to the defendant to prove that, at the time of the execution of the note, Ramaswami Naidu was not an agent of plaintiff and did not take the note for the plaintiff. It is also open to the defendant to prove payment to Ramaswami Naidu. The Subordinate Judge is right in holding that the suit is maintainable and the appeal is dismissed with costs.

V. N. V.

N. H.

Appeal dismissed.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 582 OF 1925.

July 11, 1925.

Present:—Mr. Justice Addison.

DEVI CHAND—PLAINTIFF—APPELLANT
versusCOLONEL SIR Raja JAI CHAND AND ANOTHER
—DEFENDANTS—RESPONDENTS.*Appeal, second—Finding of fact—Documentary evidence, construction of, whether question of law—Ala maliks—Shamilat, rights in.*

The question of the construction of documentary evidence, apart from the construction of a document of title which is the foundation of a claim, is one of fact and not of law and cannot be agitated in second appeal. [p. 1048, col. 2.]

Gupta Nand Bharthi v. Hari Shankar, 78 Ind. Cas. 1016; (1925) A. I. R. (A.) 39, relied on.

The expression "construction" as applied to a document includes two things, namely, the meaning of the words and their legal effect. The meaning of the words in all cases is a question of fact but the legal effect of the words is a question of law. [ibid.]

Dal Singh v. Pluiman, 80 Ind. Cas. 264; (1923) A. I. R. (L.) 626, followed.The question whether an *ala malik* is or is not entitled to rights in the *shamilat* is not a question of law. [ibid.]*Sultan Ali v. Amir*, 51 Ind. Cas. 378; 35 P. R. 1919; 78 P. L. R. 1919, *Muhammad Ali v. Amir Khan*, 51 Ind. Cas. 380; 36 P. R. 1919; 79 P. L. R. 1919 and *Diwan Chand v. Sundar*, 36 Ind. Cas. 199; 68 P. R. 1916; 162 P. W. R. 1916; 77 P. L. R. 1917, referred to,

Second appeal from a decree of the Additional District Judge, Hoshiarpur, dated the 24th November 1924, affirming that of the Subordinate Judge, Fourth Class, Kangra, dated the 25th May 1923.

Messrs. Gullu Ram and Shamair Chand, for the Appellant.

Lala Mehr Chand Mahajan, for the Respondents.

JUDGMENT.—One Mian Devi Chand sued Colonel Sir Jai Chand, Raja of Lambagraon; and the Secretary of State for India for a declaration that he should be declared *jagirdar* and *ala malik* co-sharer in the *shamilat* of 11 *tikas* in village Kotlu, Tahsil Palampur, District Kangra, to the extent of his *jagir* in these *tikas* and that he was entitled to share the income from the *shamilat* in the above proportion. The Raja *inter alia* pleaded that the plaintiff was a *jagirdar* and *ala malik* only in those lands which were in the occupation of his *adna maliks*, and that he had nothing to do with the *shamilat*. It was further pleaded that in the case of *tika ban banjar* the plaintiff was neither owner nor *ala malik* in that *tika*.

Issue No. 2 was whether the plaintiff was an owner and co-sharer with the Raja in the rights in dispute. The lower Court held that he had no rights in *tika ban banjar* and that as regards the other *tikas* he was *ala malik* only and had no right to the *shamilat* or its income. He found that the original *sanad* was not produced and that undoubtedly the Settlement entries of 1868 and of the last settlement were against the plaintiff's claim, though at the second Settlement of 1891-92 there were some entries against which an appeal was filed by the Raja and as stated in the second part of para. 91, page 53, of the final report of the revised Settlement of 1897 that appeal was accepted and it was ordered that the former entries of 1868 should be restored though this was not done. He came to the conclusion that those entries of 1891-92 were an interpolation.

The learned Additional Judge has come to the same finding on the above point and on all other points as did the Trial Court. As regards the entries of 1891-92 he could not understand how these entries had ever been made in face of the remarks in the revised Settlement report of 1897 already referred to. He further held that whether or not there had been some interpolation in 1891-92 the document in question could not

be relied upon as there was no foundation for the making of those entries. He further held that the document relied upon was inconsistent and indefinite.

On the above finding and also on other grounds the Courts below concurred in dismissing the plaintiff's suit. The plaintiff has filed this second appeal relying principally on the entries already discussed in the Settlement of 1891-92. It was contended, however, that no second appeal lay on this ground. In *Durga Chowdhani v. Jewahir Singh Chowdhri* (1), it was held "that there was no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be". The Allahabad High Court held in *Gupta Nand Bharthi v. Hari Shankar* (2) "that the question of the construction of documentary evidence, apart from the construction of a document of title which is the foundation of a claim, is one of fact and not of law and cannot be agitated in second appeal". The Lahore High Court held in *Dal Singh v. Pluiman* (3) "that the expression 'construction' as applied to a document includes two things, namely, the meaning of the words and their legal effect. The meaning of the words is in all cases a question of fact and the effect of the words is a question of law." The document in question has been held by the learned Additional District Judge to be inconsistent and indefinite though he also held that the words "two parties" referred to the Raja and the *zemindars* and not to the plaintiff. This is a finding of fact which cannot be challenged on second appeal. Besides, there is other documentary evidence which is clearly against the appellants' claim and which both the Courts below were entitled to consider. There is no evidence that the rights claimed were ever exercised. I would, therefore, hold that no second appeal lies.

It is also clear that the contention that an *ala malik* must be presumed to have rights in the *shamilat* is not a question of law. It was laid down in *Sultan Ali v. Amir* (4) that where the lower Appellate Court had after full consideration of all the evidence including the terms of the sale-

(1) 18 C. 23; 17 I. A. 122; 5 Sar. P. C. J. 560; 9 Ind. Dec. (N. S.) 16 (P. O.).

(2) 78 Ind. Cas. 1016; (1925) A. I. R. (A.) 39.

(3) 80 Ind. Cas. 264; (1923) A. I. R. (L.) 626.

(4) 51 Ind. Cas. 378; 35 P. R. 1919; 78 P. I. R. 1919

deed found that the ancestor of the defendant did not acquire a right to a proportionate share in the *shamilat* such finding was one of fact. Similarly it was held in *Muhammad Ali v. Amir Khan* (5) that where the deed of sale was silent on the point the question whether a *pro rata* share in the *shamilat* was intended to be conveyed to the vendee was not one of the construction of the deed and consequently could not be gone into in second appeal. In the recent case the original *sanad* has not been produced. It follows from these rulings that a share of the *shamilat* does not necessarily go to a particular proprietor. See also *Diwan Chand v. Sundar* (6). In the present case there is a clear finding of fact that the plaintiff is not entitled to the *shamilat* rights he claims and that finding is based on evidence properly considered and discussed.

I accordingly reject this appeal with costs.

Z. K.

Appeal rejected.

(5) 51 Ind. Cas. 380; 36 P. R. 1919; 79 P. L. R. 1919.

(6) 36 Ind. Cas. 193; 68 P. R. 1916; 182 P. W. R. 1916; 77 P. L. R. 1917.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 727 OF 1922.

March 30, 1925.

Present:—Mr. Justice Phillips.

KANCHERLA KANAKAYYA—DEFENDANT
No. 1—APPELLANT

versus

Sri Raja VENKATARAMAYYA
APPARAO BAHADUR AND OTHERS—
PLAINTIFFS NOS. 1 AND 2 AND DEFENDANTS
NOS. 2 TO 10—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 7—Decree in favour of minor—Transfer by guardian *ad litem* without sanction of Court—Transfer, whether void or voidable—Third party, right of, to question validity.

Under O. XXXII, r. 7, C. P. C., the guardian *ad litem* of a minor is not entitled to transfer a decree in favour of the minor without the sanction of the Court. But such a transaction is not void but only voidable at the instance of the minor, that is, the minor alone can avoid the transaction on attaining majority if he thinks fit, or even earlier if some guardian on his behalf thinks fit, to establish its invalidity.

But a third party is not entitled to intervene in the transaction and to plead that it is void *ab initio* when neither of the parties to the transaction accept that contention.

Ishan Chandra Kundu v. Nilratan Adhikari, 72 Ind. Cas. 1049; 2 Pat. 538; 4 P. L. T. 311; 1 Pat. L. R. 217;

(1923) Pat. 184; (1923) A. I. R. (Pat.) 375, *Phulwanti Kunwar v. Janeshar Das*, 83 Ind. Cas. 782; 22 A. L. J. 521; 46 A. 575; (1924) A. I. R. (A.) 625; L. R. 5 A. 785 Civ. and *Jita Singh v. Man Singh*, 62 Ind. Cas. 794; 2 L. 164; 4 L. L. J. 211; (1922) A. I. R. (L.) 166, relied on.

Second appeal against a decree of the Court of the Subordinate Judge, Bezwada, in A. S. No. 7 of 1921, preferred against that of the Court of the District Munsif, Bezwada, in O. S. No. 125 of 1919.

Mr. G. Lakshmanan, for the Appellant.

Mr. T. Ramachandra Rao, for the Respondents.

JUDGMENT.—The question at issue in this appeal is, whether the transfer of the decree in favour of the second defendant by his guardian *ad litem* to the first defendant is valid and whether the plaintiff is entitled to contend that it shall be deemed invalid. The lower Courts have found that the transfer was not a fraudulent or colourable transaction and consequently the plaintiff cannot avoid it as being a transaction in fraud of creditors, but it is contended that inasmuch as the guardian *ad litem* did not obtain the sanction of the Court to the transfer it is void. This question has been considered in this Court and it has been held in *Kancherla Kanakayya v. Mulpuru Kottayya* (1), that the sanction of the Court to such a transfer, even after a decree is necessary and in this it follows the prior decision in *Davud Routhar v. Paramaswami Pillai* (2) which itself follows *Virupakshappa v. Shidappa* (3).

Order XXXII, r. 7 (2), C. P. C., does not say that a transaction in which the sanction of the Court has not been obtained shall be void, but that it shall be voidable as against all parties other than the minor. That means that the minor can avoid the transaction on attaining majority if he thinks fit, or even earlier if some guardian on his behalf thinks fit, to establish its invalidity. This has been held in *Ishan Chandra Kundu v. Nilratan Adhikari* (4), *Phulwanti Kunwar v. Janeshar Das* (5) and *Jita Singh v. Man Singh* (6).

(1) 63 Ind. Cas. 285; 41 M. L. J. 75; 13 L. W. 637; (1921) M. W. N. 437.

(2) 35 Ind. Cas. 70; 31 M. L. J. 207.

(3) 26 B. 109; 3 Bom. L. R. 565.

(4) 72 Ind. Cas. 1049; 2 Pat. 538; 4 P. L. T. 311; 1 Pat. L. R. 217; (1923) Pat. 184; (1923) A. I. R. (Pat.) 375.

(5) 83 Ind. Cas. 782; 22 A. L. J. 521; 46 A. 575; (1924) A. I. R. (A.) 625; L. R. 5 A. 785 Civ.

(6) 62 Ind. Cas. 794; 2 L. 164; 4 L. L. J. 211; (1922) A. I. R. (L.) 166.

It is now urged for the respondents that although the transaction is only voidable as against all parties other than the minor, it is absolutely void as against the minor, but this cannot be so, otherwise the minor could not ratify it, if it were void *ab initio*.

Then there seems to be no ground for allowing a third party to intervene in a transaction of this sort and to plead that it is void *ab initio* when neither of the parties to the transaction accept that contention. The transaction must be either ratified or impeached by the minor and it is not open in this case for the plaintiffs to say that it is not valid. The plaintiffs cannot consequently set aside this transaction and their suit, therefore, fails and is dismissed with costs throughout.

V. N. V.

Appeal allowed;

N. H.

Suit dismissed.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL

No. 2564 of 1924.

February 19, 1925.

Present:—Mr. Justice Abdul Raoof and
Mr. Justice Fforde.

Musammat BEGUM BIBI—JUDGMENT-
DEBTOR—APPELLANT

versus

BULAQI SHAH AND SONS—DECREE-
HOLDERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Civil Procedure Code (Act V of 1908), ss. 50, 99—Execution of decree—Decree transferred for execution—Death of judgment-debtor—Substitution, application for, where to be made—Application made in Court to which decree has been transferred, validity of—Legal representative, name of, incorrectly described, effect of—Step-in-aid of execution—Limitation, extension of.

An application for the substitution of the names of the legal representatives of a deceased judgment-debtor on the record in place of the deceased may be made to the Court to which the decree has been transferred for execution, and operates to extend limitation under cl. (5) of Art. 182 of Sch. I to the Limitation Act. In any case the fact that the application is not made to the Court which passed the decree is a mere irregularity which is covered by s. 99 of the C. P. C., and does not render the application altogether invalid for the purposes of extending limitation. [p. 1051, cols. 1 & 2.]

Where in such an application the name of the legal representative of the deceased judgment-debtor is not correctly given under a *bona fide* mistake, the application is nevertheless one to take a step-in-aid of execution within the meaning of cl. (5) of Art. 182 of

Sch. I to the Limitation Act and operates to extend limitation. [*ibid.*]

[Case-law considered.]

Miscellaneous second appeal from an order of the District Judge, Gujranwala, dated the 1st July 1924, reversing that of the Subordinate Judge, Second Class, Gujranwala, dated the 15th February 1924.

Dr. Shuja-ud-Din, for the Appellant.

JUDGMENT.—On the 30th of July 1916 Bulaki Mal obtained a money-decree from a Lahore Court against Fazal Hussain. The first application for execution of this decree was made on the 16th of June 1917. The execution case was then transferred under a certificate to a Court at Gujranwala on the 18th of October 1916. On the 9th of August 1917 the record was consigned to the record room. In the meantime Fazal Hussain, the judgment-debtor, had died on the 11th of June 1918. On the 19th of April 1920 second application for execution was made against the son of the deceased judgment-debtor who was described as Rahmat Ullah under the guardianship of his mother Musammat Hussain Bibi. This application was made to the Executing Court at Gujranwala. A prayer was made in this application to have the name of Rahmat Ullah substituted as the son and the legal representative of the judgment-debtor. A house was attached, and it is stated that $\frac{1}{3}$ rd of it was sold by auction and was purchased by a third party. This sale, however, was set aside on the 11th of January 1922, on the application of a third party who claimed the ownership of the house. This was done with the consent of the decree-holder. The present application for execution was made on the 25th of October 1922, against the son of the judgment-debtor who is now described as Inayat Ullah son of Fazal Hussain under the guardianship of his mother Musammat Begam Bibi. The execution of the decree was objected to on the following grounds, namely, (1) that the application for the substitution of the name of the son as the legal representative of the judgment-debtor ought to have been made to the Lahore Court which had passed the decree; and (2) that as Rahmat Ullah whose name was mentioned in the application of the 19th of April 1920, was not the son of the deceased judgment-debtor that application in the eye of the law was irregular and had no legal effect and that consequently the present application is barred by time.

On the first question there is a conflict of authority. The Madras and Allahabad High Courts are of opinion that an application for the substitution of the name of the legal representative of a deceased judgment-debtor ought to be made to the Court which had passed the decree (s. 50 of the C. P. C.); while, on the other hand, the Calcutta High Court has ruled that the application can be made to the Court to which the decree has been transferred for execution and that in any case if the application is not made to the Court passing the decree it is a mere irregularity which is covered by s. 99 of the C. P. C. (s. 578 of the old Code, 1882). The objectors cited the cases of *Seth Shapurji Nana Bhai v. Sankar Dat Dube* (1), *Madho Prasad v. Kesho Prasad* (2) and *Swaminatha Ayyar v. Vaidyanatha Sastri* (3) in support of their objections. The decree-holder relied on the decision of the Calcutta High Court in the case of *Sham Lal Pal v. Modhu Sulan Sircar* (4).

On the second question the decree-holder relied upon the case of *Bipin Behari Mittar v. Bibi Zohra* (5).

Sardar Sewa Singh, Subordinate Judge, Second Class, Gujranwala, gave effect to the objections and dismissed the application for execution as barred by time.

On appeal Mr. Ganga Ram, the learned District Judge, preferred to follow the ruling of the Calcutta High Court and held that the application for substitution had rightly been made to the Execution Court at Gujranwala and that in any case the irregularity was covered by s. 99 of the C. P. C. On the second question also the learned District Judge adopted the view expressed in *Bipin Behari Mittar v. Bibi Zohra* (5), and held that, though the name of the son of Fazal Hussain judgment-debtor was incorrectly given the application dated the 19th of April 1920, must be treated as a step-in-aid of execution according to law. The appeal was allowed, the application for execution was held to be within time and the case was remanded with the direction that the execution of the decree should proceed according to law.

Against this order the present appeal has been preferred and both the contentions

(1) 17 A. 431; A. W. N. (1895) 74; 8 Ind. Dec. (N. S.) 599.

(2) 19 A. 337; A. W. N. (1897) 75; 9 Ind. Dec. (N. S.) 221.

(3) 28 M. 466; 15 M. L. J. 116.

(4) 22 O. 558; 11 Ind. Dec. (N. S.) 372.

(5) 35 O. 1047.

raised in the Courts below have been put forward before us by Mr. Shuja-ud-din the learned Counsel for the judgment-debtor. We have no hesitation in holding that the view taken by the Calcutta High Court being more consonant with justice is correct, and, following that ruling, we hold that the application for substitution made in 1920, cannot be treated as being wholly ineffectual. We are also in accord with the view expressed by the Judges of the Calcutta High Court in *Bipin Behari Mittar v. Bibi Zohra* (5) and we hold that application of the 19th of April 1920 was a step-in-aid of execution according to law, and the present application not barred by time.

We accordingly dismiss the appeal with costs.

Z. K.

Appeal dismissed.

ODDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 137 OF 1925.

September 9, 1925.

Present:—Mr. Simpson, A. J. C.

JAIDAT SINGH AND OTHERS—

DEFENDANTS—APPELLANTS

versus

BALDEO SINGH—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Security found insufficient—Revision, whether entertainable.

No revision can be entertained on the mere ground that the Court acted wrongly in considering a certain security offered by the applicant to be insufficient.

Civil revision against a decree of the District Judge, Fyzabad, dated the 30th April 1924, confirming that of the Additional Subordinate Judge, dated the 6th August 1923.

Mr. H. Husain, for the Applicant.

ORDER.—This is an application under s. 115 of the C. P. C. in revision. It shows to what length parties will go in claiming to take advantage of the provisions of this section. The section is intended for cases where a Court has acted without jurisdiction or mis-used its jurisdiction seriously, I am asked to act under that section because certain security which the applicant offered is found by the Court to be insufficient. Counsel expects me to go through the evi-

dence and see whether the Court was justified in concluding that the security was insufficient. I decline to do any such thing. The application is not admitted.

N. H.

Application rejected.

LAHORE HIGH COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 3106
OF 1924.

May 6, 1925.

Present:—Mr. Justice Jai Lal.

DHANPAT RAI—DECREE HOLDER—
APPELLANT

versus

Sardarni GOPAL KAUR—OBJECTOR
—RESPONDENT.

Custom—Estate of male proprietor in hands of female heir—Estate, whether liable for satisfaction of decree passed against previous male holder—Widow, whether reversioner.

Under the Customary Law of the Punjab property in the hands of the mother of a deceased proprietor is liable to attachment in execution of a decree obtained by a creditor in respect of a debt incurred by a previous male holder of the estate. [p. 1053, cols. 1 & 2.]

A female heir who derives her title to the estate of a deceased male proprietor by virtue of her marriage into the family of the deceased holder of the estate cannot be regarded as a reversioner of the deceased. [p. 1053, col. 2.]

Miscellaneous first appeal from an order of the Subordinate Judge, First Class, Lahore, dated the 31st October 1924.

Lala Badri Dass, R. B., for the Appellant.

Moulvi Ghulam Mohy-ud Din, for the Respondent.

JUDGMENT.—A suit was instituted against one Udham Singh for recovery of Rs. 13,633. Udham Singh died during the pendency of the suit and his son Balwant Singh was substituted as defendant. Balwant Singh also died and his son Harmohan Singh was substituted in his place. Harmohan Singh also died and Sardarni Gopal Kaur widow of Balwant Singh and the mother of Harmohan Singh was substituted as defendant and a decree passed against the estate of the deceased Udham Singh. When the decree-holder attempted to execute the decree by the attachment of the property in the hands of Sardarni Gopal Kaur, he was met by an objection by the lady that the estate, not being charged with the debt of Udham Singh, came to her in her own rights as a reversioner and could not, there-

fore, be attached in execution of the decree. Reliance was placed on *Jagdip Singh v. Bawa Narain Singh* (1) and on *Bur Chand v. Gopal Kaur* (2). The learned Subordinate Judge upheld the objection of Sardarni Gopal Kaur and dismissed the application for execution of the decree. The decree-holder appeals to this Court.

It is contended on behalf of the decree-holder that the judgment in *Bur Chand v. Gopal Kaur* (2), not being *inter partes*, is not *res judicata* and that *Jagdip Singh v. Bawa Narain Singh* (1) is distinguishable from the present case because in that case the property sought to be attached was in the hands of reversioners and the widow is not a reversioner. A widow, the learned Counsel says, does not claim through any common ancestor but derives her interest by virtue of her marriage with the judgment-debtor and it is, therefore, claimed that the present case is governed by *Bhambul Devi v. Narain Singh* (3), in which it was held that "where a male proprietor governed by Customary Law has contracted a debt, in respect of which a simple money-decree has been passed against him, and thereafter has died leaving ancestral landed property, which has come into the possession of his widow on the usual life-estate, such property is liable to be attached at the instance of the deceased proprietor's judgment-creditor in execution of his money-decree." In that case *Jagdip Singh v. Bawa Narain Singh* (1) was considered and distinguished and the question was propounded whether the widow was to be considered the next holder as the term was used in the 1913 ruling and the following answer was given:—

"The tenure of the widow is very different from that of the reversioner both in its nature and in its origin. The widow's life-tenure originated in her right to maintenance but though originally her right was one only of maintenance which in course of time became a right to the enjoyment of the whole estate, whether it exceeded her needs or not, it is not now disputable that her right is to the whole estate.

That right she derives from her marriage; she is her husband's representative and so far has this principle been carried

(1) 15 Ind. Cas. 866; 4 P. R. 1913; 160 P. W. R. 1912; 173 P. L. R. 1912.

(2) Case No. 836 of 1919.

(3) 29 Ind. Cas. 572; 39 P. R. 1915; 103 P. W. R. 1915; 8 P. L. R. 1916.

that in many tribes she represents her husband even in collateral succession.

Had her husband remained in existence, he could not have resisted attachment of his property. How then can his widow who derives all her right from her husband, claim a privilege which her husband did not enjoy."

On these grounds it was held that the property was attachable.

The learned Counsel for the respondent has relied upon *Mikor v. Chhaju Ram* (4) in addition to the ruling already referred to. In that case the rule laid down in *Jagdip Singh v. Bawa Narain Singh* (1) was re-affirmed. LeRossignol, J., who was one of the Judges who sat on the Full Bench in *Mikor v. Chhaju Ram* (4) doubted the desirability or utility of laying down the abstract proposition contained in *Jagdip Singh v. Bawa Narain Singh* (1) and was of opinion that the earlier ruling was misleading in that it laid down one universal principle and appeared to hold that all the incidents of the tenure of a male owner of ancestral landed property had been exhaustively ascertained. But finally he agreed with the opinion of Chevis, J., who agreed with the earlier judgment. *Bhambul Devi v. Narain Singh* (3) which is also a judgment by LeRossignol, J., was not referred to in *Mikor v. Chhaju Ram* (4) probably that was not necessary. The status of a female heir in the Punjab is quite different to that of the male proprietors; one important difference is that females are not ordinarily entitled to contest alienations made by males: see *Zenab v. Shah Nawaz Khan* (5).

The learned Counsel for the appellant relied also on *Kishen Singh v. Rahmat Bibi* (6) in which it was held that "as a daughter is not an agnate and derives her title not from the common ancestor but from her father...she represents her father and his estate in her hands is liable for his debts." *Jagdip Singh v. Bawa Narain Singh* (1) was distinguished in that case also. On the strength of these judicial pronouncements it is claimed on behalf of the appellant that the estate being in the hands of the mother of a deceased proprietor who cannot be called an agnate and who derives her title

by virtue of her marriage in the family is liable to attachment in payment of debts incurred by a previous male holder of the estate. The learned Counsel for the respondent sought to distinguish the authorities relied upon on behalf of the appellant on the ground that the original debtor in this case was Udham Singh and that between Udham Singh and Sardarni Gopal Kaur two male heirs, i. e., Balwant Singh and Harmohan Singh intervened and that, therefore, Musammatt Gopal Kaur stepped into the shoes of her husband and her son respectively and further that by virtue of *Jagdip Singh v. Bawa Narain Singh* (1), the estate not being attachable in the hands of Balwant Singh and Harmohan Singh in payment of the debts of Udham Singh, it was equally not liable to attachment in the hands of the person, that is Sardarni Gopal Kaur who represents them. At first sight this contention seems to be plausible one but, in my opinion, there is no force in it. The real question to be decided is whether the person, who is in possession of the estate and who objects to its attachment is a reversioner that is whether she derives her title from the common ancestor of herself and the judgment-debtor. This cannot be predicated about any female heir at least not of one who derived her title by virtue of her marriage in the family of the deceased holder of the estate and that was the *ratio decidendi* in *Bhambul Devi v. Narain Singh* (3) and *Kishen Singh v. Rahmat Bibi* (6). The point is not free from difficulty but I think no difference is made by the fact that the son and the grandson of Udham Singh inherited the property before it came into possession of Sardarni Gopal Kaur.

I, therefore, accept this appeal, set aside the order of the learned Subordinate Judge and hold that the land left by Udham Singh and in the hands of Sardarni Gopal Kaur is liable to attachment and sale in execution of the decree against the estate of Udham Singh and I remand the case to the learned Subordinate Judge with directions to proceed with the execution of the decree in accordance with law.

Z. K.

Appeal dismissed.

(4) 49 Ind. Cas. 281; 17 P. R. 1919; 6 P. W. R. 1919.

(5) 13 Ind. Cas. 526; 47 P. R. 1912; 103 P. L. R. 1912; 145 P. W. R. 1912.

(6) 44 Ind. Cas. 561; 12 P. R. 1918.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 77 OF 1924.

December 11, 1924.

Present:—Sir Victor Murray Coutts-Trotter, Kt., Chief Justice, and Mr. Justice Madhavan Nair.

THE OFFICIAL ASSIGNEE OF
MADRAS—APPELLANT

versus

THE Zemindar OF UDAYARPALYAM
—RESPONDENT.

Presidency Towns Insolvency Act (III of 1909), s. 18—Insolvency jurisdiction of High Court—Stay of proceedings in Subordinate Courts.

Under s. 18 of the Presidency Towns Insolvency Act, the High Court in its insolvency jurisdiction has power to stay proceedings pending before a Mofussil Court subordinate to the High Court.

Appeal from the judgment and order of Mr. Justice Waller, dated the 3rd November 1924, passed in the exercise of the Insolvency Jurisdiction of the High Court, in I. P. No. 299 of 1924.

FACTS.—The Official Assignee representing the estate of an insolvent applied by Judge's summons to His Lordship Mr. Justice Waller sitting in the Original Side to direct stay of the proceedings in O. S. No. 52 of 1924 on the file of the Sub-Court, Kumbakonam, pending the further orders of the High Court and also to give the Official Assignee leave to take such proceedings as may be found necessary against the Zemindar of Udayarpalayam in respect of certain properties. The question was then raised as to the power of the High Court sitting in insolvency to stay suits in Subordinate Courts. His Lordship Mr. Justice Waller held that the objection to jurisdiction must be sustained and that the Court exercising jurisdiction under the Presidency Towns Insolvency Act has no power of supervision over the Sub-Court of Kumbakonam, that s. 18 did not apply and that the proper course for the Official Assignee was to apply to the Sub-Court under s. 18 (3) of the Act. The Official Assignee appealed.

Mr. Varadarajalu Mudaliar, for the Appellant.

JUDGMENT.

Coutts-Trotter, C. J.—This is a matter clearly within the jurisdiction of the Court under s. 18 corresponding to the familiar section of the English Bankruptcy Act, whereby cases of this kind are transferred as a matter of course every day and every one who has ever had any experience

of these matters will be quite familiar with it.

The appeal must be allowed and the learned Judge must exercise the jurisdiction which he has held that he did not possess. Costs on the original scale.

Madhavan Nair, J.—I agree.

V. N. V.

Appeal allowed.

N. H.

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 140 OF 1925.

July 16, 1925.

Present:—Sir Shadi Lal, Kt., Chief Justice.

THE FIRM HIRA SINGH-PRITAM
SINGH, THROUGH PRITAM SINGH—
PLAINTIFFS—PETITIONERS

versus

THE SECRETARY OF STATE FOR
INDIA IN COUNCIL, THROUGH THE
COLLECTOR, AMRITSAR—DEFENDANT
—RESPONDENT.

Railway Company—Carriage of goods—Goods consigned to Railway Company, loss of—Suit for damages—Wilful misconduct—Burden of proof.

In a suit to recover damages from a Railway Company for the loss of goods consigned to the Company for carriage under Risk Note Form "B" the burden lies upon the plaintiff to prove that his case falls within the exceptions laid down in the Risk Note. The refusal of the Railway Company to account for the loss of the goods does not justify the Court in holding that the loss must have arisen from the wilful misconduct of the Company's servants.

Petition, under s. 25 of Act IX of 1887, for revision of a decree of the Judge, Small Cause Court, Amritsar, dated the 1st December 1924.

Mr. Jai Gopal Sethi, for the Petitioners.

Kanwar Dalip Singh, Government Advocate, for the Respondent.

JUDGMENT.—On the 4th February 1923, 168 tins of *ghi* were delivered at Kaithal to the defendant Railway Company for despatch to the plaintiffs at Amritsar, but when the goods reached the consignees at Amritsar, 10 tins of *ghi* were found missing. The question is whether the defendant Company are liable for the loss caused to the plaintiffs.

The contract between the parties is contained in what is called Risk Note Form B, and the goods were despatched at a reduced rate upon the condition that the Railway Company shall not be liable for loss, etc., unless the loss is due "either to

the wilful neglect of the Railway Administration or to theft by or to the wilful neglect of its servants." It is obviously the duty of the plaintiffs to prove that their case falls within the aforesaid exception and this they have failed to do. There is no direct evidence to show that the loss was due to the wilful neglect of the Railway Administration or to the theft by or to the wilful neglect of its servants, and the circumstances relied upon by plaintiffs are inconclusive.

As pointed out by the House of Lords in *Smith, Limited v. Great Western Railway* (1) even the refusal of the Railway Company to account for the loss of the goods cannot justify the Court in holding that the loss arose from the wilful misconduct of the Company's servants.

The learned Judge, of the Small Cause Court has, upon a consideration of all the relevant circumstances, come to the conclusion that the plaintiffs have failed to prove any wilful neglect or theft which would bring the case within the exception contained in the Risk Note and his finding cannot be impeached in revision.

The application for revision is accordingly dismissed with costs.

Z. K. *Petition dismissed.*
(1) (1922) 1 App. Cas. 178; 91 L. J. K. B. 423; 27 Com. Cas. 247; 38 T. L. R. 359.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 34 OF 1923.

November 19, 1924.

Present:—Mr. Justice Devadoss.

Y. A. VENKATARAMIAH—

PETITIONER

versus

M. SUBBIREDDI AND ANOTHER—

RESPONDENTS.

Election petition—Election rules—Voter writing candidate's name on ballot paper—Vote, validity of—Misconstruction of rule—Refusal to apply rule—Revision—Interference by High Court—Civil Procedure Code (Act V of 1908), s. 115.

One of the rules regulating the conduct of elections in Madras is that the voter should only place his mark on the ballot paper against the name of the candidate for whom he wants to vote and should not write his own name or the name of the candidate on the ballot paper. A voter who writes the name of the candidate on the ballot paper against the space left for the cross-mark commits a breach of the election rules. These rules are not merely directory but manda-

tory and a violation of these rules nullifies the vote and such a vote should be declared invalid.

The fact that a lower Court in dealing with an election dispute has misconstrued an election rule, is not a proper ground for interference with its decision in revision. Where, however, the Court has refused to apply a certain rule on the ground that the rules should not be strictly construed in the case of illiterate voters its decision is open to revision.

Petition, under s. 115 of Act V of 1908, praying the High Court to revise an order of the District Court, Anantapur, dated the 31st August 1922, in O. P. No. 21 of 1922.

Mr. K. Srinivasa Rao, for the Petitioner.

Mr. V. Ramadoss, for the Respondents.

JUDGMENT.—This is an application to revise the order of the District Judge of Anantapur, declining to set aside an election on the ground of violation of the rules.

The petitioner's allegation in the petition was that one of the voters, instead of making a cross against the name of the candidate, wrote his name (the candidate's name) in the space provided, and that this was against the rules governing elections. The learned Judge held, that it would be inexpedient to construe too strictly the rules regulating the conduct of unlettered persons like many of these voters. One of these rules regulating the conduct of elections, is, that the voter should only place his mark against the name of the candidate for whom he wants to vote, but should not write his own name or the name of the candidate, for, by doing so the very object of the secret ballot will be lost. It is essential that in the case of secret ballot that it should not be known for whom a particular voter recorded his vote. It is admitted that a voter who writes the name of the candidate against the space left for the cross mark commits a breach of the election rules. These rules are not merely directory but mandatory. The violation of these rules nullifies the vote, and such vote should be declared invalid. The contention of Mr. Ramadoss for the respondent is, that this is a revision under s. 115 and the learned Judge has neither exercised a jurisdiction not vested in him by law nor has he declined to exercise a jurisdiction vested in him. If the learned Judge has only misconstrued the rule, it would not be a proper ground for interference; but he seems to think that the rule should not be strictly construed in the case of illiterate voters. Whether the voters are literate or illiterate, the rule is the same. That being so, I think this is a case for this Court to interfere. It is very unfortunate that this matter comes up near-

ly two and half years, after the date of the election. It is said that an order now passed would unseat the respondent and would entitle the petitioner to a seat. Considering that the result turned upon a single vote, I think this is a case in which the lower Court's order should be set aside. I, therefore, set aside the order of the District Judge and the result will be that the petitioner will be declared elected and he will be entitled to take his seat and the respondent will lose his seat.

The petitioner will be entitled to costs only in this Court.

V. N. V.

Petition allowed.

Z. K.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 3040 OF 1924.

April 20, 1925.

Present:—Mr. Justice Martineau.

Musammât RAM RAKHI—PLAINTIFF

—APPELLANT

versus

DAULAT RAM AND ANOTHER—

DEFENDANTS—RESPONDENTS.

Hindu Law—Marriage—Widow, re-marriage of—Ceremonies, necessary—Anand marriage, validity of—Anand Marriage Act (VII of 1909), applicability of.

The Anand Marriage Act of 1909 is an enabling and not a disabling Act and it does not follow that because that Act does not apply to a particular marriage solemnized according to the anand ceremony, the marriage is not a valid one.

It is not necessary for the validity of the marriage of a *Khatrî* widow that all the usual ceremonies which have to be performed in the case of a *Khatrî* girl on her first marriage should be performed. In such a case if the parties go through such ceremonies as they can reasonably arrange for and clearly and unequivocally express their intention to enter into the marriage relation with each other and as a fact thereafter live together as husband and wife, such union is a valid marriage.

Second appeal from a decree of the District Judge, Shahpur at Sargodha, dated the 11th October 1924, reversing that of the Junior Subordinate Judge, Sargodha, dated the 18th August 1924.

Mr. D. C. Ralli, for the Appellant.

Lala Badri Das, R. B., for the Respondents.

JUDGMENT.—The plaintiff sued for a declaration that she was not the wife of the defendant Daulat Ram who alleged that she had married him after the death of her first husband. She was given a decree by the Trial Court but the District Judge on appeal dismissed the suit, finding that the plaintiff had been married to the defendant, the marriage having been solemnized according to the *Anand* ceremony, that she lived with him as his wife and that the marriage was valid.

It is contended for the plaintiff in second appeal that as the defendant Daulat Ram is a *Khatrî* and not a *Sikh* the marriage is invalid, the Anand Marriage Act VII of 1909 not being applicable to a marriage between persons not professing the *Sikh* religion. But as observed by the learned District Judge, Act VII of 1909 is an enabling and not a disabling Act and it does not follow that because that Act does not apply the marriage is not a valid one. In *Lal Chand v. Thakur Devi* (1), it was held that it is not necessary for the validity of a marriage by a *Khatrî* widow that all the usual ceremonies which have to be performed in the case of a *Khatrî* girl on her first marriage should be performed and that in such cases if the parties go through such ceremonies as they can reasonably arrange for and clearly and unequivocally express their intention to enter into the marriage relation with each other and as a fact thereafter live together as husband and wife, such a union is a valid marriage. I agree with the learned Judge that this ruling is in point and that the marriage solemnized between the parties in the *Anand* form was a valid marriage.

The appeal is dismissed with costs.

Z. K.

Appeal dismissed.

(1) 49 P. R. 1903; 118 P. L. R. 1903.

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 — 1880—IX. See CESS ACT.
 — 1884—III. See BENGAL MUNICIPAL ACT.
 — 1885—VIII. See BENGAL TENANCY ACT.
 — 1919—V. See BENGAL VILLAGE SELF-GOVERNMENT ACT.
 — 1920—III. See CALCUTTA RENT ACT.
 — 1923—III. See CALCUTTA MUNICIPAL ACT.

Acts—Bihar & Orissa.

- 1908—VI. See CHOTA NAGPUR TENANCY ACT.

Acts—Bombay.

- Act 1876—X. See BOMBAY REVENUE JURISDICTION ACT.
 — 1879—V. See BOMBAY LAND REVENUE CODE.
 — 1888—III. See CITY OF BOMBAY MUNICIPAL ACT.
 — 1890—IV. See BOMBAY DISTRICT POLICE ACT.
 — 1901—III. See BOMBAY DISTRICT MUNICIPAL ACT.
 — 1904—I. See BOMBAY GENERAL CLAUSES ACT.
 — 1906—II. See MAMLATDARS' COURTS ACT.
 — 1920—XVII. See BOMBAY PLEADERS ACT.

Acts—C. P.

- 1920—I. See C. P. TENANCY ACT.

Acts—Madras.

- 1884—V. See MADRAS LOCAL BOARDS ACT.
 — 1886—I. See MADRAS ABKARI ACT.
 — 1900—I. See MALABAR COMPENSATION FOR TENANTS IMPROVEMENTS ACT.
 — 1908—I. See MADRAS ESTATES LAND ACT.
 — 1920—V. See MADRAS DISTRICT MUNICIPALITIES ACT.

Acts—U. P.

- 1869—I. See OUDH ESTATES ACT.
 — 1876—XVIII. See OUDH LAWS ACT.
 — 1879—XIII. See OUDH CIVIL COURTS ACT.
 — 1886—XXII. See OUDH RENT ACT.
 — 1901—II. See AGRA TENANCY ACT.
 — 1901—III. See U. P. LAND REVENUE ACT.

Regulations.

- 1814—XXIX. See BENGAL GHATWALI LANDS REGULATION.
 — 1819—VIII. See BENGAL PATNI TALUKS REGULATION.
 — 1825—XI. See BENGAL ALLUVION AND DILUVION REGULATION.
 — 1872—III. See SONTHAL PARGANAS SETTLEMENT REGULATION.

Statutes.

- 1915—(5 & 6 GEO. V, c. 61). See GOVERNMENT OF INDIA ACT.

Admission, erroneous, of Counsel on point of law, whether binding.

An erroneous admission by Counsel on a point of law is of no effect and does not preclude a party from claiming his legal rights in the Appellate Court. **C** RAM CHANDRA AGARWALA v. SYAMESWARI DASIA, 42 O. L. J. 71; A. I. R. 1925 Cal. 1171 **98**

Adverse possession. See TRANSFER OF PROPERTY ACT, 1882, ss. 92, 93 **418**

—, ingredients of. See LIMITATION ACT, 1908, SCH. I, ART. 144 **1007**

Adverse possession—concl'd.

— Attachment, whether sufficient to interrupt adverse possession—Symbolical delivery—Effect on possession of persons not parties to suit.

An attachment does not interrupt adverse possession or rather possession which is ripening into adverse possession.

Per *Phillips, J.*—*Obiter dicta.*—Adverse possession is not disturbed except by actual ouster.

An attachment under Ch. XII of the Cr. P. C. implies an actual taking possession of the property by the Magistrate or by some one under his orders.

Per *Odgers, J.*—Symbolical possession is sufficient to interrupt adverse possession when the adverse possessor is a party to the execution proceedings in which the symbolical possession is given. But as regards persons not so parties, only actual dispossession can interrupt their adverse possession.

An attachment does not physically interrupt the possession of persons already on the property and it cannot be said even theoretically to do so. **M RENGANATHA IYER v. SRINIVASA IYENGAR**, 22 L. W. 274; 49 M. L. J. 656; A. I. R. 1926 Mad. 42 **1037**

— Hindu widow, possession of, when in her own right.

Where a Hindu widowed mother, who is not entitled to succeed to the property left by the widow of her deceased son, takes possession of the property on the death of such widow, she does so in her own right and the adverse possession enures in her and cannot be deemed to be referable to her son's estate. **O DIRBIJOY SINGH v. DRIGPAL SINGH**, A. I. R. 1926 Oudh 126 **825**

— Landlord and tenant—Assertion of title by tenant—Re-entry, right of, absence of—Landlord, whether affected by assertion—Ejectment suit—Tenancy, plea of, whether bar to plea of adverse possession.

Where a tenant is in possession of land and the landlord has not the immediate right of re-entry, any assertion of title by the tenant would not make time run against the landlord, for the reason that the landlord cannot claim any redress so long as he is not entitled to get possession of the land. The real fact which makes the Law of Limitation run against the landlord is that he is entitled to immediate possession.

In a suit for possession of land, a mere assertion of tenancy does not deprive the tenant from pleading limitation and it is open to him in the first place, to plead that the land was comprised in his tenancy, and, in the second place to assert that if the tenancy is not established, as he has held possession of the land for more than 12 years, the right of the plaintiff to recover possession has been extinguished by the Law of Limitation. **C KHATEMY CHHAIKUDDIN v. RAM NARAIN GHOSE** **617**

— Mortgage—Agreement to relinquish equity of redemption—Agreement not properly evidenced by document and not binding, whether sufficient to start adverse possession.

An agreement to relinquish the equity of redemption would not be binding if not properly evidenced by a document but it will start adverse possession against the mortgagor from the date of such agreement. **O IBAD ALI v. DWARKA** **736**

Agra Tenancy Act (II of 1901), ss. 196, 197—Jurisdiction of Civil and Revenue Courts—Procedure.

Sections 196 and 197 of the Agra Tenancy Act must be read together. They both deal with a case in which

Agra Tenancy Act—concl'd.

an objection is taken in the Appellate Court that the suit was wrongly instituted in the Court below instead of in a Civil or Revenue Court as the case may be. Section 196 tells the Appellate Court what to do if the objection was not raised in the Trial Court. Section 197 tells it what to do if the objection had been raised. Both sections assume that the Trial Court has entertained the suit and disposed of it on the merits.

Neither section deals with a case where either or both Courts has or have wrongly refused to exercise jurisdiction. **A BISHESHAR PRASAD PANDAY v. RAGHUBIR**, L. R. 6 A. 255 Rev.; 24 A. L. J. 83; A. I. R. 1926 All. 58 **353**

Anand Marriage Act (VII of 1909), scope of. See HINDU LAW—MARRIAGE **1056**

Appeal (Civil)—Additional evidence, admission of, without objection—Reasons, failure to record, effect of.

Where a document is admitted in evidence by an Appellate Court without any objection by the opposite party and no prejudice is caused to the latter by the admission of the document, the document would not be rendered inadmissible by the mere fact that the Appellate Court neglected to state its reasons for admitting it in evidence. **C NABIN CHANDRA KAPALI v. GOUR MOHAN MISTIRI** **756**

— Agreement to abide by finding of Court—Appeal, whether lies.

Where both parties to a suit agree in a particular matter to abide by the finding of the Court in respect to it, such finding is final and binding on the parties and no appeal lies against it, the decision in such cases being in the nature of an arbitrator's award. **N SAMBA v. PAIKI**, 21 N. L. R. 84; A. I. R. 1925 Nag. 463 **550**

— Appellant, duty of.

An appellant must establish, before he can succeed, not only that the decision of the Court below might well have been different but that it ought necessarily to have been so. **O NARAIN DASS v. DEBI DIN SINGH**, A. I. R. 1926 Oudh 38 **566**

— Appellate Court, interference by. See **HINDU LAW—JOINT FAMILY** **458**

— Appellate Court's power to determine value of appeal. See **JURISDICTION** **321**

— Mortgage suit—Preliminary decree, ex parte—Final decree—Order refusing to set aside decree—Appeal, whether lies.

No appeal lies against an order refusing to set aside a preliminary decree after the passing of the final decree.

A preliminary decree is an interlocutory order, and the right of appeal against interlocutory orders ceases with the disposal of the suit. **C JOGENDRA NARAYAN DAS v. SATYENDRA CHANDRA GHOSE**, 29 C. W. N. 640; A. I. R. 1925 Cal. 790 **380**

— Suit of small cause nature—Execution—Appellate Court, order of.

No appeal lies to the High Court against an order of an Appellate Court in a matter of execution in a suit of small cause nature. **M VEERARAYAN v. AYYAKUTTI**, 48 M. L. J. 499; A. I. R. 1925 Mad. 742 **794**

— (Second)—Construction of document—Report of Commissioner, construction of—Question of law.

It is not every document, the construction of which is to be treated as involving an issue of law.

Appeal (Second)--contd.

The report of a Commissioner under O. XXVI, r. 10, C. P. C., cannot be regarded as a document, the construction of which involves a point of law for the purposes of a second appeal.

The report of a Commissioner is not documentary evidence which might be misconstrued. It is, in fact, an investigation made by him and it takes the place of oral evidence. **O SUMER SINGH v. DALTHAMMAN SINGH** 911

----- Custom, whether question of law or fact—Finding, whether can be questioned—Wajib-ul-arz, erroneous rejection of.

A question as to the existence of a custom is one of mixed fact and law. The question whether the facts found in any given instance prove the existence of the essential attribute of a custom or usage is a question of law and in second appeal an enquiry is permitted to be made whether all the attributes of a legal custom have been established or not by the evidence which is accepted by the lower Appellate Court.

Where a lower Appellate Court in deciding whether a custom does or does not exist has rejected a *wajib-ul-arz* on an erroneous view of the law, it is open to the High Court to interfere with the finding of the lower Appellate Court in second appeal. **O RAZA HUSAIN KHAN v. SUBHANI**, 2 O. W. N. 838; A. I. R. 1926 Oudh 53 525

----- Finding of fact involving conclusions of law, whether can be questioned—Appellate Court, duty of.

The finality given by law to a finding of fact arrived at by a Court of first appeal renders it necessary that the finding should be arrived at after due circumspection and be expressed in clear and definite terms.

A party to an appeal is entitled to claim a clear, definite and specific finding on every issue of fact raised in the case, and if the finding is vague, indefinite or ambiguous, it is but right to insist on such a finding being given or to send an issue back in order that the question of fact might be determined on findings adduced in a manner not open to misconstruction or doubt.

While findings of fact cannot be questioned in second appeal, the soundness of conclusions drawn from any facts may involve matters of law and may be questioned in such appeal. **A CHANNU DUTTAVYAS v. SWAMI GYANNANDJI MAHARAJ**, A. I. R. 1926 All. 130 976

----- Finding of fact—Documentary evidence, construction of, whether question of law—Ala maliks—Shamilat, rights in.

The question of the construction of documentary evidence, apart from the construction of a document of title which is the foundation of a claim, is one of fact and not of law and cannot be agitated in second appeal.

The expression "construction" as applied to a document includes two things, namely, the meaning of the words and their legal effect. The meaning of the words in all cases is a question of fact but the legal effect of the words is a question of law.

The question whether an *ala malik* is or is not entitled to rights in the *shamilat* is not a question of law. **L DEVI CHAND v. JAI CHAND**, A. I. R. 1926 Lah. 21 1047

----- Finding of fact—Documentary evidence not considered—Finding, whether binding.

Where an Appellate Court mentions certain docu-

Appeal (Second)--concl.

ments in the course of its judgment in stating the argument on behalf of one of the parties but fails to consider the documents or their legal effect in arriving at its finding, the finding, even although one of fact, is not binding on the High Court in second appeal.

Per **Mullick, J.**—A finding as to the identity of property sold at a Court sale relates to a mixed question of fact and law and is open to revision in second appeal. **PAT CHRISTIAN v. PRASAD RAUT**, (1925) Pat. 220; A. I. R. 1925 Pat. 615; 4 Pat. 760; 7 P. L. T. 280 501

----- Finding of fact, whether can be impeached—Evidence, consideration of—First Appellate Court, position of.

The mere fact that upon the documents and evidence placed before the learned District Judge the High Court would have come to a different conclusion is no ground for second appeal; it is precisely this revision of evidence which is excluded by the limited character of a second appeal.

If there is evidence to be considered the decision of the second Court, however unsatisfactory it might be when examined, must stand final.

Given certain set of facts, from which two inferences are possible, it is open to the first Appellate Court to draw any one of them. **N E. I. RAILWAY CO. v. BADRILAL** 209

----- Finding of fact—Interference by High Court. See **BENGAL TENANCY ACT**, 1885, ss. 5, 103A 895

----- Hindu joint family—Alienation by father—Necessity, whether question of fact or law. See **HINDU LAW—JOINT FAMILY** 345

----- Nuisance—Finding of fact—Interference by High Court.

Where an Appellate Court on a consideration of the evidence in the case and all the circumstances, local and others, comes to the conclusion that a latrine does not constitute a nuisance, the finding is one of fact and cannot be interfered with in second appeal. **L MANGTU v. LACHCHI RAM**, A. I. R. 1925 Lah. 424; 7 L. L. J. 192 227

Appellate Court, duty of—Appeal purporting to be in time—Summary rejection as time-barred. See **C. P. C.**, 1908, O. XLI, r. 11 115

-----, powers of. See **PARTITION ACT**, 1893, s. 4 121

-----, powers of. See **AGRA TENANCY ACT**, 1901, ss. 196, 197 353

Arbitration Act (IX of 1899), ss. 4, 19—Submission to arbitration—Signatures, necessity of—Bias of arbitrator, effect of—Reference at option of one party, validity of—Validity of contract, plea of, effect of.

Actual signatures of the parties to a submission to arbitration are immaterial provided that the agreement is in writing and there is evidence that its terms are assented to by both the parties.

A submission is not invalid merely because an arbitrator or an umpire is to sit in judgment on his own acts, if parties with their eyes open chose to agree to a submission providing for a reference to such an arbitrator or umpire, unless it be shown that the arbitrator or umpire has made up his mind so as not to be open to change it upon argument.

An agreement to refer a dispute to arbitration providing for a reference at the option of one of the parties is still an agreement within the meaning of s. 4 of the Arbitration Act,

Arbitration Act—concl'd.

Where it is contended that a clause in a contract providing for the submission of disputes arising out of the contract to arbitration is not enforceable on account of the plea of the defendant that the contract is void and impossible of performance, the true test to apply is whether what is alleged by the defendant is something which gives the go-by to the contract, that is to say, which arises and exists independently of the contract and avoids it by its own force, or whether what is alleged is some ground of defence arising upon the contract itself. In the former case alone the submission would be unenforceable. **S MULCHAND SOBHRAJ v. RADHAKISHIN PARUMAL**, A. I. R. 1926 Sind 27 **932**

Attachment, wrongful—Damages, suit for—Malice—Reasonable and probable cause, absence of, whether necessary.

Where a decree-holder attaches property belonging to a third party and wrongfully deprives the latter of the use of the property attached in consequence of such attachment, the third party is entitled to damages on account of the loss which it suffers by the wrongful attachment without proving any malice or any absence of reasonable and probable cause on the part of the decree-holder. **A FIRM MANGAL CHAND-PARAM-SUKH DAS v. ZAINAB BIBI**, L. R. 6 A. 595 Civ.; A. I. R. 1926 All. 177 **266**

Attorney, duties of—Duty to Court—Breach of duty—High Court, disciplinary jurisdiction of—"Incorporated Law Society, Calcutta," whether can move High Court.

An attorney, being an officer of the Court, owes a duty to the Court, as well as to his client.

The "Incorporated Law Society, Calcutta" is competent to bring a breach of his duties by an attorney to the attention of the High Court, when the matter is brought to its notice.

The plaintiff in a suit, who had obtained an attachment of certain furniture before judgment, stored it at premises belonging to a charitable trust, under arrangement with the trustees. The furniture was sold after some months by the Sheriff, who realized the sale-proceeds. A claim was then made by the trustees upon the plaintiff for rent amounting to Rs. 3,250. The attorney who was acting for the plaintiff, thereupon, wrote to the Sheriff, asking for the amount to pay the rent, and enclosing the bill. The Sheriff sent the amount. The plaintiff, however, did not wish to pay the amount to the landlords, and, on his instructions, the attorney wrote a letter to the trustees repudiating all liability in respect of the rent of the premises, but "as a matter of grace" enclosing a cheque for Rs. 474 as a donation to the trust. The trustees brought the matter to the notice of the "Incorporated Law Society, Calcutta", and the latter moved the High Court in the matter:

Held, (1) that the attorney made a serious mistake in making himself a party to the course adopted by his client, and that although it was not suggested that there was any moral turpitude on his part, yet he was guilty of a breach of the duty which he owed to the Court;

(2) that having regard to the way in which the money was obtained from the Sheriff, and the purpose for which it was obtained, the attorney should have insisted on his client paying the money to the landlords in full, or returning it to the Sheriff. **C In the matter of ATTORNEYS**, 29 C. W. W. 1047; A. I. R. 1925 Cal. 964 **468**

Bengal Alluvion and Diluvion Regulation (XI of 1825), s. 1—Bed of small and shallow river belonging to private individual—Regulation, applicability of.

The first part of s. 1 of the Bengal Alluvion and Diluvion Regulation XI of 1825 has no application to land forming the bed of a small and shallow river which is recognized as the property of a private individual. **C ANDORU AKANDA v. NASIR AKANDA** **1010**

Bengal Ghatwali Lands Act (V of 1859)—Bengal Ghatwali Lands Regulation XXIX of 1814—Birbhum ghatwalis—Zemindar and ghatwal, relation between—Minerals, right to—Ghatwal, whether can be maurashi mokarraridar—Lease by zemindar, whether includes mineral rights.

A person may be a maurashi mokarraridar and also a ghatwal.

Bengal Ghatwali Lands Act (V of 1859) applies only to ghatwalis within the meaning of Bengal Ghatwali Lands Regulation XXIX of 1814 and even with regard to them it does not confer the mineral rights but merely proceeds on the assumption (which may be erroneous) that they have those rights.

The distinction between a ghatwali within the meaning of Bengal Ghatwali Lands Regulation XXIX of 1814 and a ghatwali which is outside the Regulation is that in the former case there is no tenure between the zemindar and the ghatwal who holds direct from the Government, while in the latter such a tenure exists. In the former case while the lands of the ghatwali are still deemed to be within the zemindari, the zemindar no longer pays the Government revenue for them and has, therefore, no claim to the underground rights; his only right connected with these lands is to receive the difference between the rent paid by the ghatwal and the amount of the Government revenue which was assessed on that part of the zemindari. If the Government does not claim the mineral rights, there is no one to whom they can belong but the ghatwal. In the latter case, however, the zemindar still pays the Government revenue on the lands and if the ghatwal claims the minerals he must show some transaction which grants the minerals either expressly or by necessary implication.

The zemindar is not divested of the mineral rights by a lease of the land unless the minerals are expressly granted. **PAT SATYA NIRANJAN CHAKRAVARTY v. SUSHILA BALA DAS**, 4 Pat. 799; A. I. R. 1926 Pat. 103 **513**

Bengal Land Revenue Sales Act (XI of 1859)

—Revenue, arrears of, sale for—Suit to set aside sale—Onus of proof.

In a suit to set aside the sale of an estate, held by a Collector under the Bengal Land Revenue Sales Act, 1859, on the ground that no arrears were due from the estate, the plaintiff must make out a *prima facie* case by showing that no arrears were actually unpaid on the date of the sale. **C MEAH v. DURGA CHURN DUTTA**, 29 C. W. N. 1027; A. I. R. 1926 Cal. 243 **456**

— ss. 2, 3, 33—Limitation Act (IX of 1908), Sch. I, Art. 12—Sale for arrears of rent held before last date on which rent could be paid, legality of—Suit to set aside sale, whether necessary—Limitation.

In the case of a tenant paying rent into the Collectorate, where it appears that the practice of the Collector is to receive the rent of each Bengali year in May or June of the following year, a sale of a holding held by the Collector on account of arrears of rent under the provisions of the Bengal Land Revenue Sales

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Act before the last date of the month of June of the year following that in respect of which the rent is due, is illegal.

Where a revenue sale is illegal, there is no need to bring a suit to set it aside, and the provisions of s. 33 of the Bengal Land Revenue Sales Act or of Art. 12 of Sch. I, to the Limitation Act have no application. **C AHMED YAR KHAN v. DINA NATH SADHUKHAN**, 42 C. L. J. 69; A. I. R. 1925 Cal. 1148 **40**

— **s. 37—Revenue sale—Purchaser, rights of—Structures on land, whether pass by sale—Structures, whether encumbrance.**

What passes at a revenue sale is the land or the share in the land and not the structures or buildings thereon.

The rights of a purchaser at a revenue sale are radically different from those of a purchaser at a voluntary sale.

Structures and buildings are not "encumbrances" within the meaning of s. 37 of the Bengal Land Revenue Sales Act.

Where land is sold for arrears of revenue the owner of a house built on the land is entitled as against the auction-purchaser to reside in or enjoy the house paying an equitable ground rent for the site to such purchaser and that whether the house was built by a person holding under a lease granted by the former proprietor or by the ex-proprietor himself.

On the failure of an owner to pay the Government assessment his estate or interest in the land is determined and sold under the provisions of the Bengal Land Revenue Sales Act. Under such a sale what is sold is not the interest of the defaulter owner, but the interest of the Crown, subject to the payment of the Government assessment. In a sale held under that Act the estate is sold in the condition in which it stood at the time of the settlement; the purchaser does not derive his title from the defaulting proprietor but takes the estate from the Crown in the state in which it was at its inception at the time of the settlement. **C JATINDRA NATH ROY CHOWDHURY v. NARAYAN DAS KHETRY**, 52 C. 862; A. I. R. 1926 Cal. 97 **901**

Bengal Municipal Act (III of 1884), ss. 6 (3),

85-A—Adjacent plots held by same person as owner, whether constitute one holding—Separate assessments, legality of.

Where two adjacent plots of land bounded by one set of boundaries are held by the same person as owner, they must be deemed to be held by him under one title and constitute one holding within the meaning of s. 6 (3) of the Bengal Municipal Act; it makes no difference that one plot was acquired by survivorship and the other by purchase. In such a case the owner of the plots is liable only to one assessment in respect of the plots under s. 85A of the Act and not to separate assessments in respect of each plot. **PAT TULSHI PRASAD RAM v. DUMRAON MUNICIPALITY**, 7 P. L. T. 35 **74**

Bengal Patni Taluks Regulation (VIII of 1819),

s. 11 (1), (2)—Bengal Tenancy Act (VIII of 1885), ss. 167, 195 (e)—Patni lease—Sub-lease, validity of—Zemindar, rights of.

Where a person having purchased the *patni* in execution of a rent-decree under the Bengal Tenancy Act sues for possession on the determination of the defendant's tenancy by service of notice under s. 167 of the Act the rights of the plaintiff as *patnidar* under the Bengal Patni Taluks Regulation are not

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affected in view of the provisions of s. 195 (e) of the Bengal Tenancy Act.

The mere mention of a right to create a sub-lease in the *patni* lease does not vest the *patnidar* with a higher right than is granted to him under the Patni Law.

Sub-clause (2) of s. 11 of the Bengal Patni Taluks Regulation VIII of 1819 requires that in order that the *zemindar* should be bound by the sub-lease created by the *patnidar*, and to defeat the *zemindari* right to hold the tenure of his creation answerable in the state in which he created it for his rent, the *patni* lease must confer on the *patnidar* the right to create such an under-tenure as will bar this indefeasible right of the *zemindar*. **C DURLAV CHANDRA CHOWDHURI v. JAMIRUDDIN AHAMED CHOWDHURI**, A. I. R. 1926 Oal. 314 **405**

Bengal Tenancy Act (VIII of 1885), ss. 5 (5),

103A—Landlord and tenant—Status of tenant, determination of—Test—Reclamation of land by tenure-holder—Appeal, second—Finding of fact—Interference by High Court—Suits Valuation Act (VII of 1887), ss. 11—Suit tried by Court not having jurisdiction—Appeal, interference in, when justified.

In determining whether the status of a tenant under the Bengal Tenancy Act is that of a tenure-holder or a *raiyyat*, what has to be considered is the purpose for which the land was granted and the extent of the tenancy. Where the original lease is inconclusive the attendant circumstances may be looked at for determining the purpose for which the tenancy was created.

The expression "*jot wa abad karke wa krake*" in a *kabuliyat* is consistent both with the status of a *raiyyat* and the status of a tenure-holder.

Though reclamation of the whole of a large *jot* by a settlement-holder and cultivation by his own ploughs may not be absolutely inconsistent with a tenure, it is entirely contrary to experience in the Province of Behar in cases where the tenancy is a tenure or the tenant proposes to settle *raiyyats* upon the land and become a rent receiver, more especially where the settlement-holder belongs to an agriculturist caste or tribe.

In a second appeal the High Court is not entitled to go behind the findings of fact of the lower Appellate Court unless such findings result from the misconstruction of a document of title or the misapplication of law or procedure.

The trial by a Court of a suit beyond its pecuniary jurisdiction is not in itself a ground for setting aside its order on appeal unless the Appellate Court is satisfied that the under-valuation has prejudicially affected the disposal of the suit on the merits. **PAT TARNI SINGH v. SATNARAIN MAHARAJ**, (1925) Pat. 281; 6 P. L. T. 787; A. I. R. 1926 Pat. 9 **895**

— **ss. 11, 12—Darpatni tenure—Security of charge for payment of rent, whether ceases on transfer of tenure—Rent, liability to pay, after transfer of tenure—Rule against perpetuities, charge or security if offends.**

As soon as the lessee of a *darpatni* tenure transfers it in accordance with the provisions of ss. 11 and 12 of the Bengal Tenancy Act, and ceases to have any estate, his liability for the payment of the rent ceases if that liability is based on the privity of estate. But if by the terms of the lease some further rights and liabilities, (e. g., security or charge for the payment of the *darpatni* rent) are created between the

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parties, they do not cease automatically on the transfer of the tenure and the termination of the relationship of landlord and tenant.

The rule against perpetuities affects only the creation of a future interest in property and the restricting of transfer of property by tying it up. The rule has no application to the case of a charge where a present interest is created and there is no transfer of an interest in property, but the property is merely made security for the payment of money. Therefore, where a charge or security is created as a part of the consideration for a *darpatni* lease, that charge or security is not extinguished on lessee's transfer of his interest under the lease. **C KANAI LAL GHOSH v. BASANTA BEHARI SEN**, 29 C. W. N. 1020; 42 C. L. J. 490 **451**

——— **s. 22 (a)**—*Occupancy holding—Purchase by joint proprietor or tenure-holder, effect of—Lease in favour of third person—Under-raiyat of holding, status of—Lessee, whether entitled to recover rent.*

Under s. 22 of the Bengal Tenancy Act when the occupancy right in a holding is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, such person has no right to hold the land as a *raiyat* but holds it as a proprietor or permanent tenure-holder as the case may be. Thereafter the *raiyati* holding ceases to exist and is merged in the superior right of the proprietor or the tenure-holder. Persons holding as under-raiyats under the original *raiyat* are in such a case automatically raised to the position of the *raiyats* of the holding under the proprietor or tenure-holder. If the proprietor or tenure-holder subsequently to his purchase lets out the holding to another person the latter does not become a landlord of the under-raiyats who have since the date of the purchase become the *raiyats* of the holding, and unless there is a grant of a right to collect rent from the tenants in favour of the transferee he is not entitled to sue the *raiyats* for the rent of the holding. **C HOCHANUDDI v. ABDUL HAKIM MRIDHA**, A. I. R. 1926 Cal. 158 **816**

——— **ss. 26, 183**—*Occupancy right acquired by under-raiyat, whether heritable—Custom, proof of.*

The right of occupancy acquired by an under-raiyat is a right acquired by custom or usage and not by Statute, and before such right can be said to be heritable it must be proved by evidence that by custom or usage heritability is an incident of such right. The question is one of fact and not of law.

Per *Cuming, J.*—Ordinarily the interest of an under-raiyat holding on an annual holding is not heritable. All that his heirs get is the right to remain on the holding until the end of the agricultural year. If he holds under a lease his heirs are entitled to succeed him in the tenancy and can be ejected without notice at the expiry of the lease.

It is inaccurate to speak of an occupancy holding. The right of occupancy is a right peculiar to a particular person not to a particular parcel of land or holding, and is a personal right.

Whatever may be the origin of a right of occupancy, heritability of such a right is a creature of the Statute created by s. 26 of the Bengal Tenancy Act, and outside the Statute there is no heritability of such a right. To determine if the occupancy right of an under-raiyat is heritable the Court must look to the Act itself. Such a right has been deliberately excluded from the operation of s. 26, but it is open to the under-raiyat to prove that by custom or usage

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the right is heritable. **C SUDHANYA KUMAR DAS v. ISMAIL**, 29 C. W. N. 733; A. I. R. 1925 Cal. 956 **844**

——— **s. 29**, *application of.*

Before invoking the aid of s. 29, Bengal Tenancy Act, the tenant must prove that he is an occupancy *raiyat* in regard to the rent claimed lands. **Pat RAMDHANI SINGH v. KEWAL MANI BIBI**, (1926) Pat. 29; 7 P. L. T. 145 **929**

——— **ss. 30, 50**—*Landlord and tenant—Rent, enhancement of—Burden of proof.*

Under s. 50 of the Bengal Tenancy Act the initial onus lies upon the landlord to prove that the rent of the tenancy is liable to be enhanced on the ground of additional area. This onus may be shifted by proving the origin of the tenancy or a contract or by other mode of proof showing the right of the landlord to enhance the rent on that ground. The onus is not shifted by merely producing *dakhilas* which mention the areas for which rent has been paid. **C MAHAMMAD MOYENUDDIN v. BAHARUDDIN CHOUDHURI**, A. I. R. 1926 Cal. 113 **557**

——— **s. 46 (7)**—*Landlord and tenant—Non-occupancy tenant—Enhancement of rent—Agreement by tenant to pay rent determined by Court—Liability to pay, when commences.*

Where under sub-s. (7) of s. 46 of the Bengal Tenancy Act a non-occupancy tenant agrees to pay the rent determined by the Court, his liability to pay rent at the rate so determined commences from the date on which he agrees to pay the rent so determined. **Pat WAJHUNISSA BEGAM v. BABU LAL MAHTON**, (1925) Pat. 298; A. I. R. 1926 Pat. 42; 5 Pat. 46 **871**

——— **ss. 48, 49**—*Ejectment of under-raiyat—Occupancy rights, acquisition of—Custom, proof of—Long occupation and planting of trees, whether sufficient to prove custom.*

A custom must be established independently of and apart from the case in dispute.

The mere fact that an under-raiyat has occupied certain lands for over 40 years and has planted trees upon portions of the land and has been granted printed receipts by the landlord is not sufficient in law to establish a custom whereby the under-raiyat becomes entitled to occupancy rights in the land. **Pat CHAKAURI LAL v. DEO CHAND MAHTON**, A. I. R. 1926 Pat. 61 **273**

——— **ss. 48, 178**—*Lease granted by raiyat—Rent payable at a rate not recoverable under Act—Covenant for renewal—Failure of lessee to pay stipulated rent—Renewal, whether can be claimed—Ejectment after expiry of lease—Notice, whether necessary.*

A lease granted by a *raiyat* for a period of nine years stipulated for a rent which was more than the rent which the lessor was entitled to exact from the lessee under the provisions of s. 48 of the Bengal Tenancy Act. The tenant agreed that if he did not pay the rent at the stipulated rate he was liable to be ejected without notice and the lease also contained a covenant for renewal if the lessee observed all the provisions of the lease. The lessee failed to pay rent at the rate stipulated in the lease and paid rent only at the rate at which he was liable to pay it under the provisions of the Bengal Tenancy Act. After the expiry of the period of the lease the lessor sued to eject the lessee from the land. The defendant objected that he was entitled to continue in possession of the land under the covenant for renewal contained in the lease:

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Held, per Greaves, J.—That the tenant having observed all the provisions of the lease which he was by law bound to observe, the mere fact that he had declined to pay rent at a rate at which he was not bound to pay by virtue of the provisions of the Bengal Tenancy Act did not disentitle him from obtaining a renewal of the lease.

Per Cuming, J.—(1) That there was nothing illegal in the stipulation to pay rent at a rate higher than that recoverable under the Bengal Tenancy Act and that the contract providing for the payment of such rent was not void; the mere fact that it was not enforceable in law did not prevent it from being a condition of the contract of renewal, the failure to comply with which justified the lessor in not carrying out his part of the contract;

(2) that the tenant having failed to fulfil his part of the contract, viz., to pay the enhanced rent, the landlord was absolved from his part of the contract, viz., to grant a renewal of the lease;

(3) that the period of the lease having expired the landlord was entitled to eject the lessee from the land without any notice.

A person who has entered into a contract should be held to it unless it can be shown that the contract is contrary to some provision of the law or has been obtained by fraud or undue influence. **C ASHRAF ALI v. ARMAN KHAN**, A. I. R. 1926 Cal. 162 **893**

— **s. 49—Evidence Act (I of 1872), s. 115—Lease of homestead land—Agreement not to eject lessee—Lessor putting himself forward as owner of permanent heritable tenancy—Estoppel.**

The lessee of a piece of homestead land is ordinarily a tenant and not a raiyat.

Where a lessor agrees not to eject the lessee from the lands demised, he is bound by the contract made by him unless he can show that the contract is invalid in law.

Where a lessor of a piece of homestead land puts himself forward as the owner of a permanent heritable tenancy describing his tenure as *kaimi mourashi* and agrees not to eject the lessee from the land, the agreement is not invalid in law and the lessor is estopped from subsequently contending that he is an occupancy tenant and that the lessee is an under-raiyat and that the agreement not to eject the lessee is invalid. **C BIDHUMUKHI v. GOBINDA CHANDRA PAL**, 42 C. L. J. 78; A. I. R. 1926 Cal. 215 **104**

— **s. 49—Ejectment—Raiyat holding homestead land, status of—Fixed rate tenant, whether can grant permanent lease.**

A raiyat at fixed rate of rent is competent to grant a permanent lease of the land.

A lessee from a raiyat in respect of homestead land, if he holds other lands as a settled raiyat in the village, would hold the homestead land as a raiyat and would be protected from ejectment. **C PKASANNA KUMAR DATTA v. KEDARNATH SAMANTA**, A. I. R. 1926 Cal. 299 **497**

— **s. 50. See BENGAL TENANCY ACT, 1885, s. 30** **557**

— **s. 50—Evidence Act (I of 1872), s. 32 (2)—Appeal, second—Rent, payment of, at uniform rate for 20 years, whether question of law—Jamawasilbaki papers, admissibility of—Entry of rate of rent, value of.**

The question whether a tenant has held at a uniform rate for more than 20 years or back to the

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time of the Permanent Settlement, is generally a question of fact and not of law.

Jamawasilbaki and *jamabandi* papers are admissible in evidence under s. 32 (2) of the Evidence Act but it must be clear that the persons who made them are dead and that the papers were made in the ordinary course of business.

An entry as to the rate of rent as distinguished from the amount of rent cannot be separated from other entries in the *jamawasilbaki* papers as being an entry not made in the ordinary course of business. **C DUKHU MIA v. JAGDISH NATH ROY** **564**

— **s. 50—Landlord and tenant—Rent, enhancement of, suit for—Variation in rent, explanation of—Burden of proof—Presumption, rebuttal of.**

Where in a suit for enhancement of rent it appears that there has been a variation in the amount of rent paid by the tenant the burden is on the tenant to explain why there has been such variation and if he cannot give any satisfactory explanation the inference would be that there has been a change in the rate of rent and the presumption arising under s. 50 of the Bengal Tenancy Act would be rebutted. **C NRISINHA CHARAN NANDI CHOUDHURI v. BATASI DASHI**, A. I. R. 1926 Cal. 106 **602**

— **s. 52—Landlord and tenant—Kabuliyaat granted on the basis of area—Additional rent, whether can be claimed—Jamabandi prepared by landlord, whether admissible in evidence.**

Where a contract of tenancy is made not with reference to any boundaries or a specific block otherwise identifiable but for a certain area at a certain rental the area is of the essence of the contract and any subsequent excess found upon measurement renders the raiyat liable to pay additional rent under s. 52 of the Bengal Tenancy Act.

For the purposes of s. 52 of the Bengal Tenancy Act it is not always necessary to ascertain the area of the original grant and the rent thereby reserved. All that the landlord has to show is that the present area is greater than the area for which the rent was last paid. The onus is then shifted on the tenant to show that the excess land used previously to belong to the holding and was lost by diluvion or otherwise.

A *jamabandi* prepared by the landlord though not binding upon the tenant is admissible in evidence to show that since the creation of the tenancy rent has been assessed and that such assessment was on the basis of a certain area. **PAT SIB SAHAI LAL v. BIJAI CHAND MAHTAB**, (1926) Pat. 19; 5 Pat. 157 **862**

— **s. 148A, 160 (g)—Rent suit by co-sharer landlord, frame of—Patni mortgage executed for benefit of zemindar, whether protected interest.**

It is of the essence of a suit under s. 148A of the Bengal Tenancy Act that either the whole rent must be due or else the plaintiff must be unable to ascertain whether or not the whole of the rent is due. For a suit to fall under the provisions of that section it must be a suit to recover the whole of the rent due.

Where a mortgage of a *patni taluk* is created for the benefit of the zemindar, the mortgage is an interest which comes within the provisions of s. 160 (g) of the Bengal Tenancy Act and is thus protected from annulment on a sale of the *patni* for arrears of rent. **C HARI MOHAN DALAL v. PURENDRA NATH NAG CHOUDHURY** **955**

Bengal Tenancy Act—contd.**s. 150, applicability of.**

The provisions of s. 150, Bengal Tenancy Act, do not apply to a case when the rate of rent is in issue. **C** DHIRENDRA NATH GHOSE *v.* CHARUSHASHI DEBYA, A. I. R. 1926 Cal. 191 **431**

s. 153—Suit for assessment of rent and recovery of rent, whether suit for rent—Appeal, whether lies.

An appeal should not be held to be barred under the provisions of s. 153 of the Bengal Tenancy Act unless it comes within the express limitation provided in the section.

In a suit for assessment of rent the question of the right to vary the rent is involved.

A suit in which a prayer for assessment of a rent is added to a prayer for recovery of rent is not a suit for rent within the contemplation of s. 153 of the Bengal Tenancy Act, and the section does not, therefore, bar an appeal in such a suit. **C** BEJOY CHAND MARTAB *v.* BENI MADHAB CHAUDHURY, 52 C. 689; A. I. R. 1925 Cal. 936 **71**

s. 160 (g). See BENGAL TENANCY ACT, 1885, s. 148 A **955****s. 167—Mortgage of holding—Mortgage decree—Sale of holding—Rent-decree, sale in execution of—Mortgage, whether encumbrance—Title of auction-purchaser at rent sale.**

Defendants obtained a mortgage-decree against a holding and in execution of the decree themselves purchased the holding. At a sale held in execution of a rent-decree, the holding was subsequently purchased by the plaintiff. Plaintiff thereafter brought a suit to recover possession of the holding from the defendants:

Held, (1) that the mortgage in favour of the defendants was extinguished when the defendants obtained a mortgage-decree and that by purchasing the holding in execution of their decree the defendants had become the owners of the holding and could not set up their mortgage as an encumbrance within the meaning of s. 167 of the Bengal Tenancy Act;

(2) that the plaintiff was, therefore, entitled to obtain possession of the holding as against the defendants. **C** INDRA NARAYAN GHOSE *v.* TARINI PROSAD GUIN, A. I. R. 1926 Cal. 165 **746**

ss. 167, 195 (e). See BENGAL PATNI TALUKS REGULATION, 1819, s. 11 (1), (2) **405****s. 178. See BENGAL TENANCY ACT, 1885, s. 48** **893****s. 182—Lease for purpose of shop—Right of occupancy—Transfer of Property Act (IV of 1882), s. 111.**

Section 182 of the Bengal Tenancy Act does not apply to a land let out to an occupancy ryot for the purpose of a shop in a Bazar.

Such leases are governed by the Transfer of Property Act. **C** PURUSOTTAM MAHESRI *v.* PANCHANAN MAZUMDAR, 42 C. L. J. 197 **805**

s. 183. See BENGAL TENANCY ACT, 1885, s. 26 **844****Sch. III, Art. 2 (a), s. 61—Deposit of rent by tenant, what amounts to—Suit to recover rent—Limitation.**

The limitation provided by Art. 2 (a) of Sch. III to the Bengal Tenancy Act applies only to cases where a deposit was made in accordance with the provisions of s. 61 of the Act and if no deposit was made within the meaning of that section the period of limitation provided in the Article does not apply. Where, however, there has been a *bona fide* deposit in res-

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pect of the whole amount due at the date of the deposit, and not merely in respect of a portion thereof, the deposit is validly made under s. 61, even though it should turn out that the whole amount due had not been deposited. The section provides for the case of a *bona fide* deposit of what the tenant considers to be the full amount of the rent due at the time of the deposit. The deposit, however, must be in respect of the whole rent due and not in respect of a portion only. **Pat** WAJIHUNISSA BEGAM *v.* BABU LAL MAHTON, (1925) Pat. 298; A. I. R. 1926 Pat. 42; 5 Pat. 46 **871**

Sch. III, Art. 3, operation of—Dispossession by landlord—Constructive dispossession.

In order that Art. 3 of Sch. III to the Bengal Tenancy Act may apply to a suit for recovery of tenancy land, there must be actual dispossession of the tenant by the landlord. The operation of the Article cannot be extended to the case of so-called constructive dispossession, where the landlord has never allowed the tenant to take possession of the land. **C** RAJANI KANTA BISWAS *v.* PANCHANON MONDAL **793**

Bengal Village Chaukidari Act (VI of 1870), s. 51—Putni lease—Resumption and transfer of chaukidari chakran lands to zemindar—Putnidar whether entitled to possession—Additional rent, whether payable.

A *putni* grant by a *zemindar* of his interest in lands includes his interest in *chaukidari chakran* lands within the boundaries of the grant, and upon these being resumed and transferred to the *zemindar* under Bengal Village Chaukidari Act, the *putnidar* holding from him is entitled under s. 51 of that Act to obtain their possession. But the *zemindar* is entitled to obtain additional rent from the *putnidar* in respect of such lands. **P C** BHUPENDRA NARAYAN SINGH *v.* NARAPAT SINGH, A. I. R. 1925 P. C. 226; 42 C. L. J. 227; 49 M. L. J. 722; L. R. 6 A. (P. C.) 506; (1925) M. W. N. 724; 52 I. A. 355 **607**

Bengal Village Self-Government Act (V of 1919), ss. 101 (2) (e), 8—Local Rules—President of Local Board, election of—Notice of meeting, whether necessary.

The rules framed under cl. (e) sub-s. (2) of s. 101 of the Bengal Village Self-Government Act do not apply to a meeting held under the presidency of a Government Official to elect a President of a newly constituted Union Board.

There is a very considerable difference between the nature of a meeting of members summoned under s. 8 and the rules made thereunder and a meeting of the Board summoned under rules framed under cl. (e), sub-s. (2) of s. 101 of the Bengal Village Self-Government Act. **C** NASARUDDIN MANDAL *v.* ANATH NATH CHOWDHURY, 52 C. 943; A. I. R. 1926 Cal. 279 **700**

Berar Land Revenue Code, 1896, s. 79—Tenancy from year to year—Suit for ejectment—Notice to quit, whether necessary.

A suit for ejectment is not maintainable without a previous notice to quit in the case of a tenancy from year to year. **N** BALKRISHNA *v.* RAGHUNATH **43**

s. 96-I—Evidence Act (I of 1872), s. 110—Burden of proof—Entry in Record of Rights—Possession—Presumption.

Under the provisions of s. 96-I of the Berar Land Revenue Code an entry in the Record of Rights carries with it a presumption of correctness and would support the title, or, at any rate, the possession, of the recorded holder of a survey number. The absence of

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any plea that the plaintiff is out of possession would also entitle him to the presumption under s. 110 of the Evidence Act that he is in possession as an owner, and where the question of possession has not been investigated in claim proceedings these statutory presumptions would entitle the plaintiff to succeed in his title suit in the absence of any evidence of rebuttal.

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Bombay District Municipal Act (III of 1901), s. 167—Limitation Act (IX of 1908), ss. 15 (2), 29—Suit against Municipality to recover refund of house tax—Limitation, commencement of—Notice, period of, whether can be excluded—Refusal to reconsider previous order, whether affords new cause of action.

Section 167 of the Bombay District Municipal Act prevents a claimant from commencing his suit after six months from the date of the act complained of and thereby expressly excludes time being extended under s. 15, cl. (2) of the Limitation Act. The period of a month's notice required to be given by the section cannot, therefore, be added to the said period of six months in counting the period of limitation.

Plaintiff's claim for the refund of a certain sum of money paid by him as Municipal house tax was rejected on the 29th March by the Managing Committee of the defendant Municipality, to whom the powers of the General Body with reference to such matters had been delegated. The resolution of the Managing Committee was communicated to the plaintiff in a letter by the Chief Officer of the Municipality dated 10th April which was received by the plaintiff on 22nd April. Thereafter the plaintiff again addressed the President and the members of the Municipality requesting them to re-consider the matter whereupon the papers were re-submitted to the Managing Committee who, on July 25th, refused to re-consider the matter. Plaintiff instituted a suit on 30th October for the recovery of the amount from the defendant Municipality:

Held, (1) that assuming that the period of limitation under s. 167 of the Bombay District Municipal Act commenced from 22nd April when the resolution of the Managing Committee was communicated to the plaintiff, the suit was barred by time under the provisions of that section;

(2) that the refusal by the Managing Committee to grant a refund and not its subsequent refusal to re-consider the matter was the act which afforded the plaintiff his cause of action and that the limitation for the suit commenced from the date of the refusal of the Managing Committee and not from the date of their refusal to re-consider their previous refusal. **S REWACHAND FATEHCHAND v. KARACHI MUNICIPALITY, A. I. R. 1925 Sind 322**

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Bombay District Police Act (IV of 1890), ss. 25, 25-A, 26, 79—Bombay General Clauses Act (I of 1904), s. 21—Disturbance—Compensation, levy of—Police charge, levy of—Suit for declaration of illegality of notification, whether maintainable—Irregularity in notification, effect of—"Final" in s. 25A (4), meaning of—Power of Courts to interfere with action of Government and District Magistrate.

Under s. 25 of the Bombay District Police Act Government has no power to call upon A to make a payment on behalf of B. It is open, however, to the Government under sub-s. (2) (b) of the section to charge any section or sections or class or classes of persons, and under the powers mentioned in s. 21 of

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the Bombay General Clauses Act, it is open to them to add to, amend, or vary a previous order on this point. So long as in substance the tax or rate is a tax or rate levied on another class of persons living within area concerned, it is within the legal authority of the Government to make the alteration.

The Court is not concerned with the propriety of the tax or rate; it is concerned only with its legality. It is for the Government to consider its propriety, as the Legislature has laid the obligation of determining the questions mentioned in the section upon that authority.

The mere fact that a notification, under s. 25 of the Bombay District Police Act, calls upon the Collector to collect the rate or tax imposed and does not in the first instance call upon the Municipality to pay the amount as required by sub-s. (4) of the section does not render the notification illegal. The direction to the Collector to make the collection is in the nature of an irregularity which does not affect the legality of the tax or rate imposed.

The express provision as to the finality of an order made by a District Magistrate under sub-s. (1) of s. 25-A of the Bombay District Police Act which is contained in sub-s. (4) of the section excludes the application of s. 21 of the Bombay General Clauses Act to such an order.

Quære:—Whether the Commissioner has power to revise such an order from time to time and to introduce changes into it?

Where, however, the District Magistrate has not yet made a requisition on the Collector under sub-s. (1) (b) of the section, the stage of finality contemplated by the provisions of sub-s. (4) has not been reached and the subject is still open to the District Magistrate.

It is for the District Magistrate with the previous sanction of the Commissioner to require the Collector under s. 25-A (1) (b) of the Bombay District Police Act, to recover the amount of compensation determined under the section in such proportions as he may, with the like sanction, draw from all inhabitants of the area declared under sub-s. (1) (a) (ii) or from any section or sections or class or classes of such persons and it is for the Government to determine the same questions under s. 25 of the Act with regard to Police charges. A Civil Court can interfere only when the discretion is exercised in such a manner as to enable the Court to say that it is not an exercise of the discretion within the meaning of these sections.

Section 25-A of the Bombay District Police Act does not provide for any enquiry as to an order under sub-s. (1) (b) of the section. The words "after such enquiry as he deems necessary" are to be found in sub-s. 1 (a) and do not govern cl. (b).

The omission to hold an enquiry departmentally arranged is not sufficient to vitiate a direction given by the District Magistrate under s. 25-A (1) (b). The provisions of s. 79 of the Bombay District Police Act would condone such an irregularity in the procedure.

An obligatory provision in a Statute cannot be allowed to be ignored without adequate grounds.

There is nothing in s. 25-A of the Bombay District Police Act to suggest that no fresh order can be passed by the District Magistrate in accordance with the revision of his first order by the Commissioner. The word "final" in sub-s. (4) of the section does not mean that the District Magistrate can only make his order under that section once and for all. The use of the

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word "final" merely excludes the jurisdiction of the Courts and not the power of the Commissioner or the District Magistrate to alter an order passed under the section.

The finality provided for an order under s. 25-A cl. (4) of the Bombay District Police Act means to give a final effect to the ultimate order which the District Magistrate, with the previous assent of the Commissioner may, subject to the revision of the Commissioner or in accordance with any such revision, pass. The clause is not intended to exclude the powers which by s. 21 of the Bombay General Clauses Act are included in a power to issue an order.

If a charge for Additional Police levied under s. 25 of the Bombay District Police Act is not a rate on property, it is a tax, however if may be described in the notification and is, therefore, within the powers of Government to levy under the section. Any objection to the form of such a notification is cured by s. 79 of the Bombay District Police Act.

The Courts are not concerned with whether Government or the District Magistrate have judged correctly the party who should pay the Police charge, or the amount of compensation under ss. 25 and 25-A of the Bombay District Police Act, provided the Government or the District Magistrate has exercised its or his judgment on the point. That is a matter left to Government under s. 25 and to the District Magistrate, with the previous sanction and subject to revision by the Commissioner, under s. 25-A. Section 25-A was not intended to permit the Court to enquire into the question as to who were the persons really responsible for the occurrences in respect of which the cess is levied. **B BHAGCHAND v. SECRETARY OF STATE FOR INDIA**, A. I. R. 1924 Bom. 1; 26 Bom. L. R. 1; 48 B. 87 13

— ss. 80, 81. See BOMBAY REVENUE JURISDICTION ACT, 1876, s. 4 13

Bombay General Clauses Act (I of 1904), s. 21.

See BOMBAY DISTRICT POLICE ACT, 1890, s. 25 13

— s. 21—Notification under s. 25 of the Bombay District Police Act (IV of 1890), alteration in terms of, legality of.

Section 21 of the Bombay General Clauses Act is intended to be of general application and applies to a notification issued by the Government under s. 25 of the Bombay District Police Act. It is, therefore, open to the Government to alter the terms and operation of a notification issued under the latter provision if minded to do so. **B BHAGCHAND v. SECRETARY OF STATE FOR INDIA**, A. I. R. 1924 Bom. 1; 26 Bom. L. R. 1; 48 B. 87 13

Bombay High Court Manual of Circulars, Ch. XXIII, r. 16. See PROVINCIAL INSOLVENCY ACT, 1920

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Bombay Land Revenue Code (Act V of 1879),

s. 84—Landlord and tenant—Denial of landlord's title—Forfeiture—Ejectment—Notice to quit, whether necessary.

Where in the case of a tenancy to which s. 84 of the Bombay Land Revenue Code applies, the tenant disclaims the landlord's title, the tenancy is determined and the tenant is liable to ejectment without any notice to quit. **B VIDYAVARADHAK SANGH COMPANY v. SANGIRIMALDAPPA**, 27 Bom. L. R. 1152; 49 B. 842; A. I. R. 1925 Bom. 524 614

Bombay Pleaders Act (XVII of 1920), ss. 17, 19—Pleader and client—Death of Pleader pending proceeding—Fees, apportionment of.

Bombay Pleaders Act—concl'd.

By virtue of the provisions of sub-ss. (2) and (3) of s. 19 of the Bombay Pleaders Act, in the absence of any special agreement, a Pleader is not entitled to receive fees allowed on taxation between himself and his clients for his services until the final decree or order in the proceeding is passed. If a Pleader dies before such final decree or order is passed or for any reason the engagement of his services by his clients is put an end to then the Pleader will only be entitled to ask the Court to award him proportionate fees on the basis of a *quantum meruit*. The Court in assessing the *quantum meruit* might be guided by the percentages laid down by law for the regulation of costs between party and party but is not bound to adopt that guide where the circumstances of the case would render it unjust to do so. **B MOTILAL GOPALDAS v. KRISHNABAI GOPALRAO**, 27 Bom. L. R. 1156; A. I. R. 1925 Bom. 513 604

Bombay Revenue Jurisdiction Act (X of 1876),

s. 4, scope of—Bombay District Police Act (IV of 1890), ss. 80, 81.

Section 4 of the Bombay Revenue Jurisdiction Act does not stand in the way of a suit in respect of a wholly illegal and unauthorized cess or rate purporting to be authorized by a Government or a Public officer.

Section 80 of the Bombay District Police Act refers to suits for damages against a Commissioner, Magistrate, or Police Officer and has no application to a suit for an injunction restraining the District Magistrate from collecting a rate or tax illegally imposed by the Government or by the District Magistrate, nor does such a suit fall within the purview of s. 81 of the Act. **B BHAGCHAND v. SECRETARY OF STATE FOR INDIA**, A. I. R. 1924 Bom. 1; 26 Bom. L. R. 1; 48 B. 87 13

— s. 4 (f), scope of—Bombay District Police Act (IV of 1890), s. 25A.

Government is not empowered by s. 25-A of the Bombay District Police Act to levy any cess or rate. Section 4 (f) of the Bombay Revenue Jurisdiction Act refers to a cess or a rate authorized by Government and not to a cess or rate authorized by the District Magistrate with the previous sanction of the Commissioner such as is contemplated in s. 25-A of the Bombay District Police Act.

Section 4 (f) of the Bombay Revenue Jurisdiction Act applies to a cess or rate which is legally authorized by Government. It does not apply to a case in which the legality of the order of the Government is questioned. **B BHAGCHAND v. SECRETARY OF STATE FOR INDIA**, A. I. R. 1924 Bom. 1; 26 Bom. L. R. 1; 48 B. 87 13

Buddhist Law, Burmese—Ecclesiastical—Pongyis, duties of—Participation in politics, whether permissible.

Under the Burmese Buddhist Law it is the bounden duty of the laity to do their utmost to discourage *pongyis* from transgressing the bonds which the *vinaya* lays down for them and the rules which, by donning the yellow robe, they voluntarily promised to observe. And it is the bounden duty of a *pongyi* who desires to participate in party politics to put off the yellow robe and re-assume the responsibilities as well as the privileges of ordinary civil life.

Pongyis are subject to the laws of the land they live in. If they are dissatisfied with such laws it is not for them to oppose the authorities but to move to other parts where the laws will be more congenial. So long as the civil laws are not in conflict with the rules

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to be observed by monks they must be obeyed by them.

According to Burman Buddhist ideas he who dons the yellow robe has one of two duties to perform:—

(1) to practise austerities and meditation in order to work out his own salvation; or

(2) to learn the sacred scriptures and to impart the knowledge to others.

Those who follow the first are known as Patibatti Sangha and those who adopt the second as Pariyatti Sangha.

When a *pongyi* belongs neither to the Pariyatti nor to the Patibatti, he is no longer entitled to live on the offerings of the laity, nor to receive respect from them. He has no *raison d'être*.

In attempting to oppose the orders of the executive a monk not only breaks his own personal law but sets an example to the laity which is greatly to be lamented. **R MAUNG TOK v. EMPEROR**, 3 R. 352; A. I. R. 1925 Rang. 354; 26 Cr. L. J. 1622 **918**

——— **Inheritance—Hnapazon property of last marriage—Pubbaka children and their step-parents—Practice or decision of long standing erroneous—Duty of Court.**

By the Full Bench.—Where a Burman Buddhist, who has married more than once, dies leaving *hnapazon* property of the last marriage, if there is an issue of the last marriage the step-child or children collectively take one-eighth and the step-parent seven-eighths, but where there is no issue of the last marriage the former take one-sixth and the latter five-sixths. **R MA NYEIN E v. MAUNG MAUNG**, A. I. R. 1925 Rang. 340; 4 Bur. L. J. 189; 3 R. 549 **341**

——— **Inheritance—Orasa son—Death of mother—Re-marriage of father—Right of son to claim $\frac{1}{4}$ th share of jointly acquired property, nature of—Death of son—Right, whether heritable.**

Under the Burmese Buddhist Law whilst an *orasa* son cannot claim a $\frac{1}{4}$ th share of the property jointly acquired by his parents merely by reason of his mother's death, the re-marriage of his father gives him a right to claim the $\frac{1}{4}$ th share, which he would not have if his father did not re-marry. This right of the *orasa* son is a vested right and if the *orasa* son after acquiring this right dies before obtaining possession of his $\frac{1}{4}$ th share, the right devolves on his heirs and legal representatives. **R MA E MYA v. U PE LAY**, 3 R. 281 **958**

——— **Marriage—Girl under 20 years—Parents, consent of, whether essential.**

Under the Burmese Buddhist Law, except in the case of widows and divorcees, a girl under 20 years cannot contract a valid marriage without the consent, either express or implied, of her parents or guardians. **R MA E SEIN v. MO. HLA MIN**, A. I. R. 1925 Rang. 280; 3 R. 455; 26 Cr. L. J. 1613; 4 Bur. L. J. 123 **717**

Burden of Proof—Landlord and tenant—Permanent tenure. See MUHAMMADAN LAW—WAKF **781**

——— **Transfer of Property Act, 1882, ss. 60, 61, 62—Mortgages, several—Redemption—Consolidation—Contract barring redemption. See TRANSFER OF PROPERTY ACT, 1882, ss. 60, 61, 62** **613**

——— **Possession, suit for—Title.**

In a suit for declaration of title and for possession the plaintiff must prove his own title and cannot succeed on the mere finding that the defendant has no title. **C KARUNA OHARAN DAS v. KRISHNA SUNDAR MAJUMDAR**, A. I. R. 1926 Cal. 179 **480**

Burma Registration Directions, 46 (d) (i)—Lease. See TRANSFER OF PROPERTY ACT, 1882, s. 105 **693**

Calcutta Municipal Act (III of 1923), ss. 363, 364—Unauthorised building—Proceedings by Corporation—Owner, if must be heard.

Failure to give the owner of an unauthorised building an opportunity of being heard, which he is entitled to under s. 364 of the Calcutta Municipal Act, before he is proceeded against, is a material irregularity vitiating the trial of the owner before the Municipal Magistrate. **C RAM GOPAL GOENKA v. CORPORATION OF CALCUTTA**, 29 C. W. N. 898; 52 C. 962; 26 Cr. L. J. 1533; A. I. R. 1925 Cal. 1251 **317**

Calcutta Rent Act (III of 1920), s. 2 (c)—Premises, whether include fans and lights—Intention of parties—Standard rent, whether can be fixed including fixtures.

In the case of a demise it depends on the intention of the parties and on the nature of the agreement to be gathered from the same, whether such fixtures as fans and lights are intended to go with and to form part of the premises or building demised.

Where fans and lights are attached to the premises demised and are intended to be used with them, they must be taken, according to the intention of the parties, to be part of the demised building for the purposes of the Calcutta Rent Act and it is open to the Rent Collector to fix a standard rent in respect of the premises which comprises these fixtures. **C BARBAR v. DEBENHAM**, 42 C. L. J. 87; 30 C. W. N. 274 **4**

Carriage of Goods—Goods consigned to Railway Company for carriage—Freight paid at fixed rate—Wagon used larger than that necessary—Consignor, whether liable for additional freight.

Where goods are consigned to a Railway Company for carriage and freight is paid according to the rates laid down in the Company's rules, the Company has the right of re-measurement and re-calculation of the goods on the arrival of the goods at their destination, but this does not entitle the Company, when it has made a contract with the consignor to convey his goods at a particular rate on the amount of goods consigned, subsequently and without his knowledge to alter the entire basis of calculation merely because for their own convenience they have used for the conveyance of the goods a much larger wagon than was actually necessary. In such a case the consignor is not liable to pay any additional freight by reason of a larger wagon having been used for the conveyance of the goods. **A GULAB DEI v. G. I. P. RAILWAY**, L. R. 6 A. 615 Civ.; 24 A. L. J. 129; A. I. R. 1926 All. 146 **99**

——— **Goods consigned to Railway Company for carriage—Risk Note Form "A"—Loss of goods—Suit to recover damages—Burden of proof.**

Where goods are consigned to a Railway Company for carriage under Risk Note Form "A", the Company is absolved from any responsibility for loss of the goods owing to the bad condition of the consignment throughout the period of transit, and the period of transit commences from the time that the goods are received and are carried to the train.

The question of onus is not the same in a case based on the terms of a Risk Note in Form "A" as it is in a case based on the terms of a Risk Note in Form "B". The two indemnities are quite different in their effect. In a suit based on the terms of a Risk Note in Form "A" where it appears from the admission of the plaintiff himself that there has been such loss or damage as

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is contemplated in the Risk Note, it is not necessary for the Railway Company to prove that there has been such loss. **PAT SUDHA KRISHNA MUKHERJI v. EAST INDIAN RAILWAY COMPANY THROUGH AGENT**, 7 P. L. T. 45

Cause of action accruing subsequent to suit—Relief, right to. See **CONTRACT ACT**, 1872, s. 72 906

C. P. Tenancy Act (I of 1920), ss. 11, 12, 13, 14, 105—*Hindu Law—Widow—Will of property inherited by widow, validity of—Occupancy holding, devise of—Ejectment, suit for—Jurisdiction of Civil and Revenue Courts.*

A Hindu widow has only a restricted power of alienation over property which she has inherited from her husband. She has only a life-estate in such property and can make no disposition which would enure beyond her lifetime; much less she can make one which is to come into operation after her death.

A Hindu widow, therefore, who inherits an occupancy holding from her husband cannot make a testamentary disposition of it and thus defeat the provisions of s. 11 of the C. P. Tenancy Act.

The intention of enacting the law of tenancy in the Central Provinces was to recognize a tenant-right of a restricted character as regards its heritability, transferability and partibility under certain conditions and limitations; but it was never understood to carry with it the incident of devisability by Will at the instance of the tenant. It is property in which the interest carved out is more of a limited or personal character, than of a character conveying unlimited powers of disposition to the incumbent for the time being.

Where a transfer is invalid, irrespective of the provisions of the C. P. Tenancy Act, the Act is not called into operation; there is nothing upon which it can fasten; there is no legal transaction for the consideration of the Revenue Officers. In such a case the intended transferee is not a transferee at all and if he enters upon possession under colour of the transaction his entry is a trespass at civil law and he can be ejected from the land by a suit in the Civil Courts. The jurisdiction of the Civil Courts to entertain such a suit is not ousted by anything contained in ss. 12, 13, 14 and 105 of the C. P. Tenancy Act. **N SHEODAYAL v. RAMPRASAD** 247

— **s. 37**—*Sir land—Person cultivating, status of—Lease of sir and khudkasht land—Landlord not taking part in cultivation—Lessee, ejectment of.*

The status of a person cultivating the proprietor's sir land under s. 37 of the C. P. Tenancy Act is that of a sub-tenant and is not that of an ordinary or occupancy tenant. In spite of the fact that sir land was let out to a person along with other land under one set of conditions so as to constitute one holding the land is liable to be separated from the remainder of the holding and the landlord is entitled to a declaration that the person in possession of the sir land is liable to be ejected on partition by Revenue Officers.

If the *malguzar* has supplied no capital for or has not taken any part in the cultivation of the *khudkasht* land but has let it out on condition that he should be given half the produce, the contract is not that of a *batai* and the person cultivating becomes the occupancy tenant thereof. **N GOKUL v. SHYAMLAL-SINGH**, A. I. R. 1926 Nag. 35 76

C. P. Tenancy Act—1920—cont'd.

— **s. 49**, *applicability of—Mortgage of sir land—Foreclosure before C. P. Tenancy Act of 1898—Compromise after Act—Occupancy rights in sir land, whether revived.*

The respondent took a mortgage from the appellant under which some part of the property in dispute was mortgaged by way of conditional sale. He obtained a foreclosure decree on the mortgage which was made absolute before the coming into force of the C. P. Tenancy Act of 1898. Subsequently appellant brought a suit to have the foreclosure decree set aside. This suit ended in a compromise under which one portion of the property was left with the mortgagee as his absolute property and the other portion passed to the mortgagor free from the incumbrance. In the meantime the C. P. Tenancy Act of 1920 had come into force and the mortgagor contended that the mortgagee could not obtain actual possession of the sir lands which had been left to him under the compromise as occupancy rights in the land vested in the mortgagor under s. 49 of the C. P. Tenancy Act :

Held, (1) that under the foreclosure decree the mortgagor had lost all interest in the mortgaged property and the mortgagee had become the absolute proprietor thereof and that the effect of the compromise decree was merely to vary the original decree and that it did not operate to revive the rights of the mortgagor regarding the sir land which he had already lost;

(2) that, therefore, s. 49 of the C. P. Tenancy Act had no application to the case. **N GOPALA v. LAXMAN-SINGH** 162

— **s. 105**. See **C. P. TENANCY ACT**, 1920, s. 11 247

— **s. 106**—*Suit for arrears of rent against trespasser—Jurisdiction of Civil and Revenue Courts—Plaintiff, admission of, that defendant is tenant, effect of.*

The jurisdiction of Additional Munsifs or Subordinate Judges who are Revenue Officers should be strictly confined to suits for arrears of rent under s. 106 of the C. P. Tenancy Act. Such an officer has no jurisdiction to try a suit for rent brought against a defendant who is described as a trespasser.

Where, however, during the pendency of such a suit, the plaintiff admits that the defendant is a tenant the admission converts the suit into one for arrears of rent under s. 106 of the C. P. Tenancy Act and gives a Revenue Officer jurisdiction to try it. The suit must be deemed to have been properly instituted against the defendant on the date of such admission and if this date happens to be after the coming into force of the C. P. Tenancy Act, the arrears can only be recovered for a period of three years. **N GANESHDAS v. HARILAL** 279

Cess Act (IX of 1880), ss. 41, 93, 107—*Landlord and tenant—Liability to pay cess, determination of—Cess valuation statement, entries in, value of—Jurisdiction of Civil Courts.*

The meaning of the provision contained in s. 107 of the Cess Act is that what is done under the Act is done only for the purposes of the Act and has no other effect on the rights of the parties. The section does not in any way modify the conclusive effect given by s. 93 of the Act to the cess valuation.

The question as to the liability of a tenant to pay cess has to be determined under s. 41 of the Cess Act and involves the question of the tenant's status. It is not, however, his status under the Bengal Tenancy Act that is in question, but his status

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under the Cess Act and his liability under s. 41 of the latter Act must be determined according to the entries in the cess valuation statement and not with reference to the entries in the Record of Rights. A Civil Court has no jurisdiction to interfere with the entries in the cess valuation statement. **PAT KESHO PRASAD SINGH v. RAM SWARUP** 621

Charge—

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Chota Nagpur Tenancy Act (VI of 1908), ss. 89, 139, 258—*Suit to recover possession of occupancy holding—Denial of title by defendant—Suit, whether cognizable by Civil Court—Order of Attestation Officer revised by Settlement Officer—Suit to set aside order, whether maintainable—Ghatwali lands—Occupancy rights, whether can be acquired.*

Section 139 of the Chota Nagpur Tenancy Act contemplates a case where the relationship of landlord and tenant is admitted to exist between the parties. It does not contemplate cases where there is a dispute as regards title.

A suit to recover possession of an occupancy holding on the allegation that the defendant denies the tenancy right of the plaintiff and has been asserting that the plaintiff has no right in the land in suit is not cognizable by the Deputy Commissioner under s. 139 of the Chota Nagpur Tenancy Act. The relationship of landlord and tenant not being admitted, the section does not operate as a bar to the maintainability of the suit in the Civil Court.

All orders whether by *khanapuri* officers or by Attestation Officers have to be made during the preparation of the draft Record of Rights and all such orders passed before final publication of the Record of Rights are subject to revision under the provisions of s. 89 of the Chota Nagpur Tenancy Act. Where an order made by an Attestation Officer before the final publication of the Record of Rights has been revised by the Settlement Officer under s. 89, the order is final and has the force and effect of a decree of a Civil Court and s. 258 of the Act operates to bar a suit in the Civil Court to set aside the order.

Occupancy rights cannot be acquired in *ghatwali* lands. **PAT GOBINDA BAURI v. KRISTO SARDAR**, A. I. R. 1926 Pat. 64 489

— **ss. 214, 231, 258—***Limitation Act (IX of 1908), Sch. I, Art. 95—Sale of holding—Suit to set aside sale on ground of fraud, nature of—Limitation applicable.*

Sections 214 and 258 of the Chota Nagpur Tenancy Act do not create a right to institute a suit to set aside a sale of a holding held under the provisions of the Act. They bar the institution of such a suit except on the ground of fraud or want of jurisdiction. The right to institute a suit to set aside a sale is conferred by the general law and has been restricted by these sections to the case of fraud or want of jurisdiction. A suit, therefore, to set aside a sale of a holding held under the provisions of the Chota Nagpur Tenancy Act on the ground of fraud, is not a suit instituted under the provisions of the Act as contemplated by s. 231 of the Act, and consequently the period of limitation applicable to such a suit is not the one provided by that section but the one laid down in Art. 95 of Sch. I to the Limitation Act and begins to run from the date on which the fraud becomes known to the plaintiff. **PAT RAMESWAR NARAYAN SINGH v. MAHABIR PRASAD**, A. I. R. 1926 Pat. 47 325

City of Bombay Municipal Act (III of 1888), s. 63 (x). See LAND ACQUISITION ACT, 1894, ss. 6 (3) 695

Civil Procedure Code (Act V of 1908), ss. 2 (2) (a), 47, 104 (2), O. XXI, rr. 89, 92, O. XLIII, r. 1 (j)—*Second appeal from appellate order setting aside execution sale.*

An order under s. 47, C. P. C., which is an adjudication from which an appeal lies as an appeal from an order, is excluded from the definition of a decree under sub-cl. (2) (a) of s. 2, C. P. C. Therefore, under s. 104, cl. (2), C. P. C., no second appeal lies from an order passed under O. XXI, r. 92, against which an appeal lies under O. XLIII, r. 1 (j), C. P. C., even if the auction-purchaser happens to be decree-holder. **C BANSHIBADAN MANDAL v. CHHAUNANT BIBI**, 42 C. L. J. 176 228

— **s. 9—Bengal Village Self-Government Act (V of 1919), s. 51—***Election, suit to set aside—Applicability of section.*

Section 51 of the Bengal Village Self-Government Act does not debar a suit contesting the validity of an election in a Civil Court. Such a suit can be heard by a Civil Court under s. 9 of the C. P. C. **C NASARUDDIN MANDAL v. ANATH NATH CHOWDHURY**, 52 C. 943; A. I. R. 1926 Cal. 279 700

— **s. 11, RES JUDICATA.**

See C. P. C., 1908, O. II, r. 2 622

See EXECUTION OF DECREE 83

— **s. 11—Co-defendants—***Question decided between co-defendants in previous suit after contest.*

The parties to a suit were both impleaded as defendants in a former suit and in their pleadings in that suit contended with each other on a question of relationship, the decision of which was involved in the relief given to the plaintiff in that suit:

Held, that the decision in the previous suit on the question of relationship operated as *res judicata* between the parties to the subsequent suit. **L MEHR DAD v. MOHAMMAD ALI SHAH**, A. I. R. 1925 Lah. 434; 7 L. L. J. 195 250

— **s. 11—***Question of title decided between parties—Redemption of property by plaintiff during pendency of previous suit—Dispossession—Suit to recover possession, whether maintainable.*

Defendant obtained a decree for possession of certain property against the plaintiff as reversioner to the estate of one B. During the pendency of that suit plaintiff obtained a decree for redemption of that property from a mortgagee and obtained possession thereof. He was subsequently dispossessed by a transferee of the defendant and brought a suit to recover possession of the property:

Held, that the decision in the previous suit on the question of title operated as *res judicata* between the parties and that the plaintiffs' suit must, therefore, fail. **O BHONDAI MISER v. RAM PRASAD MISER**, 2 O. W. N. 710; A. I. R. 1925 Oudh 607 569

— **s. 11, O. VIII, r. 6—***Set-off, legal or equitable, plea of, whether obligatory—Counter-claim, cause of action on, whether can be split up—Partial satisfaction by reduction of plaintiff's claim—Suit on balance of claim.*

A defendant is not under an obligation to plead a set-off, legal or equitable, and his omission to do so does not debar him from bringing a separate suit in respect of it.

Civil Procedure Code—1908—contd.

In a suit by an agent against a principal for recovery of advances in respect of purchases of certain goods on behalf of the principal, the defendant is not bound to plead by way of set-off a claim for damages for an unauthorised sale of other goods. If the plaintiff gives the defendant credit for a lesser price than that actually realized by him in respect of the unauthorised sale of goods, a separate suit by the principal for the balance due on his claim is not barred by *res judicata*. **M SUTRAME GOVINDA RAO v. ANUGODA MATADA RUDRAYYA**, (1925) M. W. N. 228; 49 M. L. J. 14; A. I. R. 1925 Mad. 830 **465**

— **s. 11, O. XXI, r. 27**—*Rent suit—Finding as to title.*

One of the issues decided in a rent suit was whether a certain portion of the land in dispute did or did not belong to a certain person. The same question arose between the same parties with regard to the same lands in a subsequent suit:

Held, that the decision in the previous suit operated as *res judicata*. **C NABIN CHANDRA KAPALI v. GOUR MOHAN MISTIRI** **756**

— **s. 15**—*Jurisdiction of Court—Suit lying in Court of lower grade—Higher Court, whether can try—Valuation by plaintiff.*

Section 15 of the C. P. C. is imperative, but it is imperative only on the suitor, who is bound to bring his suit in the Court of the lowest grade. The section is not imperative on the Courts, and does not deprive a higher Court of jurisdiction to try a suit that should have been brought in a Court of a lower grade.

The valuation put by the plaintiff *prima facie* determines the jurisdiction of the Court unless the suit is obviously over-valued and such over-valuation is *mala fide*. **R MAUNG SIT PAUNG v. MAUNG TUN**, A. I. R. 1925 Rang. 278; 4 Bur. L. J. 104 **728**

— **ss. 24, 115**—*Case, transfer of—Notice to other side, absence of—Illegality—Revision.*

A District Judge has no jurisdiction to make an order transferring a pending suit from one Court to another at the instance of a party without giving notice to the other side.

A revision is competent against an order of a District Judge transferring a pending suit from one Court to another at the instance of a party without giving notice to the other side. **A DEMELLO v. NEW VICTORIA MILLS CO. LTD.**, 23 A. L. J. 948; L. R. 6 A. 555 Civ.; A. I. R. 1926 All. 17 **287**

— **s. 35**—*Costs—Discretion of Court—Appellate Court, whether can interfere.*

An Appellate Court has no jurisdiction to interfere with the exercise of the discretionary powers of the Trial Court as to the award of costs. **C RAKHAL CHANDRA MONDAL v. GOUR GOPAL DUTTA**, 42 C. L. J. 137; A. I. R. 1925 Cal. 1085 **486**

— **s. 35**—*Costs—Discretion of Court—Interference by Appellate Court.*

The matter of costs is discretionary with the Trial Court and the High Court will not interfere in appeal with an order as to costs unless it is plainly irregular and contrary to principle. **O GOBIND PRASAD v. NARBHIR SINGH**, A. I. R. 1926 Oudh 35 **577**

— **s. 47**. See **PRESIDENCY SMALL CAUSE COURTS ACT, 1882, s. 41** **509**

— **s. 47**—*Partition suit—Decree allotting separate properties to each party—Subsequent suit to obtain possession of properties allotted, whether barred—Defendants, position of—Court-fee, whether payable by defendant in partition suit.*

Civil Procedure Code—1908—contd.

Where a partition decree merely directs the separation of the shares of the plaintiffs in the suit and leaves the shares of the defendants joint amongst themselves, the defendants cannot execute the decree and there is nothing to prevent them from bringing a fresh suit for partition of the lands jointly allotted to them. Where, however, in such a suit a partition takes place between all the parties thereto and shares are allotted to each, the defendants are also in the position of plaintiffs and in regard to the properties allotted to them they are in the position of decree-holders and can obtain possession of such properties by execution of the decree. A separate suit by any of them to obtain possession of the property allotted to him would be barred by the provisions of s. 47 of the C. P. C.

In a partition suit a defendant has merely to ask for his share of the properties in suit to be separately allotted to him and it is then open to the Court to order the shares of the defendants to be separated as amongst themselves. The decree that is finally drawn up in a partition suit has to be stamped as an instrument of partition under the Stamp Act and, except the stamp duty levied on the decree, no other duty as Court-fee is payable by the defendants in such a suit. **PAT HEMCHANDRA MAHTO v. PREM MAHTO**, (1925) Pat. 330 **739**

— **s. 47**—*“Representative,” meaning of—Mortgagee, whether representative of judgment-debtor.*

A person affected by a decree is a representative of the judgment-debtor within the meaning of the term as used in s. 47 of the C. P. C. Therefore, a mortgagee of a *patni taluk* is a representative of the *patnidar* against whom a decree for rent of the *patni* has been obtained and is competent to challenge the execution of the decree. **C HARI MOHAN DALAL v. PURENDRA NATH CHOUDHURY** **955**

— **ss. 47, 73**—*Partnership decree—Question in execution between decree-holders—Section 47, application of—Orders under s. 73, whether appealable.*

A question raised in execution between parties to a partition suit, in whose favour the decree has been passed, is a question raised between the parties to the suit within s. 47, C. P. C., notwithstanding that all the parties are in the position of decree-holders.

All orders passed under s. 73 of the C. P. C., if passed between parties to a suit, fall under s. 47 of the Code and are appealable. **M AYISA BOVI AMMAL v. SOKARA BOOI**, 49 M. L. J. 375; 22 L. W. 740; A. I. R. 1925 Mad. 1265 **869**

— **ss. 47, 104 (2)**. See C. P. C., 1908, s. 2, cl. 2 (a) **228**

— **s. 47, O. XXI, rr. 95, 97, 103**—*Decree-holder purchaser—Application under r. 95—Obstruction—Order referring applicant to suit—Claimant obstructor party to suit—Order, whether appealable—Separate suit, maintainability of.*

In execution of a decree on a mortgage, the plaintiff purchased the property himself, but was obstructed by a prior purchaser (a party to the suit) in execution of a money-decree obtained against the mortgagor. Two years thereafter, he again applied for delivery under O. XXI, r. 95, C. P. C., but the Court “referred to him to suit” under the mistaken impression that the petition was under r. 97. The decree-holder without appealing filed a suit:

Held, (1) that the matter arose under s. 47, C. P. C., and, therefore, the plaintiff ought to have appealed and a separate suit did not lie;

Civil Procedure Code—1908—contd.

(2) that the suit having been misconceived *ab initio*, the plaintiff was not entitled to ask in second appeal that the suit should be converted into an execution proceeding.

Where claim proceedings under O. XXI, C. P. C., fall also under s. 47, r. 103 of O. XXI does not prevent an appeal against an order therein as it falls under s. 47 of the Code. But the two remedies are not concurrent, so as to entitle a party to proceed at his option either by a suit or by way of appeal; the procedure under s. 47 and that under O. XXI, r. 103 are not cumulative.

Under s. 47 (2), C. P. C., the Court is at liberty to treat a proceeding under the section as a suit or a suit as a proceeding but subject only to any objection as to limitation or jurisdiction. **M PACHAIAPPA CHETTI v. VENKATACHARIAR**, (1925) M. W. N. 577; A. I. R. 1925 Mad. 1198 **952**

— **s. 48, application of—Execution of decree—Decree passed before operation of Code.**

Section 48 of the C. P. C. of 1908 prescribing a period of 12 years for execution of a decree applies to an execution application made after the operation of the said Code, notwithstanding that the decree itself was passed under the old Code of 1882, wherein there was no such bar of 12 years. **A BEGAM SULTAN v. SARVI BEGAM**, 23 A. L. J. 977; L. R. 6 A. 582 Civ.; A. I. R. 1926 All. 93 **274**

— **s. 50. See LIMITATION ACT, 1908, SCH I, ART. 182 (5)** **1050**

— **ss. 66, 2 (14)—Sale by Receiver with approval of Court, whether sale under decree or order—Sale certificate, whether necessary—Section 66, applicability of.**

Section 66 of the C. P. C. refers only to a case where there has been a sale in execution of a decree.

A sale by a Receiver with the approval of the Court is not a sale in pursuance of any decree or order of the Court and in the case of such a sale the Court does not grant a sale certificate nor does it confirm the sale. Section 66 of the C. P. C. has no application to the case of such a sale. **A NARAIN DAS v. RAM CHANDRA**, L. R. 6 A. 610 Civ.; 24 A. L. J. 26; A. I. R. 1926 All. 124 **116**

— **s. 73—Partnership decree in favour of some partners—Decree transferred at instance of one decree-holder to another Court—Realisation of assets—Rateable distribution.**

Where in a partition suit, a decree is passed for payment of certain amounts by one of the partners to the others, and one of the latter realizes a certain amount on having the decree transferred to another Court, the other decree-holders are not entitled to claim rateable distribution, without the decree having been transferred at their instance to the said Court. **M AYISA BOVI AMMAL v. SOKARA BOOI**, 49 M. L. J. 375; 22 L. W. 740; A. I. R. 1925 Mad. 1265 **869**

— **ss. 73, 46—Rateable distribution of assets—Attachment of property, whether entitles decree-holder to share—Procedure—Execution, application for.**

A mere attachment of property after judgment is not sufficient to entitle a decree-holder to share in the rateable distribution of assets in the hands of the Court.

In order to entitle a decree-holder to share in the rateable distribution of assets in the hands of the Court it is necessary that he should make a formal

Civil Procedure Code—1908—contd.

application for execution to the Court, before the assets are actually received.

An application for attachment under s. 46 of the C. P. C. cannot be regarded as an application for execution. **C KASIWAR DE v. ASWINI KUMAR PAL**, A. I. R. 1926 Cal. 249 **527**

— **s. 80—Suit against Secretary of State and Public Officer—Injunction, suit for—Notice, whether necessary—Suit instituted before expiry of period of notice, maintainability of—Bombay District Police Act (IV of 1890), s. 81.**

Per *Shah, J.*—The rule contained in s. 80 of the C. P. C. is a rule of procedure and does not affect in any way the cause of action or the rights of the parties. Where the cause of action requires an immediate remedy by way of injunction the Courts have power to entertain the suit before the expiry of two months specified in the section, where they are satisfied as to the need of an immediate remedy by way of prevention of the wrong complained of.

Where a class of persons is taxed heavily and the payment of the tax is about to be enforced by measures which would cause serious apprehension in the minds of the persons taxed that irremediable damage might be caused to their business unless the enforcement of the orders imposing the tax were stopped at once, the remedy by way of injunction is appropriate and necessary to safeguard their interests, and in such a case the suit might be entertained even if instituted before the expiry of the period limited in s. 80 of the C. P. C.

Section 81 of the Bombay District Police Act provides an additional remedy which the party concerned may follow but it does not bar a suit, which it may be otherwise open to the party to file.

Per *Kemp, J.*—So far as a suit against the Secretary of State is concerned the words of s. 80 of the C. P. C. are imperative and make no exception in the case of suits for an injunction and a Court of Law is not entitled to graft on to the plain wording of the section a qualifying clause excepting suits for an injunction from the operation of the section. Relief by way of injunction is a kind of relief which must have been in the contemplation of the framers of the Code when the section was drafted and re-drafted. It makes no difference that the injury apprehended is immediate or irreparable. No suit may be instituted against the Secretary of State until the expiration of the two months' notice required by the section.

Where, however, a suit is for an injunction against a public servant in respect of a threatened act, the section has no application and no notice is necessary under the section before the institution of the suit. **B BHAGCHAND v. SECRETARY OF STATE FOR INDIA**, A. I. R. 1924 Bom. 1; 26 Bom. L. R. 1; 48 B. 87 **13**

— **s. 99. See PARTITION ACT, 1893, s. 4** **121**

— **s. 104 (2). See C. P. C., 1908, ss. 2, cl. (2) (a), 47, 104 (2)** **228**

— **s. 105, O. IX, r. 13—"Affecting the decision" in s. 105, meaning of.**

The expression "affecting the decision" in s. 105 of the C. P. C. signifies that there has been at work something which has influenced the Judge in the mental process of arriving at his decision that the error, defect or irregularity in the order, has, so to speak, warped the mind of the Judge so as to lead him to a wrong conclusion. The word "decision" in the

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section must, therefore, be taken to mean decision upon the merits.

An order setting aside an *ex parte* decree cannot be said to affect the decision of the suit within the meaning of s. 105 of the C. P. C.

Per *Daniels, J.*—Many things may affect a decision besides the reasons given by the Judge in his judgment. Where a suit has been finally decided but an illegal order is subsequently passed setting aside the decision with the possible result that the case is heard over again and decided in the opposite way, it cannot be said that the error committed in restoring the case has not affected the ultimate decision. An illegal order, and by consequence the illegality committed in passing that order, affects the decision of the case within the meaning of s. 105 of the C. P. C., if the order passed is one but for which the decision might have been other than it was :

Held, by the Division Bench, (*Sulaiman and Daniels, J.J.*)—An Appellate Court has no jurisdiction to set aside an *ex parte* decree outside the provisions of r. 13 of O. IX of the C. P. C. *A RAM SARUP v. GAYA PRASAD*, A. I. R. 1925 All. 610; L. R. 6 A. 601 Civ; 24 A. L. J. 56 180

— s. 109. See C. P. C., 1908, SCH. II, PARA. 1 904

— s. 109—Limitation Act (IX of 1908), s. 5—“Final order,” meaning of—Appeal—Order granting extension of time—Appeal to Privy Council, whether competent.

A final order within the meaning of s. 109 of the C. P. C. is an order which finally decides any matter which is directly at issue in the case in respect of the rights of the parties.

An order extending the time for presenting an appeal under s. 5 of the Limitation Act is not a “final order” within the meaning of s. 109 of the C. P. C., and is not, therefore, open to appeal to the Privy Council. *PAT PEREIRA v. EAST INDIAN RAILWAY*, A. I. R. 1926 Pat. 102; 7 P. L. T. 256 723

— ss. 109, 115—Order passed in revision, whether passed “on appeal”—Appeal to His Majesty in Council, whether competent.

An order passed by the High Court in the exercise of its revisional jurisdiction is not an order passed “on appeal” within the meaning of cl. (a) of s. 109 of the C. P. C. Such an order may, however, be open to appeal to His Majesty in Council under cl. (c) of the section, if it is shown that the case is a fit one for appeal. *A SURAJ SINGH v. PHUL KUMARI*, 23 A. L. J. 997 904

— s. 109 (c), O. XLVII, r. 7—Review, decree passed on—Appeal to His Majesty in Council, leave for, when to be granted.

Where a decree passed by the High Court is of such a character that if it had been passed by a Court subordinate to the High Court no appeal against it would have been permissible to the High Court, leave will not be granted under s. 109 (c) of the C. P. C. for an appeal to His Majesty in Council against the decree.

Where a decree is passed by the High Court on review, leave to appeal against the decree to the Privy Council under s. 109 (c) of the C. P. C. will not be granted unless the decree is open to objection on some ground recognized by r. 7 of O. XLVII of the C. P. C. *O JAGMOHAN SINGH v. SHEO MANGAL SINGH*, A. I. R. 1926 Oudh 17 332

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— s. 110—Leave to appeal to Privy Council—Substantial question of law—Sufficiency of evidence to prove custom—Difference of opinion.

Although the question whether the evidence produced to establish a custom is sufficient is a question of law, it is not a substantial question of law within the meaning of s. 110 of the C. P. C., i. e., a question of law in respect of which there may be a difference of opinion. *N JAGESHWAR TUKARAM v. PANDURANG* 270

— s. 115.

See C. P. C., 1908, s. 24 287

See C. P. C., 1908, O. IX, R. 13 1042

See C. P. C., 1908, O. XXI, R. 89 963

See C. P. C., 1908, O. XXXIII, R. 1 949

See C. P. C., 1908, O. XLI, R. 23 426

— s. 115—Election rules—Interference by High Court. See ELECTION PETITION 1055

— s. 115—Criminal Procedure Code (Act V of 1898), ss. 476, 476B—Government of India Act, 1915, (5 & 6 Geo. V, c. 61), s. 107—Penal Code (Act XLV of 1860), ss. 193, 471—Bengal Tenancy Act (VIII of 1885), s. 40—Proceeding for commutation of rent instituted in Revenue Court—Application to prosecute petitioner for forgery, refusal of—Appeal to Collector—Complaint by Collector—Appeal to Commissioner, whether competent—Revision—High Court, power of, to interfere—Question, whether must be finally determined in Revenue proceedings—Refusal of Revenue Court to determine question—Denial of right of fair trial—Superintendence, power of, exercise of.

Petitioner filed an application for the commutation of his rent under s. 40 of the Bengal Tenancy Act before the Sub-Deputy Collector and filed a *patta* alleged to have been given to him by the opposite party in support of his application. The opposite party contended that the *patta* was a forgery and asked the Court to direct the prosecution of the petitioner for an offence under ss. 471 and 193 of the Penal Code, but the Sub-Deputy Collector after enquiry refused the application. The opposite party moved the Collector on appeal and that officer set aside the order of the Sub-Deputy Collector and made a complaint against the petitioner under ss. 471 and 193 of the Penal Code. The petitioner thereupon appealed to the Divisional Commissioner who held that no appeal lay to him and rejected the appeal. On an application for revision being made to the High Court :

Held, (1) that the Collector was acting as a Revenue Court and was exercising judicial powers in setting aside the order of the Sub-Deputy Collector and was, therefore, subject to the superintendence of the High Court and his order was revisable under s. 115 of the C. P. C. ;

(2) that the Court also had jurisdiction to interfere under s. 107 of the Government of India Act ;

(3) that the Commissioner had jurisdiction to hear the appeal preferred by the petitioner against the order of the Collector and to set aside that order if necessary.

Section 476-B of the Cr. P. C. contemplates that if an Appellate Court sets aside the order of the Original Court, the party prejudicially affected by the order of the Appellate Court has a right of appeal to the Court to which appeals from such Appellate Court ordinarily lie.

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When a criminal offence is alleged to have been committed in the course of a revenue or civil proceeding, the rule is that the facts upon which the criminal offence is founded should, as far as possible, be finally determined in the Civil or Revenue Court before a prosecution in respect of the criminal offence is commenced. The refusal of the Revenue or Civil Court to try out the proceedings in which the criminal offence is alleged to have been committed materially affects the criminal proceedings and amounts to a denial of the right of fair trial. In such a case the High Court is competent to interfere with the order directing the institution of criminal proceeding under s. 107 of the Government of India Act. **PAT FAUJDAI RAI v. EMPEROR**, 26 C. L. J. 1565; A. I. R. 1926 Pat. 25; 7 P. L. T. 199 **445**

— **s. 115**—*Jurisdiction, decision as to—Appeal—Revision, whether lies.*

An appellate judgment deciding, even if erroneously, that a Court of first instance had jurisdiction to hear a suit, is not open to revision by the High Court. **L BHOGI LAL TRIKAM LAL v. AMAR NATH LAJPAT RAI**, 2 L. C. 135; A. I. R. 1926 Lah. 47 **1042**

— **s. 115**—*Question of fact—Error of law—Revision—Interference by High Court*

The High Court will not ordinarily interfere with a finding of fact in revision.

Where a Court has jurisdiction to decide a question of law, the mere fact that its decision is erroneous is no ground for interference in revision.

The question whether the death of one of the arbitrators to whom a dispute had been referred for decision renders an award made by the remaining arbitrators invalid, is a question of law, and the mere fact that this question is decided erroneously by a Court having jurisdiction to decide it will not render its decision open to interference in revision. **O GAJADHAR v. AULAD HUSAIN**, A. I. R. 1926 Oudh 80 **373**

— **s. 115**—*Return of appeal for presentation to proper Court—Refusal to exercise jurisdiction—Revision.*

An application for revision lies against an order of a Court returning an appeal for presentation to the proper Court, and thus refusing to exercise jurisdiction. **L GHULAM SARWAR v. GHULAM MUSTAFA**, A. I. R. 1925 Lah. 479; 7 L. L. J. 285 **603**

— **s. 115**—*Security found insufficient—Revision, whether entertainable.*

No revision can be entertained on the mere ground that the Court acted wrongly in considering a certain security offered by the applicant to be insufficient. **O JAIDAT SINGH v. BALDEO SINGH** **1051**

— **s. 115, O. VII, r. 10, O. XLIII, r. 1 (a)**—*Order returning plaint for presentation to proper Court—Appeal—Appellate Court deciding that Trial Court had jurisdiction—Error of law—Revision, whether lies.*

An error of law furnishes no ground for revision.

Where on an appeal from an order directing that a plaint should be returned for presentation to a proper Court, the Appellate Court decides that the Trial Court had jurisdiction to entertain the suit, its decision is not open to revision inasmuch as even if it is erroneous, it is a mere error of law committed by a Court which had jurisdiction to decide the matter. **O HAIDRI KHANAM v. AHMAD ALI**, A. I. R. 1926 Oudh 31 **430**

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— **s. 115, O. IX, r. 13**—*Ex parte decree, application to set aside—Appeal—Appellate Court setting aside ex parte decree—Sufficient cause, absence of—Revision, whether lies.*

Per Curiam.—The High Court can interfere in revision with an appellate order directing the setting aside of an *ex parte* decree where the applicant has not shown sufficient cause under r. 13 of O. IX of the C. P. C.

Per Lindsay, J.—Where there is an independent proceeding arising out of a case, such as a proceeding to set aside an *ex parte* decree, for which the Legislature has provided an independent remedy or a different procedure, such proceeding may be a case within the meaning of s. 115 of the C. P. C. **A RAM SARUP v. GAYA PRASAD**, A. I. R. 1925 All. 610; L. R. 6 A. 601 Civ.; 24 A. L. J. 56 **180**

— **s. 115, O. IX, r. 13**—*Ex parte decree—Application by one of several defendants to set aside decree—Decree, whether can be set aside as against all defendants—Revision—Interference by High Court.*

The general rule is that an *ex parte* decree should be set aside only as against the party making an application to set aside the decree. Under the proviso to r. 13 of O. IX of the C. P. C., however, the Court has power in a case in which the decree is of such a nature that it cannot be set aside against the applicant only, to set it aside against all or any of the other defendants also. Where a Court acting under this proviso sets aside an *ex parte* decree not only against the defendant applying to set it aside but as against all the defendants, the High Court will not interfere with the order in revision.

Where a person alleging himself to be the representative of a mortgagee obtains a decree for foreclosure as against the mortgagor and also against a rival claimant to the mortgagee right, the decree against the latter being *ex parte*, and the decree is set aside at the instance of the latter, it should also be set aside as against the mortgagor, inasmuch as if the decree is allowed to stand as against the mortgagor but is set aside as against the rival claimant, this might result in the mortgagor being compelled to pay the amount of the mortgage twice over. **O DEBI CHARAN v. DEO MUKHI**, 2 O. W. N. 702; A. I. R. 1925 Oudh 621 **272**

— **s. 115, O. XXIII, r. 1**—*Withdrawal of suit—Inability to produce evidence—Revision.*

The High Court can interfere on the revision side with an order passed under O. XXIII, r. 1 of the C. P. C., where that order proceeds on grounds other than those laid down in the rule. The words "other sufficient ground" in the rule are *ejusdem generis* with the grounds mentioned.

An order granting leave to withdraw a suit with liberty to bring a fresh suit on the ground that the plaintiff had been unable to produce sufficient evidence to prove his case within the time allowed is without jurisdiction and can be set aside in revision. **L ISHAR DAS v. LAL SINGH**, A. I. R. 1925 Lah. 497; 2 L. C. 151; 7 L. L. J. 290 **632**

— **s. 115, O. XLIII, r. 1 (a), O. VII, r. 10**—*Order directing return of plaint for presentation to proper Court—Appeal, dismissal of—Revision, whether lies.*

Where on an appeal against an order directing the return of a plaint for presentation to the proper Court, the Appellate Court upholds the decision of the Trial

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Court, it cannot be said to have exercised its jurisdiction illegally or with material irregularity and its order is not open to revision. The order of the Trial Court, however, in such a case, if erroneous, may be revised by the High Court in spite of the fact that an appeal against that order has been dismissed by the Appellate Court, and if the order of the Trial Court is set aside by the High Court, the order of the Appellate Court necessarily falls to the ground with it. **A BISHESHAR PRASAD v. RAGHUBIR**, L. R. 6 A. 255 Rev.; 24 A. L. J. 83; A. I. R. 1926 All. 58 **353**

— **s. 151**—Decree for possession conditional on payment into Court within certain period—Payment beyond period prescribed—Inherent power of Court to extend time—Review. See C. P. C., 1908, O. XLVII, r. 1 **79**

— **s. 151**—Evidence Act (I of 1872), s. 167—Inadmissible evidence, decision based on—Remand, power of.

Where an Appellate Court has relied for its decision upon a document which is inadmissible in evidence, a Court of Second Appeal would be justified in remanding the case for decision to the Appellate Court with a direction to exclude that document from its consideration. **LHEM RAJ v. NIHAL SINGH**, A. I. R. 1925 Lah. 506; 7 L. L. J. 352 **678**

— **O. I, rr. 1, 3, O. II, r. 3**—Joinder of parties and causes of action—"Same act or transaction"—Partnership—Suit for dissolution of main and branch firms—Multifariousness.

A suit for dissolution and winding up of a firm and its branch firm which consists of certain additional partners, who have no interest in the main firm, is bad for multifariousness.

Order I, rr. 1 and 3 of the C. P. C., apply to questions of joinder both of parties and causes of action.

Under the present C. P. C. a plaintiff may not only join different causes of action against the same defendant or the same defendants when such defendants are jointly interested in all the causes of actions, as provided in O. II, r. 3, C. P. C., but he may also join different causes of action against different defendants, provided he is able to bring his case within the purview of O. I, r. 3, C. P. C., under which it is necessary not merely to show that a common question of law or fact would arise but that the right to relief in each case arises out of the same act or transaction or series of acts or transactions.

Ordinarily in a suit for settlement of accounts of a dissolved partnership and of any sub-partnership in which there are additional partners, the act or series of acts which give rise to relief for settlement of accounts of the main partnership are not the same as those which give rise to the relief for settlement of accounts of the sub-partnership. Though some of the evidence in support of the plaintiffs' contention may be common to both the causes of action, it does not thereby follow that there is a common question of fact involved in the two causes of action. **S JETHANAND v. CHETUMAL** **970**

— **O. I, r. 3**—Multifariousness.

A suit by a plaintiff under s. 13 of the Survey and Boundaries Act of 1897 to set aside an order of the Survey Officer that certain plots of land in the possession of the various defendants are not within the boundaries of the plaintiff's village is not bad for multifariousness. **M GOVINDA KRISHNA YACHANDRA v. SRINIVASA RAMACHARLU**, 49 M. L. J. 426; (1925) M. W. N. 629; A. I. R. 1925 Mad. 1237 **748**

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— **O. I, rr. 6, 9, 10 (2)**. See LANDLORD AND TENANT **211**

— **O. I, r. 10, s. 115**—Addition of parties—Misjoinder of parties and causes of action—Revision. The addition of a party under O. I, r. 10, C. P. C., is ordinarily a matter within the discretion of the Court trying the suit, and an erroneous exercise of discretion in a matter of procedure should not be regarded as something done illegally in the exercise of the Court's jurisdiction under s. 115, C. P. C.

Where, however, the addition of a person as a party results not only in a misjoinder of parties but of causes of action as well, a Court of Revision should interfere. **M MURUGAPPA CHETTIAR v. L. K. S. S. FIRM**, A. I. R. 1926 Mad. 135 **721**

— **O. II, r. 2, s. 11**—Transfer of Property Act (IV of 1882), s. 68 (b)—Mortgage, usufructuary—Dispossession of mortgagee—Suit to recover possession, dismissal of—Money suit, whether maintainable—Abandonment of claim—Res judicata.

A usufructuary mortgagee who had been dispossessed from the land mortgaged brought a suit for recovery of possession but the suit was dismissed on the ground that the property mortgaged was joint family property and that all the members of the family had not joined in the mortgage. It was found that the mortgage was genuine and that consideration had passed but that there was no legal necessity for the mortgage. The Court also stated in its judgment that a money-decree could not be passed in favour of the plaintiff as he had made no prayer for such a decree. Against that decree the defendants filed an appeal attacking the finding as to the genuineness of the mortgage and there was a cross-appeal by the plaintiff asking for a money-decree. The cross-appeal was dismissed on the ground that it was not sufficiently stamped and the appeal was dismissed on the ground that although no consideration had passed the appeal was not competent inasmuch as the suit had been dismissed in the lower Court. The plaintiff subsequently brought a money suit to recover the amount due under the mortgage-bond:

Held, (1) that it was open to the plaintiff in the previous suit to sue for the mortgage money under the provisions of s. 68 (b) of the Transfer of Property Act and that plaintiff having failed to ask for that relief in the previous suit the present suit was barred under the provisions of O. II of r. 2 of the C. P. C.;

(2) that the finding by the Appellate Court in the previous suit that no consideration had passed in respect of the mortgage-bond operated as *res judicata* between the parties and that the present suit must, therefore, fail on that account also. **PAT RAM AUTAR v. SHANKAR DAYAL**, (1925) Pat. 338; 7 P. L. T. 150; A. I. R. 1926 Pat. 87 **622**

— **O. VI, r. 17**. See LIMITATION ACT, 1908, s. 22 **426**

— **O. VI, r. 17**—Amendment of plaint—New cause of action.

The powers as to amendment of plaint given to Court are very wide but they should not ordinarily be used to allow a new cause of action to be introduced where the defendant would be deprived of his plea of limitation if the amendment were granted. **R NAGOOR MEERA v. MOIDEEN NAINAR MEERA ALI**, A. I. R. 1925 Rang. 264; 4 Bur. L. J. 110 **639**

— **O. VI, r. 17**—Amendment of plaint—Subsequent events, whether can be taken notice of.

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It is well-settled that events that happen even after the filing of a suit, including those that add to the title of the plaintiff, may be taken notice of.

The discretion in allowing an amendment of a plaint ought not to be exercised when there is a change of jurisdiction, when there is a great delay in making the application or if a fresh enquiry on other facts is necessary, but when these features do not exist, the amendment ought, as a general rule, to be allowed so as to avoid multiplicity of proceedings. **M VALLURU APPALASURI v. SASAPU KANNAMMA NAYURULU**, 22 L. W. 287; (1925) M. W. N. 622; 49 M. L. J. 479; A. I. R. 1926 Mad. 6 **881**

— **O. IX, rr. 3, 8, 9**—Some defendants present—Plaintiff absent—Suit dismissed in default—Application of r. 9.

Where on the day fixed for the hearing of a suit, one out of the several defendants appears, but neither the plaintiff nor the rest of the defendants are present, and the suit is dismissed in default, the order of dismissal, so far as the defendant who is present is concerned, must be regarded as one under O. IX, r. 8, C. P. C., and as against the absentees under O. IX, r. 3. Consequently, a fresh suit on the same cause of action against the absentee defendants is not barred by provisions of O. IX, r. 9. **A MAKUNDI SINGH v. PARBHU DAYAL**, L. R. 6 A. 200 Rev.; 23 A. L. J. 993; A. I. R. 1926 All. 169 **2**

— **O. IX, rr. 4, 5**—Absence of petitioner on date of hearing—Dismissal of petition for default—Opposite party not served, effect of—Dismissal, whether can be set aside.

Where a petitioner has failed to appear on the date fixed for the hearing of his petition, r. 5 of O. IX of the C. P. C. has no application. The fact that the summons had not been served on the opposite party is no ground for setting aside an order of dismissal for default passed owing to the absence of the petitioner on the date of hearing. **C SARMA SUNDARI (DAXI) DASSI v. PANCHANON RAY**, A. I. R. 1926 Cal. 112 **675**

— **O. IX, r. 8**—Adjournment of suit refused—Pleader having no further instruction—Default of appearance—Dismissal of suit.

Where, after an application for the adjournment of the hearing of a suit is rejected, the party's Pleader states that he has no further instruction, that is equivalent to the absence of the party from the proceeding, and the dismissal of the suit for default by the Court in such a case is a dismissal under r. 8 of O. IX of the C. P. C. **C MANMATHA NATH CHOUDHURY v. JAMINI NATH MALLIK**, A. I. R. 1926 Cal. 246 **768**

— **O. IX, rr. 8, 9, O. XLVII, r. 1**—Limitation Act (IX of 1908), s. 5, Sch. I, Art. 163—Dismissal of suit for default—Review, whether lies—Application for restoration—Limitation—Delay, whether can be excused.

The only remedy open to a party whose suit has been dismissed for default under O. IX, r. 8, of the C. P. C., is to apply under r. 9 of the Order to set aside the order of dismissal. It is not open to him to apply under r. 1, O. XLVII of the Code for a review of the order dismissing his suit.

Section 5 of the Limitation Act is not applicable to an application under O. IX, r. 9 of the C. P. C. to set aside an order dismissing a suit for default and a Court has therefore, no jurisdiction to admit an application under r. 9 on the ground that the applicant had sufficient cause for not preferring his appli-

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cation within the time prescribed. **B MAHADEO GOVIND v. LAKSHMINARAYAN**, 27 Bom. L. R. 1159, 49 B. 839; A. I. R. 1925 Bom. 521 **610**

— **O. IX, rr. 9, 13, s. 115**—Ex parte decree, application to set aside—Order setting aside ex parte decree on condition of payment of costs within fixed period—Extension of time, application for, refusal of—Revision.

An order restoring a case dismissed for default, or setting aside an ex parte decree, on condition of the payment of a reasonable amount of costs to the opposite party, within a time fixed by the order, is not an illegal order, but on the contrary is an order contemplated by rr. 9 and 13 of O. IX of the C. P. C.

Where in the case of such an order, the petitioner applies to the Court for extension of the time fixed for payment of costs and the Court refuses to extend the time, its order is not open to revision. **A AHMAD HUSAIN KHAN v. HARDIAL**, L. R. 6 All. 586 Civ.; 24 A. L. J. 120; A. I. R. 1926 All. 142 **243**

— **O. IX, r. 13**. See C. P. C., 1908, s. 115 **180**
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— **O. IX, r. 13**—Ex parte order—Defendants' default—Application to set aside order—Terms—Discretion of Court.

Where an order passed ex parte is not challenged on the ground of an irregularity entitling the applicant to have it vacated *ex debito justitiæ*, but the defendant applies to be relieved of his own default, he should be put to terms, for instance, he may be called upon to deposit the amount claimed by the opposite party before a judgment which is otherwise regular is vacated, specially when the *bona fides* of the applicant's defence are not free from doubt. **S DAVID SASSOON & CO. LTD. v. SHIVJIRAM DEVIDAS**, A. I. R. 1926 Sind 50 **236**

— **O. IX, r. 13**—Mortgage suit—Ex parte decree—Appeal by plaintiff—Decree varied—Application by defendant to set aside ex parte decree, whether maintainable.

A mortgage suit was decreed ex parte but the stipulated rate of interest was not allowed from the date of the institution of the suit. After the preliminary decree was signed the defendant applied under r. 13 of O. IX of the C. P. C. to have the matter reopened. The plaintiff preferred an appeal against the decree with regard to the dismissal of his claim for interest from the date of the institution of the suit. The appeal was allowed and the Appellate Court passed a fresh decree in lieu of the decree passed by the Trial Court. Thereafter the defendant's application to set aside the ex parte decree was rejected by the Trial Court on the ground that the decree sought to be set aside had ceased to exist and had merged in the decree of the Appellate Court.

Held, that the defendant's application under r. 13 of O. IX of the C. P. C. was rightly dismissed inasmuch as there was no decree of the Trial Court in existence which could be set aside. **C MURTAZA BEGUM v. JOGENDRA NATH ROY** **724**

— **O. IX, r. 13, s. 115**—Ex parte decree, application to set aside—Matters for consideration—Good defence on merits, relevancy of—Defendant's knowledge of decree, nature of—Effect—Order without considering real question—Interference—Revision.

In an application under O. IX, r. 13, C. P. C., what the Court has to find is not whether the defendant has any good defence on the merits but whether there has been proper service, and if there is proper

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service whether there was sufficient cause for his non-appearance. Apart from the question of limitation the defendant's knowledge of the suit after a decree is irrelevant for any other purpose.

And even for the purposes of limitation, a vague knowledge that a decree had been passed by some Court is not enough. It must be found that the defendant had knowledge that a particular decree had been passed against him in a particular Court in favour of a particular person and for a particular sum.

Where the Courts below have not considered in such a case the real question, whether sufficient cause has been shown by the defendant for non-appearance, it is an irregularity justifying the interference of the High Court in revision under s. 115, C. P. C.

Where on summons being taken out in a suit the *amin* went to the village of the defendants and learnt that they had gone to another place and the time of their return was not known and there was no adult male member in their families and the summonses were then affixed to the outer-doors of their houses:

Held, that there was not merely substituted service but good service according to law. **M MUHAMMAD SAHIB v. ALAGAPPA CHETTIAR**, 49 M. L. J. 445; 22 L. W. 423; A. I. R. 1926 Mad. 31 **1042**

— **O. IX, r. 13, O. XVII, r. 3—Award in suit—Objections—Petition for time to summon witnesses, refusal of—Decree in accordance with award—Decree, whether ex parte.**

Where an objection is taken by the defendant to the award submitted by the arbitrators in a suit, and on the date of hearing an application by him for time to summon his witnesses is refused, and the Court pronounces a decree in accordance with the award, the decree passed is not *ex parte*, where there is nothing on the record to show that the Pleader for the defendant, who applied for time, had no further instruction to appear. **C RAMESH CHANDRA GUHA v. DINESH CHANDRA GUHA**, 42 C. L. J. 224; A. I. R. 1925 Cal. 1010 **512**

— **O. IX, r. 13, O. XXII, rr. 3, 4, s. 115—Ex parte decree, application to set aside—Finding as to non-service of summonses and date of knowledge of decree based on evidence—Revision—Interference with finding.**

Where on an application to set aside an *ex parte* decree the Court considers the evidence on the record and comes to the conclusion that the applicant had no knowledge of the institution of the suit and that summonses were not served upon him and that he came to know of the decree within 30 days of the application and on these findings sets aside the *ex parte* decree, its order cannot be interfered with in revision inasmuch as it cannot be said that the Court has committed any error, illegality or irregularity such as to affect its jurisdiction.

Where in a proceeding to set aside an *ex parte* decree it appears that the heirs of a deceased plaintiff have not been made parties to the application, but the Court comes to the finding that the remaining plaintiffs represent the deceased plaintiff and that it was not necessary to bring his heirs on the record, the finding cannot be interfered with under s. 115 of the C. P. C. **PAT SHAMSHER NARAIN SINGH v. MAHOMMED SALE**, A. I. R. 1926 Pat. 29 **329**

— **O. XIII, rr. 1, 2—Document not produced at first hearing, rejected by Trial Court—Appeal, second—Interference by High Court.**

The High Court will not in second appeal interfere

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with the order of a Trial Court refusing to admit a document in evidence which was not produced at the first hearing of the suit in accordance with the provisions of r. 1 of O. XIII of the C. P. C., where no reason is shown for the non-production of the document at such hearing. **C NRISINHA CHARAN NANDI v. BATASI DASHI**, A. I. R. 1926 Cal. 106 **602**

— **O. XVI, r. 1—Witnesses not served—Fresh summonses, issue of—Procedure.**

Where certain witnesses, whom a party wishes to produce in support of his case, are not present on the date of hearing owing to the fact that summonses have not been served upon them, the Court ought to issue fresh summonses for service upon the witnesses and is not justified in depriving the party who wishes to produce them, of his right to have the evidence of those witnesses taken. **L GOPI CHAND v. KIRPA RAM**, A. I. R. 1926 Lah. 26 **1030**

— **O. XVI, rr. 10, 11, 12—Witness, failure of, to obey summons to attend Court—Court's power to impose fine—Attachment or proclamation, whether condition precedent—Words "such person" in r. 12, meaning of.**

Neither the issue of a proclamation nor an order for attachment of property is a condition precedent to the imposition of a fine for non-attendance of a person who has been summoned to attend a Civil Court as a witness.

Per *Spencer, J.*—The words "such person" in r. 12 of O. XVI of the C. P. C. do not mean a person against whom a proclamation has been issued or whose property has been attached; but mean a person to whom a summons has been issued and who fails to attend under r. 10 (1).

Per *Ramesam, J.*—Order XVI, r. 12, C. P. C., deals with all cases of disobedience not covered by r. 11, whether there has been attachment or not and is not confined to cases in which there has been an attachment. **M In re PETA NAGAYYA**, 22 L. W. 332; 49 M. L. J. 438; (1925) M. W. N. 767; A. I. R. 1925 Mad. 1247; 48 M. 941 **991**

— **O. XX, r. 4—Judgment of Small Cause Court—Mere statement of all issues being found for plaintiff—Judgment, whether in accordance with law.**

It is enough if a judgment of a Small Cause Court sets out only the points for determination and the decision with regard to each separately.

A judgment, however, which clubs together all the points arising in the case and merely contains a statement that all the issues are found in favour of the plaintiff is not a sufficient compliance with the provisions of O. XX, r. 4, C. P. C. **M SRAMBIKKAL MALIAKKAL MOIDEEN KOYA v. KATTAPARAMBATHI MOIDEEN**, 49 M. L. J. 354; A. I. R. 1925 Mad. 1229 **968**

— **O. XX, r. 12—Mesne profits, determination of—Application for ascertainment of mesne profits, nature of.**

An application for the determination of mesne profits is an application in the suit. **C JANAKINATH SINGHA ROY v. NIRODE BARAN ROY**, A. I. R. 1926 Cal. 175 **811**

— **O. XX, r. 12—Mesne profits subsequent to suit—Decree for fixed amount, whether proper—Decree, whether final or only preliminary.**

Order XX, r. 12 (1) (c), C. P. C., contemplates only an inquiry as to the amount of subsequent mesne profits, and not a decree for a particular and definite amount. Where, however, in a case the Court after

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ascertaining such mesne profits passes a decree for the sum without directing an inquiry, the decree is not preliminary but final and further proceedings under the decree are in execution and not in suit. **M MUTHIALAGAPPA CHETTIAR v. AHMAD IBRAHIM ALIM SAHEB**, 22 L. W. 347; A. I. R. 1925 Mad. 1276

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— **O. XX, r. 14**—*Pre-emption decree, form of—Date of payment, specification of.*

The proper form of a decree for pre-emption is laid down in O. XX, r. 14 of the C. P. C. The date by which the purchase-money should be paid must be specified in the decree. It is not a compliance with this direction of the law to say that the money is to be paid within a certain period from the date on which the decree becomes final. **A JAGAT NARAIN LAL v. HAWALDAR**, L. R. 6 A. 597 Civ; 21 A. L. J. 63; A. I. R. 1926 All. 165

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— **O. XX, rr. 16, 17, O. XXVI, r. 11**—*Principal and agent—Accounts, suit for—Surcharging and falsifying, when allowed—Delivery of written accounts, whether discharges agent—Papers delivered to principal—Procedure—Commissioner, duties of—Duty of Court.*

A suit by a principal for accounts on the allegation that the defendant, his agent, has not rendered any account, has an entirely different scope from that of a suit in which a principal alleges that the defendant, his agent, has rendered accounts and prays to have them re-opened or to have liberty to surcharge and falsify them on the ground of fraud or material error. It is only in the case of settled accounts that liberty has to be obtained by a plaintiff to surcharge and falsify.

An agent cannot discharge himself from the duty of accounting, by merely delivering to his employer a set of written accounts without attending to explain them and producing vouchers by which items of disbursement are supported.

Before an order can be made for the appointment of a Commissioner to examine accounts, the examination and adjustment of accounts or the taking of accounts must be considered necessary.

The determination of the *factum* of the liability of an agent to account is a matter which falls entirely within the province of the Court and cannot be delegated to a Commissioner appointed for the purpose of taking accounts.

Where in a suit for accounts it is found that the defendant has delivered to the plaintiff all the papers containing the account, it lies upon the plaintiff to point out entries in the account which he alleges to be erroneous or in respect of transactions not shown in the accounts and to state what moneys have been received and not credited and the Court will have to deal with the questions thus raised between the parties treating each item separately. In such a case it is the duty of the plaintiff to produce the accounts together with a succinct statement of what they contain and what the balance is, whether in favour of the plaintiff or against him. The Court will then decide as to each particular item or series of items, giving the defendant an opportunity of explaining, supporting or accounting for the said items. If on dealing with the questions so raised it is found that the defendant is liable a preliminary decree should then be passed directing a Commissioner to be appointed to examine and adjust the accounts on the basis of the findings of the Court on the questions decided as aforesaid

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and special directions should be given to the Commissioner as to the scope and limits of the investigation to be held by him so as to determine the extent of the defendant's liability.

It is only to prevent a waste of public time that resort is to be had to the appointment of a Commissioner, but when it is found necessary to have recourse to the provisions of r. 16 of O. XX of the C. P. C. the Court should follow the directions contained in r. 17 of the Order and furnish the Commissioner with such part of the proceedings and such detailed instructions as appear necessary. **C BHARAT CHANDRA CHAKRAVERTY v. KIRON CHANDRA**, 52 C. 766; A. I. R. 1925 Cal. 1009

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— **O. XXI, rr. 54, 66, 67, 69**—*Execution of decree—Sale, adjournment of—Fresh proclamation—Notice to judgment-debtor, whether necessary.*

The issue of the notice enjoined by sub-r. (2) of r. 66 of O. XXI of the C. P. C. relates to cases where a proclamation has to be drawn up. Where a sale is adjourned all that sub-r. (2) of r. 69 of the Order requires is that a fresh proclamation must be made under r. 67, which again requires that the proclamation must be made and published, as nearly as may be, in the manner prescribed by sub-r. (2) of r. 54. Where the latter rule is complied with, the proclamation is duly published and no notice to the judgment-debtor under sub-r. (2) of r. 66 is necessary. **O AHMAD HASAN v. KODI LAL**, A. I. R. 1926 Oudh 76

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— **O. XXI, r. 63**—*Execution of decree—Claim proceedings—Procedure—Suit under r. 63, nature of, scope of.*

The policy of the Legislature is to secure the speedy settlement of questions of title raised in claim proceedings and the finding of a Court in such a proceeding is a summary decision from which the suit allowed by r. 63, O. XXI of the C. P. C., is simply a form of appeal. The object of the Legislature in prescribing a suit by way of appeal is to give the parties an opportunity of placing their respective cases before a Court, because a summary investigation might not have furnished sufficient material for a decision by an Appellate Court. **N DAULAT v. RAMAPPA**

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— **O. XXI, r. 89, s. 115**—*Execution sale, setting aside of—Interest in property—Title negatived previously—Locus standi of applicant—Refusal to entertain application—Revision.*

Order XXI, r. 89 of the C. P. C. of 1908, has wider scope than s. 310A of the old Code for which it has been substituted, and the right to make a deposit to set aside an auction sale is not now restricted to the judgment-debtor alone.

The words "owning such property" in O. XXI, r. 89, C. P. C., cannot be divorced from the rest of the clause so as to read them independently of the expression "by virtue of a title acquired before such sale" as if they, as also the other words "holding an interest therein," stand by themselves and are not controlled by the aforesaid expression.

The applicant under O. XXI, r. 89, C. P. C., must be a person who can even at the date of his application be proved to be a person either owning the property or holding an interest therein by virtue of a title, and further the title must be a pre-existing title, that is, a title acquired before the auction sale.

If in an objection to attachment in execution of a decree preferred by a person, as also in the declaratory suit following the order therein, the title of that person to the property is negatived, he has no right to

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make an application to set aside the auction sale by making a deposit under O. XXI, r. 89 of the C. P. C.

An auction-purchaser is entitled to take advantage of an adjudication in the objection case, as also in the regular declaratory suit.

Where a Court refuses to entertain an application under O. XXI, r. 89 of the C. P. C., on the ground that the petitioner has no *locus standi*, it is a case where the Court fails to exercise a jurisdiction vested in it by law within the meaning of s. 115 of the Code and the High Court can interfere in revision in such a case. **N ONKAR v. DHAN SINGH**, 21 N. L. R. 102; A. I. R. 1926 Nag. 10 963

— O. XXI, rr. 95, 97, 103. See C. P. C., 1908, s. 47 952

— O. XXI, rr. 103, 101, 100. See LIMITATION ACT, 1908, SCH. I, ART. 11-A 575

— O. XXII, rr. 3, 11—*Appeal—Death of appellant—Respondent, whether can make application or substitution.*

Rule 3 of O. XXII of the C. P. C. read with r. 11 of the Order does not confine the right to make an application to bring on the record the legal representatives of a deceased plaintiff or appellant to such legal representatives alone. Where a defendant or a respondent is interested in bringing on the record the legal representatives of a deceased plaintiff or deceased appellant it is open to him to do so by making an application for that purpose. **A KEDAR NATH v. BISMILLAH BEGAM**, L. R. 6 A. 614 Civ; 24 A. L. J. 67; A. I. R. 1926 All. 156 72

— O. XXII, r. 4—*Pre-emption suit—Appeal by pre-emptor—Death of one of several vendee respondents—Substitution not effected within time—Abatement of appeal.*

The cause of action for a pre-emption suit is one and indivisible. Therefore, where an appeal by the pre-emptor in a pre-emption suit abates as against one of several vendee respondents, on account of failure to effect substitution within time after his death, the appeal abates in its entirety. In such a case the right to sue does not survive against the remaining vendees who constitute only a part of what was for the purposes of the suit one legal unit. **A SHABBAR HUSSAIN v. ABRAS ALI**, 23 A. L. J. 935; L. R. 6 A. 567 Civ.; A. I. R. 1926 All. 152 324

— O. XXII, r. 4 (1), (2)—*Representative of deceased respondent already on record—Appellant, whether relieved from making application—When whole appeal abates.*

The mere fact that the legal representatives of a deceased respondent are already on the record does not relieve the appellant from the necessity of making an application under O. XXII, r. 4 (1), C. P. C.

Where the respondents are joint and the cause of action against them is also a joint one, the whole appeal abates if the representative of one of them is not impleaded in time. **L GURDITTA MAL v. MUHAMMAD KHAN**, 7 L. L. J. 544; A. I. R. 1926 Lah. 37 41

— O. XXII, r. 4, O. XLI, rr. 4, 20, 33—*Appeal—Death of plaintiff-respondent—Abatement, extent of—Suit for possession—Appeal, maintainability of—Test—Court, whether can add parties not substituted*

The test to be applied in determining the extent of the abatement caused by reason of the death of one of the plaintiffs-respondents is whether the suit could proceed in the absence of the deceased or, whether, if the plaintiffs were appellants, the appeal could pro-

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ceed in the absence of the deceased either as appellant or respondent.

An appeal arising out of a suit for possession of land to which one of the plaintiffs-respondents is not a party cannot proceed in his absence.

Rule 20 of O. XLI of the C. P. C. is ordinarily intended to apply to cases where the Court finds that it cannot proceed with the suit without the presence of a party who was not made a party to the appeal. It is not intended to override the provisions of O. XXII of the Code.

The right obtained by a respondent when the appeal abates as against him is a valuable right and should not be lightly treated.

Rule 4 of O. XLI of the C. P. C. is limited to the case of appellants and is not applicable to a case where all the respondents are not present on the record as parties to the appeal.

The provision contained in r. 33 of O. XLI of the C. P. C., is intended to cover cases where the Court may vary the decree in such a way or pass such an order as to make the party in whose favour the order of the lower Court was passed liable under the order passed by the Appellate Court. It is not intended to apply to a case in which all the necessary parties have not been brought on the record. **C MANINDRA CHANDRA NANDI v. BHAGBATI DEVI**, 30 C. W. N. 45; A. I. R. 1926 Cal. 335 986

— O. XXII, r. 10—*Assignment of interest pending suit—Assignment challenged—Substitution—Court, power of.*

The Court has power to decide the question as to the validity or otherwise of an assignment of interest pending suit, when an application for substitution is made to the Court under O. XXII, r. 10 of the C. P. C. The power of the Court to effect substitution is not confined to cases where the assignment is unchallenged. **C SURENDRA NARAYAN DEB v. NITYENDRA NARAIN**, A. I. R. 1926 Cal. 173 267

— O. XXIII, r. 1. See C. P. C. 1908, s. 115 632

— O. XXIII, r. 1.—*Withdrawal of suit—Leave, when can be granted—“Other sufficient grounds,” scope of.*

Under r. 1 of O. XXIII of the C. P. C. a Court has power to allow a plaintiff to withdraw a suit with liberty to institute a fresh suit in respect of the same subject-matter only when the suit is bound to fail by reason of some formal defect or on other sufficient grounds. The other sufficient grounds, however, must be grounds analogous to that provided for in sub-cl. (a) of the rule.

The fact that upon the case as made in the plaint the plaintiff is bound to fail is no ground for allowing a plaintiff to withdraw from a suit with liberty to bring a fresh suit. **PAT. JAGANNATH SAHU v. SHEOGOBIND PRASAD**, A. I. R. 1926 Pat. 128 217

— O. XXIII, r. 1—*Withdrawal of suit, application for—Refusal to grant permission to bring fresh suit—Procedure.*

Where a plaintiff applying for withdrawal of suit, does not desire to withdraw from the suit unless with liberty to bring a fresh suit, and the Court considers that such liberty should not be granted, the proper course is simply to dismiss the application. An order in such a case allowing withdrawal of suit without permission to bring a fresh suit is wrong, and must be set aside, with the restoration of the suit to the file.

A plaintiff who does not take any objection to the above course adopted by the Court cannot be deemed

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to have agreed to it, and to have withdrawn from the suit, it being not necessary for him to expressly take the objection before the refusal of his application. **C KAMINI KUMAR ROY v. RAJENDRA NATH ROY**, 42 C. L. J. 219; A. I. R. 1926 Cal. 233 **432**

— **O. XXIII, r. 1 (1)**—*Abandonment of part of claim at completion of trial—Sufficient grounds for abandonment—Jurisdiction—Revision—Duty of defendant.*

A Civil Court has no jurisdiction to permit a plaintiff at the completion of the trial to withdraw a part of his claim with leave to bring a fresh suit in respect of it, on the sole ground that the plaintiff preferred to withdraw. If such an order is made the High Court will set it aside in revision.

It is the duty of the defendant to have such an order vacated without delay. He need not wait until the suit in respect of the claim withdrawn by the plaintiff is filed and then to plead that the permission was given wrongly. **M KHAJAMIYAN ROWTHER v. APPAYU PILLAI**, (1925) M. W. N. 493; A. I. R. 1926 Mad. 126 **642**

— **O. XXIII, r. 3.** See EVIDENCE ACT, 1872, s. 92 **378**

— **O. XXVI, rr. 2, 7, 8**—*Evidence recorded on commission—Party other than one at whose instance evidence taken, whether can exhibit it.*

Where the evidence of a witness is taken on commission at the instance of a party who refuses to exhibit it, it is competent for any other party to do so, if it so likes. **S CHOTUMAL-BULCHAND v. FIRM OF LILARAM-LAKHMICHAND**, A. I. R. 1926 Sind. 31 **64**

— **O. XXVI, r. 11.** See C. P. C., 1908, O. XX, rr. 16, 17 **944**

— **O. XXIX, r. 2**—*Suit against Railway Company—Description of defendant—Suit filed against Agent, whether competent—Procedure.*

Where a suit is brought against a registered Corporation the latter should be described in the plaint by its official name and title. In the case of an unincorporated or unregistered Company the names of the individuals constituting the Company must be given or the ordinary name by which the Company is known and under which it carries on its business should be given.

In the case of a suit against a Railway Company the proper name under which the Company should be sued is the name and the style under which it carries on its business. If a plaintiff deliberately chooses to sue not the Company but the Agent of the Company he cannot by any decree which he obtains in the suit bind the Company. If, however, upon a fair reading of the plaint it is made out that the description of the defendant is a mere error and that the Company is the real defendant then the suit may proceed against the Company. **PAT RADHE LAL v. EAST INDIAN RAILWAY**, 7 P. L. T. 57; 5 Pat. 128; A. I. R. 1926 Pat 140 **680**

— **O. XXX, r. 3**—*Firm, suit against, nature of—Liability of each partner—Summons, whether to be served on each partner—Firm having another firm as partner—Dissolution of former, effect of, on latter.*

A firm as such has no legal existence and partners in a firm carry on business both as principals and as agents for each other within the scope of the partnership business. A firm's name is a mere expression, not a legal entity.

When a suit is instituted against a firm in the firm's name it is a suit filed against every partner

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of the firm and a decree against the firm has the same effect as a decree against all the partners thereof.

Where, therefore, a suit is instituted against a firm in the name of the firm and some of the partners are individually served under the provisions of O. XXX, r. 3 of the C. P. C., the suit cannot be held to be incompetent on the ground of all the partners not being individually served.

Where the partners composing a firm as one single entity form a partnership with another person the dissolution of the latter partnership does not dissolve the former partnership.

A cause of action against the partners of a firm is a joint cause of action against all partners and each one is jointly and severally liable for the whole of the claim and not only to the extent of his share in the partnership. **S LAKHMICHAND CHANDAMAL v. FIRM OF GOKAL DAS RANCHORDAS** **242**

— **O. XXXII, r. 7**—*Decree in favour of minor—Transfer by guardian ad litem without sanction of Court—Transfer, whether void or voidable—Third party, right of, to question validity.*

Under O. XXXII, r. 7, C. P. C., the guardian ad litem of a minor is not entitled to transfer a decree in favour of the minor without the sanction of the Court. But such a transaction is not void but only voidable at the instance of the minor, that is, the minor alone can avoid the transaction on attaining majority if he thinks fit, or even earlier if some guardian on his behalf thinks fit, to establish its invalidity.

But a third party is not entitled to intervene in the transaction and to plead that it is void *ab initio* when neither of the parties to the transaction accept that contention. **M KANCHERLA KANAKAYYA v. VENKATARAMAYYA APPARAO**, 49 M. L. J. 443; A. I. R. 1925 Mad. 1287 **1049**

— **O. XXXIII, r. 1, s. 115**—*Permission to sue in forma pauperis—Application rejected—Erroneous view of law—Revision, whether lies—"Sufficient means," scope of—Occupancy holding, whether "property."*

If a Court refuses to allow a person to sue as a pauper on an erroneous view of law, the order is liable to be set aside in revision under s. 115 of the C. P. C., as by reason of such a view its decision is vitiated on the ground of illegality which led it to refuse to exercise the jurisdiction vested in it by law.

In order that permission to sue in *forma pauperis* should be granted, the law requires that the intending suitor should establish the negation of the actuality of possession of means by him and not of the chance of a contingency, much less of an expectancy, on his part, of getting in future some means sufficient to enable him to pay the prescribed fee for his plaint.

An occupancy holding of a person seeking permission to sue in *forma pauperis* cannot, therefore, be taken as sufficient means within the meaning of O. XXXIII, r. 1, C. P. C., as the right of occupancy is in the nature of a purely personal right and cannot be transferred or even surrendered for value without restrictions.

The price or compensation which an occupancy tenant, who has made an agreement with the landlord for surrendering his holding, but has not actually executed the surrender deed, expects to get for surrendering or dowering his lesser interest into the greater interest of the landlord, cannot be considered

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to be "means possessed" by him for the purposes of O. XXXIII, r. 1, C. P. C. It is more 'in the nature of an expectant claim' under an 'inchoate' right than 'property' or 'means' of which a person may be said to be possessed. **N CHANDAN SINGH v. LAXMAN**, 21 N. L. R. 98; A. I. R. 1925 Nag. 438 **949**

——— **O. XXXIV, rr. 1, 13.** See **MORTGAGE** **410**

——— **O. XXXIV, r. 3, cl. (2)**—*Decree for foreclosure—Discretion to extend time—Good cause.*

Under the proviso of O. XXXIV, r. 3, cl. (2), C. P. C., it is only upon good cause shown that the Court may postpone the day fixed for the payment of money under the foreclosure decree. But a very wide interpretation is to be given to those words. The fact that the judgment-debtor was not able to raise money, but could do so if time was given, is a good cause.

Judgment-debtors in decrees for foreclosure are always treated with indulgence. A mortgage is a transaction in which money is lent and immoveable property is pledged as security for re-payment. The Courts have always lent in the direction of enforcing the original contract, that is to say, the re-payment of the money, rather than the penalty, that is, the foreclosure. **O BANKATESHWAR KAWAN BAHADURPAL SINGH v. DINANATH BALGOBIND** **936**

——— **O. XXXIV, r. 8**—*Transfer of Property Act (IV of 1882), ss. 92, 93—Preliminary decree for redemption—Payment not made on due date—Mortgagee, possession of, if adverse—Payment after due date—Terms, imposition of.*

The right of a mortgagor to pay the amount due under a preliminary decree for redemption is a continuous right, and can be exercised at any time until a final decree for sale is passed. The possession of the mortgagee does not become adverse if the mortgagor does not deposit the amount fixed by the preliminary decree on the due date.

A Court has no power to impose terms on a mortgagor who comes forward to make payment of money due under a preliminary decree for redemption after the due date, when the mortgagee has taken no action himself. **O BHAWANI PRASAD SINGH v. RAM RATI KUNWAR**, 28 O. C. 261; A. I. R. 1925 Oudh 649 **418**

——— **O. XXXVIII, r. 5**—*Order under, whether "judgment" within the meaning of cl. 13 of Letters Patent (Rang.)* See **LETTERS PATENT (RANG.)**, CL. 13 **995**

——— **O. XXXIX, r. 1**—*Injunction restraining transfer of property—Sale in defiance of injunction, validity of—Vendee taking bona fide without notice.*

A temporary injunction restraining a party to a suit from making a transfer of certain property has not the effect of avoiding a sale of the property carried out in defiance of the restraining order where the transferee is a bona fide purchaser for valuable consideration without notice of any fraud or collusion on the part of the vendor. **L BELI RAM & BROS. v. RAM LAL**, 6 L. 380; A. I. R. 1925 Lah. 644 **937**

——— **O. XLI, r. 1**—*Appeal—Copy of judgment not filed—Notice issued—Copy, whether dispensed with.*

A memorandum of appeal stated that a copy of the judgment appealed against would be filed afterwards. The appeal was admitted on presentation and notice was ordered to be issued to respondent:

Held, that it must be taken that the Court had dispensed with a copy of the judgment. **N AGENT, G. I. P. KY. Co., v. JASRUP SHRINATH**, A. I. R. 1926 Nag. 57 **135**

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——— **O. XLI, rr. 4, 20, 33.** See **C. P. C.**, 1908, O. XXII, R. 4 **986**

——— **O. XLI, r. 11**—*Appeal purporting to be within time—Summary rejection as time-barred—Appellate Court, duty of.*

Under O. XLI, r. 11, C. P. C., the Court is bound to fix a date for hearing an appellant. Where the memorandum of appeal is in order and at least purports to be within time, it is not open to the Court to reject the appeal summarily as time-barred. **O SRIPAT v. HUBDAR**, 2 O. W. N. 678; A. I. R. 1925 Oudh 643 **115**

——— **O. XLI, rr. 20, 33.** See **C. P. C.**, 1908, O. XXII, R. 4 **986**

——— **O. XLI, r. 23**—*Second appeal, if lies when remand order not in proper form—Inherent power of Court—High Court, if can interfere when appeal is incompetent.*

An appeal lies from an order of the Appellate Court purporting to be an order under O. XLI, r. 23, of the C. P. C., even though the order may not be in strict accord with the provisions of the said rule.

An order of remand passed by the Appellate Court in the exercise of its inherent jurisdiction is appealable even though it does not come within the scope of O. XLI, r. 23, C. P. C.

The High Court can interfere under s. 115, C. P. C., with an order found to be not appealable, if it is satisfied that the order is not in accordance with law. **C AGENT, B. N. RY. v. BEHARI LAL DUTT**, 29 C. W. N. 614; A. I. R. 1925 Cal. 716; 52 C. 783 **426**

——— **O. XLI, r. 27**—*Transfer of Property Act (IV of 1882), s. 59—Mortgage—Attestation, proof of—Court, refusal of, to examine scribe—Appellate Court, power of, to admit evidence of scribe—Proof of execution.*

In a suit on a mortgage one of the witnesses to the mortgage being dead and the other attesting witness being unable to say whether the mortgage-deed was or was not the document which he had attested, the plaintiff made an application for the issue of a commission to examine the scribe of the deed as a witness, it being alleged that the scribe was ill and was unable to attend the Court. This application was refused on the ground that it was not supported by a certificate from a recognized medical practitioner. In appeal the Appellate Court admitted in evidence the testimony of the scribe who deposed that the deed was executed in his presence:

Held, (1) that the Appellate Court had power to admit the evidence of the scribe both under cl. (a) and cl. (b) of r. 27 of O. XLI of the C. P. C.;

(2) that the evidence of the scribe was sufficient to prove the execution of the mortgage-deed. **C DHIRAJ- UDDIN BEPARI v. BAHARULLA SHIEKH**, A. I. R. 1926 Cal. 318 **630**

——— **O. XLIII, r. 1 (a).** See **C. P. C.**, 1908, s. 115 **353, 430**

——— **O. XLIV, r. 1, O. XXXIII, r. 3**—*Application for leave to appeal as pauper, dismissal of—Procedure—Appeal, memorandum of, order on—Court-fees, payment of—Presentation of memorandum of appeal, mode of.*

An application for leave to appeal as a pauper and the memorandum of appeal accompanying such application must be treated as two separate documents and if the Court dismisses the application for leave to appeal as a pauper summarily under the proviso to r. 1 of O. XLIV of the C. P. C., or after enquiry on the

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ground that the applicant is not a pauper, the Court should pass a separate order on the memorandum of appeal directing the appellant to pay the Court-fee within a certain time, with a penalty attached of his appeal being liable to be dismissed for want of such payment.

Rule 3 of O. XXXIII of the C. P. C., read with r. 1 of O. XLIV of the Code, applies only to the presentation of an application for leave to appeal as a pauper and has no application to the presentation of the memorandum of appeal which must accompany such application. **O. SAJJAD ALI KHAN v. JAGMOHAN DAS, A. I. R. 1926 Oudh 13** 371

——— **O. XLVII, r. 1.** See C. P. C. 1908, O. IX, r. 8 610

——— **O. XLVII, r. 1—Appeal pending—Review, whether should be granted—Review granted during pendency of appeal, effect of.**

There is no necessity to grant a review of a decree while an appeal against the decree by the applicant for review is pending, inasmuch as the applicant can get the decree modified in the Appellate Court.

Where, however, a review is granted against a decree which is under appeal, the appeal becomes incompetent and cannot be proceeded with. **O. GHUTUR SINGH v. PHULLANG SINGH, A. I. R. 1926 Oudh 55** 119

——— **O. XLVII, r. 1, ss. 115, 151—Decree for possession conditional on payment of money into Court within certain period—Payment beyond period prescribed—Extension of time—Power of Court—Review—Revision.**

A suit to recover possession of certain lands was decreed on condition that the plaintiff should deposit in Court for payment to the defendant a certain sum of money within three months from the date of the judgment. The plaintiff deposited the amount mentioned in the decree into Court three days after the expiry of the period fixed and applied for extension of the period which was granted, the Court holding that as there was no order to the effect that the suit was to be dismissed in case the deposit was not made within three months from the date of the judgment, it was open to it to extend the time. On revision:

Held, (1) that the Court had for the reason given by it jurisdiction to extend the time;

(2) that in any event the Court had jurisdiction to extend the time upon an application for review of its judgment and that there was no reason why its order should be disturbed because it had been made upon an application for extension of time and not upon an application for review. **PAT. RAM KUMARI v. DEONANDAN SINGH, (1925) Pat. 151; A. I. R. 1925 Pat. 452** 79

——— **O. XLVII, r. 7—Decree given on one out of two grounds alleged in plaint—On review decree maintained on other ground—Appeal, whole case, whether can be opened in.**

Where a plaintiff bases his claim on two grounds and the Court decrees it on one of them only without discussing the other, but on a review application by the defendant, rejects the ground on which it had based its decision formerly and maintains the decree on the second ground, in an appeal by the defendant, although his application for review was limited only to the first ground, it is open to the plaintiff to reopen in the Court of Appeal the question concerning the second ground as well. **C. MEAH v. DURGA CHURN DUTTA, 29 C. W. N. 1027; A. I. R. 1926 Cal. 243** 456

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——— **O. XLVII, r. 7—Order granting review—Appeal, whether lies.**

No appeal lies against the order granting a review. An order granting an application for review of a judgment can only be objected to on the grounds specified in r. 7 of O. XLVII, of the C. P. C. **C. HARENDRA NATH CHAUDHURY v. SONA GAZI, A. I. R. 1926 Cal. 259** 504

——— **Sch. II, paras. 1, 15, 16, ss. 109, 115—Arbitration—Reference by Court—Objection, disposal of—Revision.**

Under the C. P. C. of 1908 the policy of the law is to make all decisions in arbitration cases final and it is contemplated that any objection taken in respect of the validity of an award should be determined by the Court through which the reference was made, including an objection that what purports to be an award is by reason of certain events which are said to have happened prior to the reference not an award at all.

Where, therefore, in such a case an award is upheld by the Court which made the reference and a petition for revision of such order is dismissed by the High Court, an order of the Trial Court or of the High Court is not open to appeal to His Majesty in Council inasmuch as the order of the High Court being passed in revision cannot be said to have been passed "on appeal" within the meaning of cl. (a) of s. 109 of the C. P. C., and cl. (c) of the section is inapplicable for want of the case being a fit one for appeal within the meaning of that clause. **A. SURAJ SINGH v. PAUL KUMARI, 23 A. L. J. 997** 904

——— **Sch. II, paras. 14, 20—Partition suit—Compromise referring certain matters to arbitration—Arbitration, nature of—Arbitrator proceeding ex parte after due notice, legality of—Finding that no material has been produced by parties with regard to certain items, effect of—Award, validity of—Appeal—Oral evidence, appreciation of—Trial Judge, opinion of, value of.**

A partition suit was compromised and a decree was passed in accordance with the compromise. The compromise provided that certain preliminary matters had been settled in a certain way between the parties and that certain properties which were the subject of the suit should be treated as joint properties and should be divided among the parties by a named arbitrator according to the shares of the parties, taking into consideration the conveniences and inconveniences. The compromise also contained a clause that if the arbitrator "fails or becomes unable to make the divisions and partition of all these properties that are settled as *ijmali* and to adjust and settle the account relating to such of the *karbars* as to which accounts have to be taken, in such a case, any of the parties shall have power to enforce such divisions and partition and the taking of such accounts by executing this decree and upon such adjustment and settlement of accounts each party shall get a decree for the amounts that may be found due to him or her thereby".

Held, that the parties intended that no further steps should be taken in Court and that the arbitration should be an arbitration without the intervention of the Court and that the rules contained in the Second Schedule to the C. P. C., relating to such arbitrations were applicable to the case.

Where an arbitrator is authorised to proceed in the absence of a party who fails to appear in spite of the notice of the date of hearing being given to him, the

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award made by the arbitrator cannot be objected to on the ground that the arbitrator carried on an *ex parte* enquiry owing to the failure of one of the parties to the reference to appear before him after proper notice.

Where with reference to certain items in dispute between the parties, no material is produced before the arbitrator on which he can decide that there is any liability from one party to another, the award of the arbitrator cannot be objected to on the ground that it fails to determine some of the points in dispute between the parties. The effect of the award is that no party can make any claim against any other party in respect of such items, and the award is final for all time settling the dispute between the parties relating to such items.

Where there is direct conflict of oral evidence with regard to any point, an Appellate Court must give weight to the impression that the witnesses made on the Judge in whose presence they gave evidence. **C HEM CHANDRA KUNDU v. JNANENDRA CHANDRA KUNDU**, A. I. R. 1926 Cal. 116 **624**

Sch. III, para. 7—Execution of decree—Agricultural land, farming out of—Conditions of farm, determination of—Duty of Court.

Where in execution of a decree the Executing Court proposes to farm out agricultural land belonging to the judgment-debtor, the term of the farm and the other conditions must be decided by the Court itself. The Court must seek the Collector's advice on the subject and should ordinarily follow it, but is not bound to do so. **L SHEO NATH v. PURAN MAL**, A. I. R. 1925 Lah. 425; 7 L. L. J. 212 **228**

Commissions—Commissioner appointed to carry out demarcation—Report unsatisfactory—Procedure.

The fact that a Commissioner who has been appointed to ascertain the proper demarcation and site of the property in dispute in a suit has made a muddle of his enquiry should not in any way prejudice any of the parties to the suit. If the Court finds that the Commissioner's work is unsatisfactory, the proper procedure is to appoint another Commissioner who should carry out his work in accordance with the instructions of the Court. **PAT MOHAMMAD SADIQ v. BASGIT SAH** **834**

Common Law of England—Applicability to India. See FOREIGNERS ACT, 1864, s. 2 **310**

Companies Act (VII of 1913), ss. 79, 81, 213—Extraordinary general meeting of share-holders—Notice, form of—Proceedings, when liable to be upset—Special resolution—Amendment, whether may be moved—Chairman, power of—Proper amendment disallowed, effect of—Right of speech—Irregularity in proceedings—Court, whether can interfere—Fraud.

Where there is any secret agreement or any interest of the Directors in the agreement not disclosed in the circular, or in the notice, of a meeting of the Company, the Court will view with strictness any omission to refer to it in the notice or in the circular accompanying the notice; and the omission to mention any secret arrangement would constitute a serious defect in the notice. But where no secret agreement is proved or suggested and where there is no indication that there was anything to conceal, the Court will as far as possible take a liberal view of the terms of the notice and will not upset the proceedings taken on a notice for some defect, which might have been avoided, but which was not avoided on account of some honest mistake.

Companies Act—cont'd.

Where the general nature of the business to be transacted at the meeting of the share-holders is clearly indicated and sufficient details are given such as are necessary for the purpose of enabling the share-holders to consider the question, the notice is a valid and proper notice.

A clause for winding up the Company or for the appointment of liquidators may form part of a special resolution and be passed along with it.

An amendment to a special resolution may be allowed to be moved at the first meeting, but no alteration whatever of the special resolution can be allowed at the confirmatory meeting.

It must necessarily depend upon the nature of the resolution and the nature of the amendment whether it could be or should be allowed by the Chairman.

Any proper amendment which is moved by any member at a meeting should be put to the meeting for consideration, and if the Chairman rules out any such amendment, the resolution is liable to be set aside.

The majority must not refuse to listen to the speech of a member in reasonable terms for a reasonable time.

It is difficult to lay down any general rule as to what should be the result where the right of speech is denied to a member in a general meeting of the share-holders.

The proper test to lay down is to consider the facts and circumstances of each case and to determine whether the denial of the right of speech is sufficient to vitiate the resolution under the circumstances of that case.

Those who refuse unnecessarily out of sheer impatience to listen for any reasonable length of time, to any arguments in support of the opposite views incur a grave risk in adopting this attitude of exposing the very resolution, which they may be anxious to adopt, to the scrutiny of the Court and to render it liable to be set aside. The very purpose which they may have in view may be defeated on account of such conduct.

The Court should incline more in favour of the validity of the proceedings than in favour of their invalidity, if the fact which would go to invalidate the proceedings is not established beyond reasonable doubt.

It is futile for any member to raise a general objection to the validity of notes, without indicating the nature of the objection, and without any attempt to particularise the votes objected to. It can only be interpreted as a sort of invitation on the part of the member to adjourn the proceedings of the meeting to examine the votes over again.

Per Fawcett, J.—Where a special resolution for the voluntary winding up of a Company has been passed, the proposed liquidators may be changed at the confirmatory meeting.

It is a well recognised rule that an amendment should be affirmative in form, and not merely negative of something already proposed, and be in such a form that a definite decision can be arrived at.

The Court should not interfere on the ground of an irregularity in the case of acts which are valid if done with the approval of the majority of share-holders, unless the acts complained of are of a fraudulent character or are *ultra vires*.

A case of fraud or over-bearing influence is necessary to justify interference by the Court. **B PARSHURAM DATTARAM SHAMDASANI v. TATA INDUSTRIAL BANK**, 26 Bom. L. R. 987; A. I. R. 1925 Bom. 49 **580**

Company. See COMPANIES ACT, 1913, s. 79 580

Articles of Association, whether can be altered—Share-holder entering into special contract with Company, position of.

A share-holder in a Company must be taken to know that one of the incidents of membership of a Company is that the Company may, by adopting the proper method, *bona fide* alter its articles in a way which may prejudicially affect his interests, and, provided that the alteration in the articles is not inconsistent with the objects set out in the Memorandum of Association, and is *bona fide* made in the interests of the Company a share-holder in ordinary circumstances would be bound by such an alteration. The rights of a share-holder in respect of his shares, except so far as they may be protected by the Memorandum of Association, are by Statute made liable to be altered by special resolution. But the case of a contract between an outsider and the Company is entirely different and even a share-holder must be regarded as an outsider in so far as he contracts with the Company otherwise than in respect of his shares. In such a case the Company cannot by altering its articles justify a breach of contract. **C HARI CHANDANA JOGA DEVA v. HINDUSTAN CO-OPERATIVE INSURANCE SOCIETY**, A. I. R. 1925 Cal. 690; 52 C. 239 86

Compromise—Repudiation by one party—Other party, right of, to repudiate—Executed contract, effect of.

Where there is a compromise which finally settles the rights of the parties and nothing more has to be done to give effect to it, the conduct of one of the parties in acting in a manner inconsistent with the compromise does not justify the other party in repudiating it.

A landlord made in favour of a *ryot* an absolute and hereditary grant of a village on *sarvamanyam* tenure. After the landlord's death, his son challenged the alienation, and the matter was compromised by the *ryot* agreeing to pay a favourable rent on the holdings. The son thereafter repudiated the compromise and sued to set aside his father's alienation on the ground of its having been executed under undue influence. The suit was dismissed. In a subsequent suit to recover rent on foot of the compromise:

Held, that the compromise settlement was not an executory contract and the plaintiff was entitled to sue to enforce its terms and was not disqualified from so doing by having sued for a greater relief than he was entitled to in the prior suit. **M KUPPUSWAMI IYER v. RAJESWARA SETHUPATHI**, 22 L. W. 258; 49 M. L. J. 462; A. I. R. 1925 Mad. 1282 973

Construction of deed—Ijara deed, whether mortgage—Suit to recover haq ajiri—Interest, whether can be claimed—Ijaradar, rights of.

Under the terms of an *ijara* deed it was agreed that the *ijaradar* should remain in possession of the *ijara* property and that out of the fixed annual rent he should pay Government revenue and road-tax into the Government Treasury every year, should deduct and appropriate to himself a certain sum in lieu of interest on the *zarpeshgi* money and should pay the balance as *haq ajiri* to the owner. In a suit to recover the *haq ajiri* in respect of several years:

Held, (1) that the *ijara* deed was a deed of usufructuary mortgage and that the *ijaradar* held possession not as tenant but as mortgagee and that the *haq ajiri* was not a payment in the nature of rent and that, therefore, in the absence of a stipulation in the deed for payment of interest thereon, the plaintiff

was not entitled to recover any interest on the arrears of *haq ajiri*;

(2) that the defendant as *ijaradar* was not entitled to remove any portion of the soil of the land held in *ijara* and that, therefore, damages recovered by the plaintiff from a third person in respect of an injury done by the latter to the soil could not be claimed by the *ijaradar* and could not be set off against the plaintiff demand. **PAT NATHAN PRASAD SHAH v. KALI PRASAD SHAH**, (1925) Pat. 317; A. I. R. 1926 Pat. 77; 7 P. L. T. 158 785

Construction of document—Agreement to execute *ikararnama* authorizing creditor's agent to receive cheques due to debtor, whether assignment—Decree in favour of third person—Attachment of cheques—Creditor, whether can object—Lien.

L, a P. W. D. contractor, borrowed money from B and executed two agreements in his favour on 4th September 1917 and 19th September 1919, agreeing to credit or deposit at B's shop all cheques that he may get from P. W. D. on account of the works and not to cash them, and to execute an *ikararnama* in the name of a servant of B whom B may appoint to authorize him to take on his (L's) behalf cheques in his name from the P. W. D. and get them credited in B's shop, and that he will have no authority to take the cheques until the satisfaction of the debt. One N, another creditor of L, obtained a decree against L and attached certain cheques of L obtained from P. W. D. B objected in execution proceeding that cheques were assigned to him. The objection was overruled. B then filed a suit for a declaration that the attachment was not valid:

Held, that the terms of the *ikararnama* did not constitute a present assignment of the debt due to A but an agreement to assign at future dates, and unless L authorized the P. W. D. to make over each cheque to the agent of B there was no lien acquired over it. **N BALLABH DAS v. NARAIN PRASAD** 323

Insurance policy—Insured taking shares in Company—Premia, balance of, to be recovered from dividends—Liability of Company.

Under a policy of an insurance the defendant Company guaranteed to the insured that if the latter paid to the Company a certain sum each year for a certain number of years the Company would pay to the insured the sum of Rs. 20,000 and would also pay at the end of the period fixed (called the endowment period) such additional sums by way of profits as according to the Society's Regulations may accrue and become payable in respect of the policy, after paying up in full all calls due and payable in respect of certain bond shares which the insured had agreed to take. One of the conditions of the policy was that in case the insured should outlive the endowment period all dividends to become payable on the shares shall be subject during the period to a lien in favour of the Society for payment of the premium payable on the policy, the total premium in each case being equal to the face value of the policy. The plaintiff continued to pay the stipulated sum each year to the Company and at the end of the endowment period sued the Company to recover the amount of Rs. 20,000 as a debt due by the Company under the policy:

Held, (1) that the true construction of the policy was that the Company had agreed at the end of the endowment period to pay the principal sum insured and that it undertook also to pay at the same time an additional sum in respect of dividends accrued on the shares after

Construction of document—contd.

retaining thereout all calls due and payable in respect thereof and that it had agreed to pay an additional sum in respect of dividends accrued after the period had expired during which it was at liberty to allocate the dividends towards the balance of the premium;

(2) that the risk of the dividends not being sufficient to cover the balance of the premia was taken by the Company;

(3) that the plaintiff having paid the whole sum which the Company required him to pay during the endowment period under the policy, he was entitled to recover from the Company the sum of Rs. 20,000 being the principal sum insured. **C HARI CHANDANA JOGA DEVA v. HINDUSTAN CO-OPERATIVE INSURANCE SOCIETY**, A. I. R. 1925 Cal. 690; 52 C. 239 **86**

——— *Lease, duration of—Covenant against assignment—Receipt of rent from assignee—Estoppel.*

The owner of a *raiya* interest demised certain premises to certain persons on a *dar-raiya*. The lease provided for the lessees building a house for the purpose of a shop on the land and carrying on business therein and paying the rent therein named every year to the lessor. There was a further provision in the document that if the rent was not paid in any year the lessor would be entitled to recover *khas* possession of the land with arrears of rent and damages by suit. The document further provided that if the lessees did not carry on business on the land then they would give up the land to the lessor and that the lessees would not be entitled to give the land to any body else. The lessees failed to pay the rent stipulated in the lease and the lessor, instead of recovering possession of the premises, brought the property to sale in execution of his rent-decree and the property was purchased by the defendants first party. The interest of the lessor was purchased by the plaintiff. Defendants first party sub-let the premises to the defendants second party and the latter put up a permanent structure upon the land of which the plaintiff was aware. Plaintiff continued to receive rent from the defendants second party after the erection of the building. Sometime afterwards the plaintiff sued to recover *khas* possession of the premises on the allegation that the defendants first party had parted with their possession of the premises to the defendants second party in contravention of the terms of the original lease:

Held, (1) that the original lease was one for the lives of the lessees subject to its determination if they failed to pay the stipulated rent in any year or if they failed to carry on business on the land or if they transferred the lease to a third party;

(2) that by their purchase in execution of the rent decree the defendants second party had obtained a tenancy in the terms of the original demise, that is to say, during the lives of the original lessees determinable on the grounds mentioned in the lease;

(3) that the plaintiff being aware of the sub-lease in favour of the defendants second party and of the erection of the permanent structure by them and having received rent from them with such knowledge could not eject the defendants on the ground that the defendants first party had parted with the possession of the premises to a third party in contravention of the terms of the original lease. **C CHANDRA KUMAR SHAHA v. MAFIZAR RAMHAN** **832**

——— *Maintenance deed—Provision for payment of paddy or equivalent value—Option—Market rate, claim at, maintainability of.*

Construction of document—contd.

It is not an invariable rule that where a person undertakes to pay maintenance in kind he should always pay it in kind. Where a document is clear, effect must be given to its terms.

Where a person by a deed of maintenance undertook to deliver to a maintenance holder paddy worth Rs. 39 for every year, 3 *podies* of paddy without moisture and chaff, and the deed further provided that "if at any time the giving of maintenance is delayed at the rate of 13 only for every *pod* money should be collected or sued for":

Held, that the document gave an option to the grantor to give maintenance in kind or in cash at the rate mentioned and that the maintenance holder was not entitled to insist on payment at the market rate on the date of the plaint. **M CHINNAMMA NAIDU v. VENKATAMMAL**, 49 M. L. J. 186; 22 L. W. 369; A. I. R. 1925 Mad. 1023; (1925) M. W. N. 735 **996**

——— *Mortgage or sale—Intention of parties—Evidence of conduct, whether admissible—Inadequacy of consideration, effect of—Muhammadan parties—Practice.*

It is well-known that documents are executed by Muhammadans in which they conceal, or at least try to conceal, the real nature of the transaction and attempt to make out that the transaction is an out-and-out sale although, as a matter of fact, the intention of the parties is to create a mortgage. In considering a document, therefore, of this nature where the question arises whether the document is a deed of sale or a deed of mortgage, regard must be had to this practice where the parties are Muhammadans.

In order to construe such a document intrinsic evidence afforded by the terms of the document must be taken into consideration and the Court must also take into consideration the facts which may legitimately be proved with a view to showing in what manner the language of the document is related to the existing facts and may also refer to the contrast between the value of the property and the consideration that passed in money. Evidence relating to the subsequent conduct of the parties themselves, however, is not admissible as showing their intention.

In the case of such a document the absence of any mention of a definite date by which the transferor can by re-paying the amount of the consideration claim a re-transfer of the property does not indicate that the deed is not one of mortgage, nor is the absence of any reservation to the transferee of the right to recover the money paid by him or of a stipulation authorising the transferor to sue for redemption a safe criterion for the determination of the question.

A deed of transfer ran as follows:—"I have been in the ownership and possession of land fit for erection of shops by right of my purchase within the boundaries mentioned below situated in the line to the north of the road facing westward in Bander Bazar Chak. Now for my own necessity on receipt from you of Rs. 400 in cash as the price of that shop land I sell to you the same and I and my descendants cease to have right therein. You from this day being in ownership and possession in these lands, continue to enjoy the same with the rights of transfer by gift and sale, etc. I and my successors cease to have any right thereto. I make over my *kobala* of purchase dated the 11th *Sravan*, 1287. Moreover when I or my heirs would return the purchase price to you and your heirs you shall give up the properties. And I shall get this *kobala* registered within the period of limitation." It was found that

Construction of document—conclld.

the consideration for the transfer was wholly inadequate :

Held, that the inadequacy of the price coupled with the mention in the deed of the need of money on the part of the vendor and the stipulation as to the return of the price to the vendee and the re-conveyance of the property indicated that the document was intended to be one of mortgage by way of conditional sale and not one of sale out-and-out. **C MOHAMMAD USMAN v. ABDUL RAHAMAN**, 42 C. L. J. 74; A. I. R. 1925 Cal. 1151 100

——— *Sale or lease—“Moghli,” meaning of.*

The term “*moghli*” is a word of doubtful meaning and at the best imports no more than that the rent assessed represents a proportion of the Government revenue assessed on the lands. In no sense of the term does it constitute rent.

Certain lands were conveyed by a document which was described as a *khas kobala*, the consideration money being arrived at by a calculation of annual profits of the land conveyed, deducting therefrom a small sum payable by the transferor as the “*moghli*”. The *kobala* recited:—“From this day forth you become fully entitled to the said lands and are empowered to sell and make a gift of the same and paying yearly Re. 1-1-0 only *moghli* to me and to my heirs and legal representatives from 1286 B. S. you become entitled from this day from generation to generation by cultivating the same yourself or by settlement of tenants and to that I or my heirs and representatives shall never make any objection.”

Held, that the transaction was one of sale and not one of lease. **PAT PRASANA KUMAR BANERJI v. KALEYAN CHARAN MANDAL**, 7 P. L. T. 71; A. I. R. 1926 Pat. 80 352

——— *Usufructuary mortgage—Redemption provided after possession by mortgagee—Limitation, operation of—Limitation Act (IX of 1908), Sch. I, Art. 148.*

Where a usufructuary mortgage provides that the right of redemption would accrue only after possession is delivered to the mortgagee, limitation does not run against the mortgagor until possession is delivered to the mortgagee.

A usufructuary mortgage executed in 1854 provided that the mortgagee would retain possession of the mortgaged land and that he would realise rents, and that afterwards if the mortgagor re-paid the money, then the land would be released. The mortgagee did not get possession before December 1860. In September 1919 a suit was brought to redeem the property:

Held, that under the terms of the mortgage-deed, the right of redemption did not arise until after possession had been delivered to and enjoyed by the mortgagee, and that the suit brought well within sixty years from December 1860 was within time. **C MAHAMMED ISMAIL v. SHARFATULLAH** 763

——— *Will, charitable trust created by. See HINDU LAW—WILL* 829

Contract, construction of—Non-performance—Termination of contract.

The material portion of a contract to cut sleepers by the second party from the jungle of the first party was as follows:—“We, the second party, shall during the term each year from the month of *Kartik* up to the end of *Asarh*, get 15,000 sleepers of every measurement prepared every month, and shall, after they are counted according to the contract, pay to the first party the price thereof according to the rates mentioned above, without any objection. To this

Contract—conclld.

neither we, the second party, nor our representatives shall raise any objection. If we do so the first party shall be competent to cancel this deed and stop the cutting of the trees in the lands specified below without waiting for the expiry of the term of this agreement.... Let it be known that we, the second party, will have to prepare 1,35,000 one lakh and thirty-five thousand sleepers of different measurements every year during the nine months from *Kartik* to *Asarh*, in accordance with the terms specified above. If, through negligence on the part of us, the second party, we fail to prepare so many sleepers no plea regarding deficiency in the number of sleepers, put forward by us, shall be entertained and we, the second party, shall be held liable to pay on demand, the price of the entire number of one lakh and thirty-five thousand sleepers to the first party.... Without paying in full the price of the sleepers that will be got ready every month and obtaining receipt therefor, the second party will not be entitled to cut trees or prepare sleepers in the succeeding month. In that case, on the expiry of the said succeeding month, I, the first party, shall be competent to bring the trees mentioned in the schedule given below in my direct possession and to stop the cutting of the trees, without waiting for the expiry of the term of this agreement.” The second party failed to cut 15,000 sleepers during the first month or to pay for them, and the first party terminated the contract. The second party sued for damages:

Held, that the claim must fail, as upon a consideration of all the terms of the contract, the first party was, under the circumstances, within his rights to determine the contract. **P C HOMESHWAR SINGH v. JUGAL KISHORE**, A. I. R. 1925 P. C. 223; 49 M. L. J. 800; 43 C. L. J. 8; 28 Bom. L. R. 187 596

Contract Act (IX of 1872), s. 2. See HINDU LAW—ADDITION 1000

——— **ss. 15, 16, 23—Unlawful agreement—Agreement to stifle prosecution—Coercion—Threat not to withdraw prosecution—Undue influence—Relation between creditor and debtor.**

In order to avoid a contract on the ground that its object was to stifle prosecution, two things must be established,

(1) that there was really a criminal case in respect of a non-compoundable offence pending at the time when the agreement was entered into, and

(2) that one of the objects for which the agreement was entered into was to stifle prosecution of the case.

A threat not to withdraw criminal proceedings, already instituted, unless a bond was executed, is not “coercion” as defined in s. 15 of the Contract Act.

The relation between a debtor and a creditor is not necessarily one in which the former is to be taken as being situated in such a position that his will is bound to be dominated by the latter.

So long as there is no agreement not to prosecute, there is nothing to prevent a creditor from taking a security for the payment of his debt, even if the debtor is induced to give the security by a threat of criminal proceedings. **C RAMESHWAR MARWARI v. UPENDRA NATH DAS SARKAR**, 29 C. W. 1029 463

——— **s. 16—Mortgage—Interest, high rate of—Court, power of, to reduce rate of interest—Undue influence, finding of, whether necessary.**

A finding in a suit to recover money due on a mortgage-bond that the parties are near relations,

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that there was good security given for the debt and that the interest charged is excessive is not sufficient to enable the Court to reduce the rate of interest. There must be a further finding that the mortgagee had unduly taken advantage of his position and that he was in a position to dominate the will of the mortgagor and to exercise undue influence over him. Unless it can be shown that undue advantage was taken, the Court cannot interfere with the contract. **C PANCHI DASI v. KSHIRODA DASI**, A. I. R. 1926 Cal. 171 727

— **s. 16**—*Undue influence of third person, effect of—Debts incurred by profligate young man consolidated into mortgage—Undue influence, proof of.*

Undue influence exercised by a third person over a mortgagor is no defence to the mortgagee's claim on the mortgage.

The facts that a mortgagor was a profligate young wastrel unaccustomed to the possession of any money, that on his father's death he embarked upon a career of debauchery and that the mortgagee, a professional money-lender, advanced him moneys on various documents, which debts were subsequently consolidated in the mortgage in suit, do not justify a finding of undue influence. **L SARDARI MAL v. ABDUL SAMAD**, A. I. R. 1925 Lah. 430; 7 L. L. J. 208 39

— **s. 23**—*Chit-fund, whether lottery—Suit on pro-note passed by one chit-fund older to another, maintainability of—Penal Code (Act XLV of 1860), s. 294A.*

Plaintiff and defendant formed a partnership to promote a "chit-fund". A capital fund of Rs. 500 was raised from 500 subscribers subscribing each one rupee per mensem. At the end of the month there was a drawing by lot and the subscriber who drew the ticket was paid Rs. 50 and his connection with the transaction forthwith ceased. This process was repeated month after month till the end of the 49th month. At the close of the 50th month each of the remaining subscribers was paid Rs. 50 and the stakeholders divided the profit and the fund was dissolved. In settlement of the accounts of the partnership, defendant executed a pro-note in favour of the plaintiff. In a suit to recover the amount of the note:

Held, (1) that the right of the subscribers to the return of their contributions not having been made a matter of risk or speculation the transaction was not a lottery and did not fall within the mischief of s. 294A of the Penal Code;

(2) that the plaintiff's suit was, therefore, maintainable.

Per Ramesam, J.—A chit-fund the main object of which is the promotion of co-operation, prudence and thrift ought to be regarded as legitimate even though there is an element of chance. If by the time a society of this kind becomes known to the public, all its members are ascertained and there is no invitation to any member of the public to join it, it cannot be said that any person keeps a lottery office, at which the public are invited to join and pay, within the meaning of s. 294A of the Penal Code.

In other words, it is not every lottery that constitutes an offence, but it is the keeping of a lottery office which is a standing invitation to the public that constitutes the offence.

Per Venkatasubba Rao, J.—In a transaction like the one mentioned above, while chance determines the disposal of the interest earned, there is absolute certainty

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with reference to the distribution of the capital fund itself. The dominant feature of the transaction is that it enables a large number to gradually lay by money and receive their savings in a lump sum and the scheme is in their case an incentive to thrift.

A transaction is not necessarily a lottery simply because a matter of whatever kind is agreed to be decided by lot. **M SHANMUGA MUDALIAR v. KUMARASWAMI MUDALI**, 21 L. W. 403; A. I. R. 1925 Mad. 870; (1925) M. W. N. 655; 48 M. 661 420

— **ss. 23, 30**—*Obligation connected with betting—Public policy.*

Neither in India nor in England has the Legislature gone so far as to enact in express terms that betting transactions are illegal, but both in India and in England the Legislature regards it as undesirable in the public interest that any assistance should be afforded by Courts of Law to enforce obligations which have been created in connection with betting or wagering transactions. **C WALTER MITCHEL v. A. K. TENNENT**, 52 C. 677; A. I. R. 1925 Cal. 1007 59

— **s. 28**—*Contract providing for suit to be brought in one of two Courts having jurisdiction, validity of.*

Where there are two Courts both of which would normally have jurisdiction to try a suit relating to a dispute arising out of a contract the parties are entitled to agree among themselves that a suit relating to such a dispute should be brought in one of those Courts and not in the other. Such an agreement does not contravene the provisions of s. 28 of the Contract Act, inasmuch as the plaintiff is not thereby restricted absolutely from enforcing his rights under or in respect of the contract by the usual legal proceedings in the ordinary Tribunals, as the restriction is only partial.

Where a contract between a vendor and purchaser of goods provided that "in all legal disputes arising out of the contract, A will be understood as the place where the cause of action arose":

Held, that the clause did not offend against s. 23 of the Contract Act as being in restraint of legal proceedings and was valid and must be given effect to. **M ACHRATLAL KESAVALLAL METHA & Co. v. VIJAYAM & Co.**, 49 M. L. J. 189; 22 L. W. 70; A. I. R. 1925 Mad. 1145 1019

— **s. 30**—*Wagering contract—Agent, whether can recover expenses or commission—Forward contracts, whether wagering contracts.*

Where a plaintiff, on behalf of the defendant, has entered into gambling transactions with third parties, the defendant is bound to make good the losses incurred in those transactions to the plaintiff and pay the commission.

The fact that the defendant is a Limited Company would not disentitle the plaintiff to recover, where he has entered into the contracts under arrangement with the manager of the Company, apparently acting in exercise of the powers vested in him.

The fact that forward contracts are made in the rice trade is not one, which of itself indicates anything at all. No doubt such contracts must, in the nature of things, be speculative to a large extent. But the fact that they are speculative does not render them wagering contracts, and there can be no wagering contract where there is not an intention common to both parties that the dealing should be by way of wager or gambling in differences. **R ALLY MCOLLA INDUSTRIAL COR. LTD. v. ISMAIL**, A. I. R. 1925 Rang. 284; 4 Bur. L. J. 131 & 174 676

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— **s. 38**—*Sale of goods—Vendor, duty of—Offer of goods—Opportunity for inspection—Duty of purchaser.*

Clause (3) of s. 38 of the Contract Act only requires that the promisee should have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver. The promisor is under no obligation to prove the identity of the thing offered to the promisee's satisfaction. It is the promisee's duty to take the steps necessary to satisfy himself. The promisor has only to give him an opportunity for it.

Where on an offer by the vendor to deliver the goods, the goods could have been inspected if the purchaser had applied to the vendor to enable him to do so, for the purpose of satisfying himself that the goods offered corresponded with the goods contracted for, but the purchaser took no steps for this purpose but contented himself with writing letters with a view to raise a defence subsequently; in a suit for damages by the vendor for non-acceptance of goods:

Held, that the plaintiff had done all he was bound to do under the contract and there was no default on his part and that consequently the defendant was liable in damages.

Actual physical possession of the goods by the vendor is not necessary. It will be enough if the goods are under his control and he is able and willing to deliver on the price being paid. **M ARUNACHELAM CHETTY v. KRISHNA IYER**, (1925) M. W. N. 324; 22 L. W. 265; 49 M. L. J. 530; A. I. R. 1925 Mad. 1168 481

— **s. 43.** See LANDLORD AND TENANT 211

— **s. 45**—*Partnership—Suit by one partner to recover debt due to partnership, maintainability of—Other partners, whether necessary parties.*

Ordinarily all the individuals constituting a partnership are necessary parties to a suit to recover a debt due to the partnership. Where there are several partners in a firm and only one of them files a suit to recover a partnership debt, the suit is not maintainable unless and until the other partners are brought on the record. Where, however, one of the partners is able to substantiate that the reason for the appearance of the other partners on the record has ceased to exist by reason of their ceasing to have any interest in the partnership, the suit is maintainable without bringing the other partners on the record. **S MULIBAI v. SHEWARAM MENGHRAJ** 111

— **s. 61**—*Re-payment—Appropriation—Court, powers of.*

In the absence of anything to show that a re-payment was towards a particular item a Court is entitled to appropriate it towards the earliest outstanding item irrespective of its being in time or not. **N DULICHAND v. SONI**, A. I. R. 1926 Nag. 75 239

— **s. 65.** See TRANSFER OF PROPERTY ACT, 1882, s. 6 340

— **s. 69.** See TRANSFER OF PROPERTY ACT, 1882, s. 55 851

— **s. 69**—*"Bound by law to pay," meaning of—Failure of defendant to make payment under contract—Decree obtained by creditor—Properties belonging to plaintiff and defendant put up to sale—Payment by plaintiff—Suit to recover amount of payment from defendant, maintainability of.*

The expression "bound by law to pay" in s. 69 of the Contract Act does not mean bound by law to the

Contract Act—contd.

plaintiff, but that the defendant at the suit of any person might be compelled to pay.

Plaintiff purchased certain properties free of encumbrances. The plaintiff's vendor subsequently sold some other properties to the defendant, a portion of the consideration being left with the defendant to pay off a decree obtained against the vendor by one R. Defendant did not pay off this amount with the result that the properties sold to the plaintiff together with those sold to the defendant were sold by R in execution of his decree. In order to prevent the sale being confirmed plaintiff paid the decretal amount and then brought a suit to recover that sum from the defendant:

Held, that the suit fell within the purview of s. 69 of the Contract Act and that the plaintiff was entitled to a decree. **M RASAPPA PILLAI v. DORAISAMI REDDIAR**, 49 M. L. J. 88; (1925) M. W. N. 486; A. I. R. 1925 Mad. 1041 545

— **ss. 69, 70**—*Contribution, suit for—Bona fide claim to property—Person depositing money, if entitled to recover—"Interested in payment of money," meaning of—Implied request, origin of—"Lawful payment," meaning of.*

Where payment is made by a person who puts forward a bona fide claim to the property in dispute, he is entitled to the protection afforded under s. 69 of the Contract Act, even though it ultimately transpires, as a result of litigation, that he had no interest for the protection whereof the payment was made.

The expression "interested in the payment of the money" in s. 69, Contract Act, is comprehensive enough to include cases of apprehension of any kind of loss or inconvenience, and is not restricted to cases of individuals who are sure to suffer actual detriment assessable in money value.

In a suit under s. 69 of the Contract Act it is essential that there should be, firstly, a person who is bound by law to make a certain payment, secondly, another person who is interested in such payment being made, and thirdly, a payment by such last mentioned person.

A debt for money paid arises where a person has paid money for another under circumstances and upon occasions which make it just and equitable that it should be re-paid; a debt or promise to pay is then implied in law without any actual agreement to that effect.

Section 70 of the Contract Act is not limited to persons standing in particular relations to one another and except in the requirement that the act shall be lawful, no condition is prescribed as to the circumstances under which it shall be done. The section does not justify the officious interference of one man with the affairs or property of another or to impose obligations in respect of services which the person sought to be charged did not wish to have rendered.

The word "lawfully" in s. 70 is not a mere surplusage and it must be considered in each individual case whether the person who made the payment had any interest in making it, and if not, the payment cannot be said to have been made lawfully.

The existence of an interest is generally a test as to the lawful character of a payment, but even if an interest were not shown to exist, payments on account of another, if lawfully made, would generally be provided for by s. 70 of the Contract Act. **C NAGENDRA NATH ROY v. JUGAL KISHORE ROY**, 23 C. W. N. 1052; 43 C. L. J. 83; A. I. R. 1925 Cal. 1097 281

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——— **s. 72**—*Mistake of fact—Payment of money towards non-existing debt—Suit for refund—Cause of action, accrual of, subsequent to suit—Relief, right to.*

A person is entitled to recover money which he pays to another under a *bona fide* forgetfulness of fact.

The plaintiff sent money to the defendant with intent to discharge a particular promissory note, but by mistake wrongly described it. The defendant took advantage of the mistake and allotted the money for the discharge of this fictitious pro-note and thereupon endorsed the real pro-note to a third person who ultimately got a decree. In a suit by the plaintiff against the defendant for recovery of money paid under mistake:

Held, that the plaintiff was entitled to a decree, and it was immaterial that his suit was instituted before the endorsee's suit was actually decreed.

There is no general rule that Courts have no power to grant a decree where the cause of action arises subsequent to the suit. **M RAMASWAMI NAICKER v. NARAYANASWAMI NAICKER**, (1925) M. W. N. 41; A. I. R. 1925 Mad. 762 **906**

——— **s. 73**—*Lessor and lessee—Option of renewal—Failure to give possession—Damages—Profits of premises.*

A lessee who is not given possession is entitled to recover as damages the value of the possession of the premises between the time from which it ought to have been given, to the time he succeeds in obtaining other premises.

Even in respect of agreements relating to immovable property, the principles enunciated in s. 73, Contract Act, are applicable, and a plaintiff is entitled to damages which only arise in the usual course of things from the breach. In assessing such loss the amount which is expected to remedy the inconvenience caused by the non-performance of the contract must be taken into account.

Plaintiff obtained a lease of a rice mill from the defendant for a year, with option of renewal for another year. The possession, which was to be delivered shortly before the paddy season, was not given to the plaintiff, and he sued for damages. The plaintiff admitted that he made no attempt to secure another mill, but the defendant did not show that other mills were available:

Held, (1) that it may be presumed that it was not possible for the plaintiff to look for and obtain another mill in time for the paddy season of the first year, and that, therefore, he was entitled, as damages, to the profits he would have made from the mill in that year;

(2) that, however, the plaintiff was not entitled to any damages for the second year, as, in the first place, he might not have exercised the option, and, secondly, because the presumption as to his inability to obtain another mill could not be made as to the second year. **R MA HNIN YI v. CHEW WHEE SHEIN**, A. I. R. 1925 Rang. 261; 4 Bur. L. J. 93 **635**

——— **ss. 170, 55**—*Article given for repairs—Repairs not finished within fixed or reasonable time—Owner's right to take back article before completion of repairs—Workman's lien for repairs done in part—Removal of article by owner without paying for incomplete repairs—Theft. See PENAL CODE, 1860, ss. 378, 380* **289**

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——— **s. 196**—*Contract by guardian—Ratification by minor after attaining majority—Effect.*

An admission by a person who has attained majority, which imparts complete ratification by him of the acts of his guardian, dispenses with the necessity of any proof being adduced by the creditor to show that the debts were binding. **N DULICHAND v. SONI**, A. I. R. 1926 Nag. 75 **239**

——— **s. 233**—*Transaction with agent as principal—Suit against agent and principal, maintainability of—Evidence Act (I of 1872), s. 21—Admission, whether must be taken as a whole.*

Where one person deals with another on the assumption that the latter is acting as a principal, it is open to the former, in a suit arising out of the transaction, to implead as defendants, along with the person with whom he had dealt, those persons for whom the latter acted as an agent and to claim that if it should be found, as a matter of fact, that the person with whom he had dealt had acted as an agent for the others, a decree may be passed both against the agent and against the principals. The provisions of s. 233 of the Contract Act would warrant the passing of such a decree in such a case.

Every admission which a party makes is evidence against him, and may properly be acted on without necessarily accepting other admissions or other statements which he might have made. **O LACHMAN DAS v. BHAGIRATH**, A. I. R. 1926 Oudh 41 **487**

Contribution—*Property belonging to deceased person recovered by some of his heirs—Suit by other heirs to recover their share—Liability to pay proportionate share of costs.*

Some of the heirs of a deceased person brought a suit to recover his estate from a person who claimed to be entitled to it under the terms of a Will left by the deceased and the suit was eventually compromised, the heirs being allowed to take possession of the estate on payment to the claimant of a certain sum of money, which under the circumstances of the case was not unreasonable. Subsequently the remaining heirs of the deceased brought a suit against those heirs who had recovered the estate of the deceased for their share of the estate:

Held, that the plaintiffs were entitled to their share in the estate of the deceased only on payment to the defendants of their proportionate share of the sum which the defendants had spent in the former litigation for the purpose of obtaining possession of the estate. **O DUNYA SINGH v. GANGA DHAR**, 2 O. W. N. 684; A. I. R. 1925 Oudh 650 **408**

Costs, award of, rule applicable to.

The ordinary rule is that costs should follow the event. It is generally necessary that when costs do not follow the event, particular reasons should be given why the ordinary rule should not be followed. **B RAMPARASAD SHIVLAL v. SHRINIVAS BALMUKAND**, 27 Bom. L. R. 1122; A. I. R. 1925 Bom. 527 **685**

Court-Fees—*Partition suit—Court-fee, whether payable by defendant. See C. P. C., 1908, s. 47* **739**

Court Fees Act (VII of 1870), s. 19-l. See PROBATE AND ADMINISTRATION ACT, 1881, s. 64 **620**

——— **Sch. II, Art. 17 (6)**—*Decree, mode of execution of, appeal against—Court-fee payable.*

When an appeal is not preferred against a decree as a whole, but only against the mode of the execution of the decree, the case falls under Art. 17 (6) of

Court Fees Act- conold.

Sch. II to the Court Fees Act, and a stamp of Rs. 10 is sufficient. **L RADHA KRISHAN v. MEHTAB MIAN, A. I. R. 1925 Lah. 496; 7 L. L. J. 364** 629

— **Sch. II, Art. 17 (6)—Hindu joint family—Division in status—Partition by metes and bounds, suit for—Relief, whether can be valued—Court-fee payable.**

The correct method of regarding the relief claimed in a suit for partition by metes and bounds by one member of a Hindu joint family which has already become divided in status against the other members is that it is merely a prayer to change the form of enjoyment and can only be valued by deducting from the value of the plaintiff's share as ascertained in the partition the value of his beneficial enjoyment as co-parcener before partition. In such a case it is impossible to estimate the money value of the suit and the suit is governed by Art. 17 (6) of Sch. II to the Court Fees Act. **M PRATHIPATI SURAYANARYANA v. PRATHIPATI SESHAYYA, A. I. R. 1926 Mad. 122** 843

Criminal Procedure Code (Act V of 1898), s. 6

— **Calcutta Municipal Act (III of 1922), ss. 363, 364—Municipal Magistrate, order of—High Court, whether can interfere.**

A Magistrate appointed for trial of offences against the Calcutta Municipal Act is a Criminal Court within the meaning of s. 6 of the Cr. P. C.

An order passed by the Municipal Magistrate is a judicial order, and the High Court has jurisdiction to interfere by way of revision. **C RAM GOPAL GOENKA v. CORPORATION OF CALCUTTA, 29 C. W. N. 898; 52 C. 962; 26 Cr. L. J. 1533; A. I. R. 1925 Cal. 1251** 317

— **ss. 144, 145, 439—Dispute regarding land—Order confirming possession of one party without following procedure laid down in s. 145, legality of—Revision.**

The Police submitted a report to a Magistrate recommending action under s. 144 followed by proceedings under s. 145 of the Cr. P. C. in respect of a plot of land against certain parties. On this report the Magistrate passed an order directing that the parties should appear before him on a certain date and that in the meantime they should not commit a breach of the peace by going to the land in dispute. On the parties appearing before him the Magistrate heard the lawyers and passed an order to the effect that one of the parties was in possession of the land and that the others were forbidden to interfere with the former's possession. The order wound up by saying that in case of interference with such possession the parties guilty of interference would be proceeded against under s. 107 of the Cr. P. C., and that if they had any right they had better go to the Civil Court. On revision:

Held, that the order passed by the Magistrate was, in substance though not in form, an order under s. 145 of the Cr. P. C., and that having been passed without observing the formalities indispensable under that section was passed without jurisdiction and must be set aside. **PAT HARBANS NARAIN SINGH v. MOHAMMED SAYEED, 26 Cr. L. J. 1511; A. I. R. 1926 Pat. 51** 295

— **s. 145, proceedings under—Final order—Breach of peace, apprehension of, finding as to, absence of, effect of—Preliminary order not served on certain party—Order, whether binding.**

The law does not require a Magistrate to record in his final order in a proceeding under s. 145 of the Cr. P. C. an express finding that a breach of the

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peace is imminent. A finding in respect of the existence of a dispute likely to cause a breach of the peace is a matter to be considered in relation to the preliminary order and where the preliminary order states that the Magistrate is satisfied on the materials before him that a dispute likely to cause a breach of the peace exists as regards the property in dispute, the final order cannot be objected to on the ground that it does not contain a finding as to the apprehension of a breach of the peace.

A party upon whom the preliminary order required by sub-s. (1) of s. 145 of the Cr. P. C. has not been served and who has not been given an opportunity to prove his possession over the subject of the dispute, cannot be subjected to the final order passed in the proceedings. **O MUQIM-UN-NISA v. AHMAD-UN-NISA, 2 O. W. N. 704; A. I. R. 1925 Oudh 605; 26 Cr. L. J. 1581** 541

— **ss. 145, 107—Bona fide dispute about land.**

In case of a bona fide dispute as to the possession of land the proper course to follow is to proceed under s. 145, Cr. P. C., and unless and until the Court is in a position to say that the party sought to be bound down is clearly in the wrong, s. 107, Cr. P. C., should not be resorted to. **PAT SHAMA CHARAN v. EMPEROR, (1925) Pat. 263; A. I. R. 1925 Pat. 610; 6 P. L. T. 766; 26 Cr. L. J. 1562** 442

— **ss. 145, 146—U. P. Land Revenue Act (III of 1901), s. 40 (2)—Order under ss. 145, 146, Cr. P. C.—Mutation in favour of opposite party—Restitution.**

An order under s. 145 or s. 146 of the Cr. P. C. does not interfere with an order subsequently made by the Revenue Authorities under s. 40 of the U. P. Land Revenue Act making over possession of the property to the party in whose favour an order of mutation has been passed. If the opposite party wins the mutation case at a subsequent stage, the Revenue Court has power to grant restitution to him. **O EMPEROR v. NISAR ALI KHAN, 26 Cr. L. J. 1551** 399

— **s. 146—Attachment of property, withdrawal of—Delivery of possession—Discretion of Court.**

Where property attached under s. 146, Cr. P. C., is released by the Magistrate on being satisfied that there is no longer any likelihood of a breach of the peace, it is open to the Magistrate to make over possession of the property to any party he thinks fit. He is not bound simply to direct the Receiver to abandon the property, leaving the parties to scramble for the estate. There may, however, be cases in which it might be sufficient for him to make an order withdrawing the attachment, and leave some party to take possession. **O ALI BAHADUR v. EMPEROR, 2 O. W. N. 868; 26 Cr. L. J. 1629** 925

— **ss. 154, 161—Statement of witnesses recorded in course of investigation, whether "information" given to Police—Penal Code (Act XLV of 1860), s. 182—"Give," whether means "volunteer."**

A statement made by a witness to a Police Officer in the course of an investigation under Ch. XIV of the Cr. P. C., and recorded by the Police Officer under s. 161 of the Code, cannot be treated as information given to the Police under s. 154 of the Code, and, therefore, if false, is not punishable under s. 182 of the Penal Code.

Obiter.—The word "give" in s. 182, Penal Code, does not bear the restricted meaning of the word "volunteer." **R SULTAN v. C. DE M. WELLSBOURN, A. I. R. 1925 Rang. 364; 26 Cr. L. J. 1532; 3 R. 517** 316

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— **s. 190**—*Penal Code (Act XLV of 1860), s. 211—False charge of dacoity before Village Magistrate—Case struck off on Police report—Charge by Police of false information, legality of—Complaint—Procedure.*

An offence under s. 211 of the Penal Code is a non-cognizable one, and the Police are not empowered to investigate into it of their own accord, and to prefer a charge in respect of it.

Accused made a complaint to a Village Munsif of a dacoity having been committed in his house, mentioning certain persons as having taken part in it. The Police on investigation reported the case to be false, and the Sub-Magistrate to whom the papers were sent struck the case off his file. The Police then put in a charge-sheet against the accused before the Sub-Divisional Magistrate for an offence under s. 211 of the Penal Code:

Held, that it was open either to the persons alleged to have taken part in the dacoity or to the Village Munsif, or to any Police Officer, to prefer a complaint against the accused under s. 190 of the Cr. P. C., in which case the Magistrate before whom the complaint was made could take the case on his file after taking a sworn statement from the complainant, but that the Police could not start proceedings of their own accord, and that, consequently, the proceedings must be quashed as illegal. *M In re PERUMAL NAICK*, (1925) M. W. N. 317; A. I. R. 1925 Mad. 672; 22 L. W. 209; 26 Cr. L. J. 1550 **398**

— **ss. 190 (1) (c), 191**—*Magistrate transferring person from witness-box to dock—Right of such person to be tried by another Court.*

A Magistrate takes cognizance of an offence, not of offender. Therefore, if he transfers a person from the witness-box to the dock, he does not act under s. 190 (c), Cr. P. C., and take cognizance of an offence at all. Consequently the person so transferred is not entitled, under s. 191 of the Code, to be tried by some other Court. *O SRI KISHAN v. DEBI DAYAL*, 2 O. W. N. 823; A. I. R. 1925 Oudh 739; 26 Cr. L. J. 1619 **915**

— **ss. 190, 195, 200**—*Complaint, what should contain—Fabrication of false evidence, complaint of—Notice to accused.*

A complaint ought to contain particulars of the offence with which a man is charged. Therefore, no enquiry should be started on a complaint which does not give sufficient particulars of the offence with which the accused is charged.

In respect of a complaint under s. 193, Penal Code, the false statement should be set out in detail. It should not be left to the Trying Court to find out what statements are false and what statements are not false.

Before taking action against a person for fabrication of false evidence, it is necessary that he should be given an opportunity to substantiate his allegations. *M BALIJIPPALLI SESHAYYA v. BALIJEPPALLI SUBBARAYUDI*, (1925) M. W. N. 470; A. I. R. 1925 Mad. 1157; 26 Cr. L. J. 1589 **661**

— **ss. 192, 204**—*Case made over to Magistrate for disposal, effect of—Magistrate directing Police to put up charge-sheet, validity of—Issue of process against accused—Procedure.*

A complaint under s. 420 of the Penal Code was sent by a Sub-Divisional Magistrate to the Police for investigation and report. The Police made a report that the case was maliciously false and also filed a

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complaint for the prosecution of the complainant for an offence under s. 211 of the Penal Code. The complainant thereupon put in a petition impugning the Police report and praying for an enquiry by a Judicial Officer. The Sub-Divisional Magistrate passed an order on this petition in the following words:—"Seven witnesses are present. To Mr. Q. for disposal." On the matter coming up before Mr. Q. the latter did not examine any of the witnesses but after looking through the papers directed the Police Investigating Officer to submit a charge-sheet. The Sub-Divisional Officer thereupon passed an order re-calling the case from the file of Mr. Q. and making it over to another Magistrate with certain instructions as to how he should proceed:

Held, (1) that the order passed by the Sub-Divisional Officer making over the case to Mr. Q. for disposal was one under s. 192 of the Cr. P. C., whereby the whole case was transferred to Mr. Q. and that it was, therefore, competent to the latter to pass an order in the case summoning the accused to appear before him;

(2) that, therefore, the Sub-Divisional Officer's subsequent order re-calling the case from the file of Mr. Q. and making it over to another Magistrate was not justified;

(3) that Mr. Q.'s order directing the Police Investigating Officer to submit a charge-sheet was also without authority and should be set aside, leaving it to Mr. Q. to issue process against the accused in the usual way. *PAT MAHANI DHANGAR v. BALDEO NARAIN*, 26 Cr. L. J. 1585; (1926) Pat. 16 **657**

— **s. 195**—*Claim disallowed by one Court—Fraudulent decree obtained from another Court—Court, which can start proceedings.*

Where a person after having a claim disallowed in one Court, obtains an *ex parte* decree in respect of the same from another Court, the institution of the second suit, and the obtaining of decree by fraudulent means, cannot be held to be an offence committed in relation to proceedings in the first Court, so as to enable it to take action under s. 195, Cr. P. C. The action to be regular should be taken by the second Court, or by the Court to which both the Courts are subordinate. *L WISHNU RAM v. EMPEROR*, A. I. R. 1925 Lah. 524; 6 L. 445; 7 L. L. J. 341; 26 Cr. L. J. 1588 **660**

— **ss. 195, 476**—*Penal Code (Act XLV of 1860), ss. 193, 471—Perjury—Using forged document as genuine—Complaint by Court—Preliminary enquiry, whether necessary—Complaint, whether must specify false statement.*

Section 195 of the Cr. P. C. is a restrictive section and there is nothing in that section or in s. 476 of the Code to prevent a Court from making a complaint under the ordinary law in respect of an offence under s. 471 of the Penal Code which it finds to have been committed before it.

The finding of a competent Court that a document produced before it is a forgery or that a witness has committed perjury before it, is sufficient *prima facie* ground for a complaint under s. 476 of the Cr. P. C., and no preliminary enquiry is necessary in such a case before making a complaint.

In making a complaint of an offence under s. 193 of the Penal Code, a Court should quote the passages in the statement of the accused in respect of which the complaint is made. Where, however, there is no doubt as to what is the statement complained of the complaint is not rendered invalid by the mere omission to specify therein the statement com-

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plained of. **A DWARKA PRASAD v. MAKUND SARUP**, L. R. 6 A. 630 Civ. & 213 Cr.; 26 Cr. L. J. 1506; A. I. R. 1926 All. 21; 24 A. L. J. 122 **290**

— **ss. 196A, 234** — Conspiracy — Charge of cheating—Forgery committed to cheat—Object of conspiracy—Abetment of forgery—Sanction of Local Government.

Where the object of a conspiracy is to commit forgery there can be no prosecution for such a criminal conspiracy without the sanction of the Local Government under s. 196A of the Cr. P. C. But this is not so, where the main charge is that of cheating, in which it is not necessary at all to mention, as the object of the conspiracy, forgery committed not for its own sake but in order to cheat a person in a way, in which, if he had known the fact, he would not have parted with the money.

If cheating is carried out by means of forgery it does not follow that the provisions of s. 196A of the Cr. P. C. would apply. For a prosecution of an offence of forgery no sanction is necessary under s. 196A and no distinction can be drawn between the offence of forgery and the offence of abetment thereof. **O BISHAMBHAR NATH TONDON v. EMPEROR**, 26 Cr. L. J. 1602; 2 O. W. N. 760 **706**

— **s. 203**—Complaint dismissed under s. 203—Reasons, whether to be recorded.

It is incumbent upon a Magistrate to record briefly his reasons for dismissing a complaint under s. 203, Cr. P. C. **PAT HARNANDAN DAS v. ATUL KUMAR PRASAD**, 26 Cr. L. J. 1502; A. I. R. 1926 Pat. 57 **158**

— **s. 208**—"Complainant," meaning of.

Obiter.—The informant in a case which has been investigated by the Police is not necessarily the "complainant" referred to in s. 208, Cr. P. C. **C KASEM MOLLA v. EMPEROR**, 42 C. L. J. 114; 26 Cr. L. J. 1560; A. I. R. 1926 Cal. 410 **440**

— **ss. 209, 210**—Case triable by Sessions Court—Enquiring Magistrate, duty of—Discharge, order of, when can be passed.

In cases triable by the Court of Session only one trial is contemplated and the enquiry before the Magistrate is only in the nature of a preliminary enquiry.

Sections 209 and 210 of the Cr. P. C. speak only of there being or not being sufficient grounds for committing the accused for trial. When the Legislature speaks of sufficient grounds for committing for trial, it should not be supposed to have spoken of sufficient grounds for conviction and, similarly, when the Legislature speaks of there not being sufficient grounds for committing for trial, it should not be supposed to have spoken of there not being sufficient grounds for conviction.

The intention of the Legislature is to make a distinction between grounds for conviction and grounds for committing for trial. Satisfactory proof of the guilt of the accused is the ground for conviction and satisfactory evidence to go to trial must be regarded as the ground for committing for trial.

If the enquiring Magistrate on the evidence before him comes to the conclusion that the charge is groundless, then he should discharge and not commit for trial. For a charge being groundless, it is not necessary that there should be no evidence at all of the charge. That will be a case of there being no evidence of the charge at all and not a case of the charge being groundless.

A charge may be said to be groundless when the evidence adduced at the enquiry is such that no

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Tribunal, Judge or Jury would ever on that evidence convict the accused. If no reasonable man taking into consideration the evidence adduced in the case could possibly on such evidence conclude that the accused was guilty, then it must be taken that the charge is groundless, and in such a case the duty of the enquiring Magistrate is clear to discharge the accused.

What the enquiring Magistrate has got to try and determine is not whether the case has been made out but only whether there is a case for trial. There is always a case for trial when the evidence is of such a nature that the guilt of the accused can be held to be proved or disproved only as the result of valuing and weighing of the evidence. **M In re MANIA MANIKHA PADAYACHI**, 49 M. L. J. 155; A. I. R. 1925 Mad. 1061; 22 L. W. 755; 48 M. 874; 26 Cr. L. J. 1570 **530**

— **s. 210**—Sessions case—Committing Magistrate, duty of—Criminal trial—Prosecution failing to prove story set up—Acquittal.

Where in a criminal trial the prosecution fails to make out the case set up by it the accused are entitled to an acquittal.

In a Sessions case it is not sufficient for a Committing Magistrate to say that a *prima facie* case has been made out and thus to relieve himself of further responsibility in the case. If the Police has not sent up all the material witnesses, it is the Committing Magistrate's duty to examine them himself in order to determine which side is speaking the truth. **PAT RAM PERSHAD TEWARI v. EMPEROR**, 26 Cr. L. J. 1588; A. I. R. 1926 Pat. 5 **661**

— **s. 215**—Commitment, irregularity in—Sessions trial, whether vitiated.

It is too late to object to the commitment after the accused has pleaded to the charge before the Sessions Court.

The Sessions Judge has jurisdiction to try a case that has been committed to him for trial, and if the trial is legally held, an irregularity in the commitment would not vitiate the proceedings in the Sessions Court. **C KASEM MOLLA v. EMPEROR**, 42 C. L. J. 114; 26 Cr. L. J. 1560; A. I. R. 1926 Cal. 410 **440**

— **s. 227**. See Cr. P. C., 1898, s. 234 **914**

— **s. 231**—Charge amended—Accused's right to re-call and cross-examine witnesses.

If a charge is amended the accused is entitled to re-call and cross-examine any of the prosecution witnesses and not only those witnesses on the basis of whose evidence the charge was amended. **L HAZARA SINGH v. EMPEROR**, 26 Cr. L. J. 1197; A. I. R. 1926 Lah. 60 **153**

— **ss. 234, 235, 227**—Misjoinder of charges—Offences committed at different times—Single trial—Irregularity—Procedure—Striking out of one charge and conviction for another, legality of.

Under ss. 231 and 235 of the Cr. P. C., a Magistrate is entitled to try an accused person for more offences than one in one trial, if the offences have been committed in the course of the same transaction, or for three different offences of the same kind committed during the course of a year.

What can be done under s. 227, Cr. P. C., is only to alter or modify the charge at any time before judgment. The section does not permit a Court to try two distinct offences, such as assault and abuse, which are in no way connected with one another, and which were committed at different times, in the same trial.

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Where it is discovered that two charges have been improperly joined together the proper procedure is to initiate separate trials in respect of each charge.

Where a Magistrate on discovering that he had improperly joined together two charges merely struck out one of the charges already framed and convicted the accused under the other charges :

Held, that the procedure adopted was illegal and that the conviction could not be sustained. **M KRISHNAMURTHI IYER v. NARAYANASWAMI IYER**, 49 M. L. J. 93; 22 L. W. 402; (1925) M. W. N. 746; A. I. R. 1925 Mad. 1065; 26 Cr. L. J. 1618

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— **s. 239**—*Articles belonging to two different persons, theft of—Offences, whether distinct.*

The fact that the articles stolen, happen to belong to two different persons does not make the theft two offences when it is committed in the course of one transaction. **N BHURA v. EMPEROR**, 26 Cr. L. J. 1495; A. I. R. 1926 Nag. 89

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— **ss. 239, 235**—*Penal Code (Act XLV of 1860), s. 121—Waging war against King—Various incidents on various dates—Continuing offence—"Same transaction"—Joint trial of persons accused of various acts, legality of.*

Six persons were jointly tried for the offence of waging war against the King, by attacking and looting a number of Police Stations on various dates and by attacking the forces of the Crown at various places on different occasions. It was shown that one of the accused joined the party waging war only long after some of the other accused had ceased to be members of that party. But all the accused were found to be followers of one leader animated throughout with the same motive of overthrowing the British Government :

Held, Per *Spencer, Offg. C. J.* and *Krishnan, J.*, (*Reilly, J.*, dissenting) that the various incidents which constituted the waging of war were parts of the same transaction and that the joint trial of the accused was justified under s. 239 (1) of the Cr. P. C.

Per *Krishnan, J.*—The question of the legality of a joint trial really depends upon the accusation made and not upon the result of the trial; provided that the accusation is a real one and not a mere excuse for a joinder of charges which cannot be otherwise joined.

The waging of war is a continuing offence beginning with the first act of war and going on till the war is ended in some manner.

The various incidents in a war may be so disconnected as to form different transactions. But the question whether they form parts of the same transaction or must necessarily be held to be different transactions has to be judged on the facts of each case.

The usual tests applied to decide whether different acts are parts of the same transaction are proximity of time, unity of place, unity of purpose or design and continuity of action. It is not necessary that all of them should be present to make the several incidents parts of the same transaction. Unity of place and proximity of time are not important tests at all; but the main test is unity of purpose. If the various acts are done in pursuance of a particular end in view and as accessory thereto, they may be treated as parts of the same transaction.

Per *Spencer, Offg. C. J.*—When a series of acts are so connected by community of purpose and continuity of action as to form not only one transaction but a single offence, proximity of time between the performance of the various acts composing that offence not be-

Criminal Procedure Code—contd.

ing the sole test of the unity of the transaction, s. 235 of the Cr. P. C. authorizes persons accused of doing those acts to be charged and tried at one trial for them all. Section 239 (d) of the Cr. P. C. authorizes the trial of more persons than one on one charge and at one trial if they are accused of different offences committed in the course of the same transaction.

Intervals of time between the commission of a series of acts do not necessarily import want of continuity when the aims of those jointly tried have throughout been directed to one and the same objective.

The waging of war is essentially a continuing offence, in which several incidents, which may in themselves be separate offences, may be comprised.

Rebellion implies a state of being rather than the doing of any act, although for a conviction it is necessary to prove that some overt act was committed by the offender. Rebellions and wars continue until they are suppressed by capture or destruction of the rebel forces or by the rebels laying down their arms and making their submission as subjects to their Sovereign and receiving his pardon.

Per *Reilly, J.*, (*dissentiente*).—The charge in a Sessions trial must be based on evidence given before the Committing Magistrate. A misjoinder of persons cannot be escaped by deliberately making the charge wider than the evidence produced to support it, in order to represent all the persons tried as accused of all the offences or incidents included, though there is no prospect nor intention of proving more than that each is guilty of some of them.

A non-continuing offence is necessarily one transaction: a continuing offence may or may not be so; persons accused of the same continuing offence may be tried together so far as their offence is confined to one transaction.

An offence cannot be treated as necessarily one transaction—merely because it is a continuing offence. On the contrary s. 239 of the Cr. P. C. implies that a continuing offence may embrace more than one transaction, but only so far as it is concerned with one transaction, can more persons than one be tried together for it. The section allows the Court to try several persons together for the same continuing offence of waging war within the limits of one transaction but not if the offence alleged covers more than one transaction. Under s. 239 (d) several persons may be charged and tried together when accused of different offences committed in the course of the same transaction; but "transaction" there must have the same meaning as in s. 239 (a).

The provisions of the Cr. P. C. regarding charges are designed to simplify and define within reasonable limits the charges that may be tried at one and the same time and so avoid the embarrassment of the accused.

It is very desirable that Public Prosecutors and the Courts should give full effect to the spirit of the provisions of the Cr. P. C. instead of straining them to cover doubtful cases.

The general rule is laid down in s. 233 of the Cr. P. C. that for every distinct offence there shall be a separate charge separately tried. The principle is that the accused person shall have a simple allegation to meet and the Court a clear issue to try. But to the general rule certain exceptions are made in ss. 231, 230. All these exceptions can, however, be interpreted so

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as not to conflict with the general principle that the accused should not be perplexed and the Court should not be confused by complicated or numerous or disconnected allegations. In interpreting these exceptions it must never be forgotten that they are exceptions to the general rule and, therefore, to be interpreted with strictness and, so far as they affect the defence of accused persons, with the utmost strictness.

It is entirely wrong to approach the interpretation of the word "transaction" in s. 235 or s. 239 of the Cr. P. C. with the idea of ascertaining how far etymologically it will extend, how far the thread of continuity implied in it can be stretched, how far its meaning can be strained without an obvious break down.

The word "transaction" in ss. 235 and 239 of the Code must not be interpreted in any special or artificial or conventional or technical way but as it is ordinarily used by men of education and common-sense. If you cannot speak of a series of events as a transaction in the ordinary sense in which that word is used, you cannot try a number of persons together in respect of those events by attributing a special and unusual meaning to the word in s. 239 of the Code.

The ordinary meaning of the word "transaction" cannot be stretched so as to make it embrace all the incidents of a long continued rebellion spread over a wide area and extending over many months. *M In re GAM MALLU DORA*, 48 M. L. J. 308; (1925) M. W. N. 192; A. I. R. 1925 Mad. 690; 26 Cr. L. J. 1513; 49 M. 74

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— s. 250—Recording of reasons essential for awarding compensation—Policy underlying s. 250.

Section 250, Cr. P. C., requires, before an order for compensation could be made by a Magistrate, not only that he should be satisfied that the accusation was either frivolous or vexatious but that the Magistrate, directing compensation to be paid, should record his reasons for making such a direction. The recording of the reasons, for ordering compensation to be paid, is almost a condition precedent to the proper exercise of the power and is in addition to the finding of the Magistrate that the accusation was either frivolous or vexatious.

The reasons must go to show, why it is that the Magistrate considers the accusation against the accused, to be frivolous or vexatious and why in his opinion it is a fit case, in which an order for compensation should be made. The policy of the Legislature in requiring that in such a case the reasons should be recorded in writing is to afford an opportunity to an Appellate or Revising Tribunal to consider the sufficiency of the reasons so recorded.

"That no case is made out against any of the accused, that some of the accused were added vexatiously, that the complainant has shown no cause why he should not be ordered to pay compensation, and that, therefore, he is directed to pay compensation," is not a proper compliance with the provisions of s. 250, Cr. P. C. *M THADIAPPAN v. VEERAPERUMAL*, 21 L. W. 616; A. I. R. 1925 Mad. 1139; 23 Cr. L. J. 1501

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— s. 250 (3)—Right of appeal depends on total amount of compensation.

Under s. 250 (3), a complainant's right to appeal depends on the aggregate amount of compensation which he is directed to pay to all the accused. Therefore, an appeal lies where the compensation ordered to be paid to each of the several accused is less than

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Rs. 50, but the total amount payable to all of them exceeds Rs. 50. *Pat SOBHIT MALLAH v. EMPEROR*, 26 Cr. L. J. 1504; A. I. R. 1926 Pat. 70

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— s. 257—Procedure—Defence witness, summoning of—Refusal of Magistrate to summon witness as unnecessary, legality of—Prejudice to accused.

Ordinarily once a Magistrate has given orders that a certain witness should be called he should take such steps as may be necessary or possible to enforce the attendance of the witness. It cannot, however, be laid down that in no case is it possible for the Magistrate, if he comes to the conclusion that the attendance of the witness is not really necessary, to dispense with his attendance.

A prosecution witness was cross-examined at length before and after charge. Subsequently the accused made an application that the witness may be summoned and examined as a defence witness. The Magistrate acceded to this request and granted two adjournments for the purpose of summoning the witness, who, however, could not attend and eventually the Magistrate dispensed with the attendance of the witness on the ground that as he had been cross-examined at length his examination as defence witness was not necessary:

Held, that in the absence of any prejudice to the accused as the result of the refusal of the Magistrate to summon the witness, it could not be said that the Magistrate had acted entirely without jurisdiction. *Pat RAMSAKAL RAI v. EMPEROR*, 26 Cr. L. J. 1627

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— ss. 263 (g), 342—Summons case—Summary trial—Examination of accused, whether necessary—Interpretation of Statutes.

The provisions of s. 342 of the Cr. P. C. as to examination of an accused person are mandatory and apply even to Summons Cases and the words "if any" in s. 263 of the Code do not limit the obligation imposed on Courts by s. 342, or render it inapplicable to summary trials, they merely have reference to those cases in which, owing to the admission and plea of the accused, or owing to the weakness of the evidence called in support of the prosecution, the accused can either be convicted on his own plea without the taking of evidence, or acquitted on the evidence without the examination referred to in s. 342.

The law does not favour legal and strained intendments, when over-minute precision may confound legal certainty. *S EMPEROR v. NABU*, 26 Cr. L. J. 1554; A. I. R. 1926 Sind 1

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— s. 288—Deposition of witness, admissibility of—"Subject to provisions of Evidence Act," meaning of.

The deposition of a witness before the Committing Magistrate when put in the Sessions Court under s. 288, Cr. P. C., becomes substantive evidence and is used as such. The meaning of the words "subject to the provisions of the Indian Evidence Act" in the section is not that the deposition must be admissible under some section of the Evidence Act. They simply mean that it cannot be used as substantive evidence, if for any reason it is irrelevant under the Evidence Act. *C FAZRUDIN v. EMPEROR*, 42 C. L. J. 111; 26 Cr. L. J. 1553; A. I. R. 1926 Cal. 105

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— s. 288—Evidence not recorded for commitment, whether admissible—Evidence admitted under section, whether substantive evidence—Evidence retracted in Sessions Court—Charge to Jury—Duty of Court.

There is no special procedure laid down in

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Ch. XVIII of the Cr. P. C. for recording evidence, and any evidence recorded by a Magistrate before commitment, whether recorded with a view to commitment or in the ordinary course of trial, is evidence recorded in the presence of the accused under Ch. XVIII, for the purposes of s. 288, Cr. P. C.

The evidence recorded by the Committing Magistrate, if admitted under s. 288, Cr. P. C., must be treated as evidence for all purposes even as the basis of finding or verdict and on a par with any other evidence before the Sessions Court or as a substantive evidence on which the verdict of the Jury or judgment of the Judge can be based.

Witnesses who retract in the Sessions Court their statements made before the Committing Magistrate are lying witnesses, as they must have spoken falsehood either before the Committing Magistrate or in the Sessions Court. In their case the Sessions Judge must tell the Jury in his charge that their evidence should be regarded with great caution. The jurors ordinarily are not men who are used to weighing evidence and it is, therefore, necessary that all help should be given to them in estimating the evidence in the light of the observations made by learned Judges in decided cases.

Where instead of cautioning the Jury as to placing reliance on the evidence of witnesses who have retracted their statements made before the Committing Magistrate, the Judge expresses his opinion in his charge with a certain degree of assertion in the words: "It seems clear to me that these witnesses have decided to go as far as they possibly can towards altering their evidence in such a way as shall secure the acquittal of the accused," the charge is vitiated, although the Judge also tells the Jury "it is for you to say whether you feel convinced as to the truth of the Magisterial depositions to an extent which would warrant you as prudent men in acting upon them." **C ABDUL GANI BHUYA v. EMPEROR**, 42 C. L. J. 205; 26 Cr. L. J. 1577; A. I. R. 1926 Cal. 235 **537**

— **ss. 307, 342—Trial by Jury—Disagreement between Judge and Jury—Reference to High Court—Duty of High Court—Verdict manifestly wrong or perverse, finding as to—Examination of accused, nature of.**

Where in a case tried by a Jury the Sessions Judge disagreeing with the unanimous verdict of the Jury makes a reference to the High Court under s. 307 of the Cr. P. C., the question to be decided by the High Court is whether the verdict of the Jury is manifestly wrong or perverse. The High Court has not to decide what would appeal to it as true or false, but has to consider whether the view taken by the Jury was such as could not be supported on any consideration of the case whatsoever.

It makes a considerable difference to listeners like a Jury whether the statement of the accused made before the Committing Magistrate is read over by the reader of the Court, or whether the accused person is carefully examined in the presence of the Jury and his answers and demeanour noted by the Jury. In a case tried with a Jury the Judge should examine the accused person with care so that the defence of the accused and its hollowness, where it is untenable, may be fully impressed on the minds of the Jury. **O EMPEROR v. MOHAMMAD SHAFI**, 26 Cr. L. J. 1576; A. I. R. 1926 Oudh 57 **536**

— **s. 342.**

See CR. P. C., 1898, s. 263 (g)

See CR. P. C., 1898, s. 307

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— **s. 342—Examination of accused, nature of.**

What is necessary for the purpose of s. 342, Cr. P. C., is that the accused should be brought face to face solemnly with an opportunity given to him to make a statement from his place in the dock in order that the Court may have the advantage of hearing his defence of he is willing to make one with his own lips. The section must not be interpreted so as to give the Court the power to cross-examine the accused.

Where a Court asks an accused, "What is your defence," and he replies, "I am innocent," it is sufficient compliance with s. 342, Cr. P. C. **C REZ MUHAMMAD v. EMPEROR**, 26 Cr. L. J. 1510; A. I. R. 1926 Cal. 424 **294**

— **s. 345—Composition of offence, what is—**

Agreement to refer to arbitration, whether amounts to composition—Compromise of civil and criminal cases, difference between.

The compounding of an offence supposes an agreement by which the parties have settled their differences and in the more usual acceptation of the term implies that the prosecutor has received some consideration or gratification for dropping the prosecution. At any rate the arrangement must be one by which the parties have settled their differences and not a mere arrangement to settle the disputes in future as the result of some action either by themselves or by the arbitrators and some decision arrived at by themselves or by third parties.

The mere signing of an agreement to refer the subject-matter of certain criminal proceedings to arbitration does not amount to a composition of the offence under s. 345, Cr. P. C., and does not oust the jurisdiction of the Magistrate to try the case.

A *muchilika* is only one step towards the composition of the offence between the parties. It is only if the *muchilika* is carried out and according to its terms an award is arrived at, that there would be a complete composition in the case. Till that is done, the mere agreement or *muchilika* is only a preliminary step towards composition and not the composition itself.

Criminal cases do not stand on the same footing as civil cases in the matter of settlement. A criminal case is not a matter between parties as a civil case is. A Magistrate is not bound to recognize a reference to arbitration and wait for the arbitrators to make the award though it will be reasonable to do so. If he does not choose to wait he will not be doing anything illegal. But if he chooses to wait and then there is an award, that award may amount to a compounding of the offence in question and if it is an offence compoundable under s. 345, effect will be given to such compounding. But till the actual compounding takes place the Magistrate is not bound at all to stay his hands but may go on with the trial of the case. **M RAMALINGA IYER v. BUDDA VARADARAJULU IYER**, 22 L. W. 390; 49 M. L. J. 514; (1925) M. W. N. 753; A. I. R. 1925 Mad. 1211; 26 Cr. L. J. 1594 **666**

— **s. 345—Compoundable offence, trial of—Arbitration agreement filed in Court—Adjournment requested—Case, whether compounded.**

The complainant and the accused in a compoundable case filed a petition of compromise agreeing to be bound by the decision of certain arbitrators and asking the Court to grant an adjournment for settlement of the dispute. The award was subsequently not accepted by the complainant, and he wanted the Court to proceed with the trial;

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Held, that the petition of compromise had not the effect of compounding the case within the meaning of s. 315 of the Cr. P. C., as the fact that the parties asked for an adjournment of the case showed that what the parties contemplated was that the arbitrators should go into the matter, and that, after effect was given to their decision by mutual agreement, the case would be compromised. **C SRISH CHANDRA GHOSE v. ABANI NATH HAZRA**, 42 C. L. J. 139; 26 Cr. L. J. 1584; A. I. R. 1926 Cal. 266 **544**

— **ss. 349 (1A), 258**—*Joint trial of several accused—Accused, some, held guilty—Reference to Sub-Divisional Magistrate with regard to all accused, legality of.*

Under sub-s. (1A) of s. 349 of the Cr. P. C. only the case of those accused who are in the opinion of the Magistrate guilty should be forwarded to the District or Sub-Divisional Magistrate. Those accused in the case who in the opinion of the Magistrate are not guilty of the offence charged should be acquitted and an order referring their case to the Sub-Divisional Magistrate along with the case of those accused who are guilty is illegal and in contravention of the sub-section. **A SULTAN MUHAMMAD KHAN v. EMPEROR**, L. R. 6 A. 194 Cr.; 26 Cr. L. J. 1630; 24 A. L. J. 80, A. I. R. 1926 All. 176 **926**

— **s. 350**—"De novo trial," meaning and object of.

A *de novo* trial means a new trial from the very beginning of the case. The object of granting a *de novo* trial is to enable the Magistrate who hears the case to see the way in which the witnesses give evidence before him, to mark their demeanour, and thereby to be in a position to judge of their credibility. That object is lost if the witnesses are not examined again but are only allowed to be cross-examined by the accused. Such a course is not in accordance with the provisions of s. 350, Cr. P. C.

Even if no objection is taken to the course of merely allowing the witnesses to be cross-examined further, still the trial is vitiated. **M NARAYAN REDDY v. ENUMULA BOJAMMA**, (1925) M. W. N. 652; 49 M. L. J. 423; A. I. R. 1925 Mad. 1280; 26 Cr. L. J. 1596 **668**

— **s. 360 (1)**—*Depositions to be read immediately—Provisions, whether mandatory—Non-compliance—Illegality.*

The terms of s. 360 (1) of the Cr. P. C. being mandatory, any violation or departure from the practice or procedure enjoined upon the Court is not merely an irregularity which can be cured but an illegality. It is not a compliance with the section for the Magistrate to examine a number of witnesses and ask them to be in a room and then have the depositions read over to them later in the day. Such a procedure is altogether illegal. **M In re KUPPA MUDALI**, 49 M. L. J. 421; 22 L. W. 330; (1925) M. W. N. 795; A. I. R. 1925 Mad. 1206; 26 Cr. L. J. 1587; 49 M. L. J. 71 **659**

— **ss. 420, 421, 439**—*Appeal preferred through mukhtar—Subsequent appeal through Jail, rejection of, effect of—Revision.*

Where in ignorance of the fact that a convict had already preferred an appeal against his conviction through a mukhtar, the Sessions Judge rejected an appeal subsequently preferred by the convict through Jail:

Held, that the High Court had, in revision, power to set aside the order of rejection and to direct the Sessions Judge to re-hear the appeal after giving the

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convict an opportunity of appearing by Counsel. **A EMPEROR v. MEVA RAM**, L. R. 6 A. 202 Cr; 26 Cr. L. J. 1621; 23 A. L. J. 1051; A. I. R. 1926 All. 178 **917**

— **s. 423**—*Penal Code (Act XLV of 1860), ss. 411, 457—Charge, alteration of—Appellate Court, power of.*

A charge cannot be so altered by an Appellate Court as to make it necessary for the accused to meet an absolutely different case from that with which he was charged in the Trial Court.

Where an accused person is tried for an offence of house-breaking in order to commit theft, under s. 457, Penal Code, together with other accused persons charged with the offence of being in possession of stolen property on different dates, under s. 411, Penal Code, he cannot in the Appellate Court be charged with and convicted for an offence under s. 411, Penal Code. **A MULA v. EMPEROR**, L. R. 6 A. 159 Cr.; 23 A. L. J. 924; 26 Cr. L. J. 1494; A. I. R. 1926 All. 33 **150**

— **ss. 436, 439**—*Discharge of accused—Pending proceedings—Interference by High Court—Revision, powers of.*

The High Court has jurisdiction to interfere in a proceeding pending before a Magistrate in the exercise of its revisional powers and to pass an order of discharge in favour of the accused person if it considers such an order to be in the interests of justice. **L GOPAL DAS v. MAGHI RAM**, A. I. R. 1925 Lah. 439; 7 L. L. J. 252; 26 Cr. L. J. 1503 **292**

— **s. 437**—*Further enquiry, when to be directed.*

A District Magistrate cannot set aside an order of discharge if there is no irregularity, illegality or impropriety in the proceedings. Further enquiry ought not to be ordered in a case in which the Courts are liable to take different views of the evidence and of the probabilities, especially where the Magistrate has disbelieved the evidence for the prosecution. **N SHEOCHARAN v. EMPEROR**, 21 N. L. R. 88; 26 Cr. L. J. 1537; A. I. R. 1926 Nag. 117 **385**

— **s. 439**. See Cr. P. C., 1898, s. 144 **295**

— **s. 439**—*Acquittal, revision against—High Court, interference by.*

The High Court will not interfere with orders of acquittal in the exercise of its revisional jurisdiction, unless there are very special circumstances calling for interference. **L NUR MOHAMMAD v. NUR MOHAMMAD**, A. I. R. 1925 Lah. 490; 7 L. L. J. 367; 26 Cr. L. J. 1596 **668**

— **s. 476**. See Cr. P. C., 1898, s. 195 **290**

— **ss. 476 (1), 476A, 476B**—*When superior Court can take action—Limitation Act (IX of 1908), Sch. I, Art. 154—Appeal from Criminal Court's order rejecting application for making complaint—Limitation.*

If a subordinate Court neither makes a complaint nor rejects an application for the making of a complaint, the superior Court may take action and may make a complaint under s. 476A, but where an application made to a subordinate Court for making a complaint is rejected then the procedure contemplated by the Code is by way of appeal to the superior Court and the limitation for such an appeal is 30 days under Art. 154 of Sch. I to the Limitation Act. **C CHANDRA KUMAR SEN v. MATHURIYA DEBYA**, 29 C. W. N. 1035; 42 C. L. J. 120; 52 C. 1009; A. I. R. 1925 Cal. 1228; 26 Cr. L. J. 1569 **529**

— **s. 476B**. See Cr. P. C., 1908, s. 115 **445**

— **s. 488**—*Maintenance of wives and children—Rs. 100, whether can be awarded to each wife and*

Criminal Procedure Code—contd.

child—"In the whole," meaning of—Alimony, grant of, by English Court, whether ousts jurisdiction of Magistrate under s. 488.

Under s. 488, Cr. P. C., every wife and every legitimate child and every illegitimate child can be awarded upto Rs. 100 provided the husband or the father has the means to pay the amount. The words "Rs. 100 in the whole" in the section do not mean that a Magistrate cannot award more than Rs. 100 in all for the support of the wife and the children whatever their number. What the words mean is that only a sum of money not exceeding Rs. 100 should be ordered to be paid and no other payment either in the shape of fees or medical expenses, etc., should be ordered to be paid.

All that has to be proved in order to give jurisdiction to a Magistrate under s. 488, Cr. P. C., is that the child is unable to maintain itself and that the father neglected or refused to maintain it, and in the case of the wife that the husband refused or neglected to maintain her. Even a grown up child, if unable to maintain itself, is entitled to get maintenance from the father if he has the means.

That there has been no neglect to maintain the wife and children is a question of fact. But a mere offer to maintain is not sufficient.

The existence of an order for alimony by the English Divorce Court is not sufficient to oust the jurisdiction of a Magistrate under s. 488, Cr. P. C., since a mere order for maintenance is not equivalent to maintaining the wife. *M KENT v. KENT*, 49 M. L. J. 335; 26 Cr. L. J. 1597; A. I. R. 1926 Mad. 59 **669**

— **s. 497**—*Bail—Jurisdiction of Court to order re-arrest of accused—Principles governing grant of bail.*

Under sub-s. (5) of s. 497 of the Cr. P. C. a Court has ample jurisdiction in the exercise of its discretion to order the re-arrest of any person out on bail, if it feels that the circumstances warrant or demand such a course.

On an application for bail, the Court is not called upon to conduct a preliminary trial of the case and consider the probability of the accused's guilt or innocence. It would be entirely exceeding its function if it did that in any detail; but it may incidentally have to look at the weight of the evidence against the accused as a necessary part of its proper function, that is, to enquire whether the giving of the bail as opposed to the arrest of the accused might lead to a real danger of his absconding and not appearing to take his trial or whether there is any real reason to suppose that he is likely to tamper with the witnesses who would be called against him. *M SANYASAYYA NAIDU v. PUBLIC PROSECUTOR*, 22 L. W. 156; A. I. R. 1925 Mad. 1224; 26 Cr. L. J. 1593 **665**

— **s. 526**—*Transfer of case—District Magistrate, expression of opinion by, whether sufficient ground for transfer.*

A District Magistrate in making over a case for disposal to another Magistrate made the remark that the case was quite clear and that the defence was ridiculous. He further directed that the Government Pleader should conduct the case and press for a severe sentence:

Held, that this expression of opinion on the part of the District Magistrate was a sufficient ground for directing that the case should be transferred to some other district. *O MOHAMMAD YAKUB v. EMPEROR*, 2 O. W. N. 688; A. I. R. 1925 Oudh 690; 26 Cr. L. J. 1525

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Criminal Procedure Code—concl'd.

— **ss. 539B, 145**—*Proceedings under s. 145—Local enquiry—Memorandum not recorded—Proceedings, whether vitiated—Prejudice.*

There is no universal rule that disobedience of a mandatory provision in a Statute has the consequence of nullification of all proceedings irrespective of the question of prejudice.

Where in a proceeding under s. 145, Cr. P. C., the Magistrate makes a local enquiry in the presence of the Pleaders of the parties, who know where the Magistrate goes and the points to which his attention is drawn, but they do not ask the Magistrate to record a memorandum as required by s. 539B of the Cr. P. C., and are content to go on to judgment without seeing the memorandum, or even ascertaining whether one has been made, it is not open to any of the parties subsequently to say that the proceedings should be set aside for this formal defect unless it is shown that prejudice has been caused. *C FORBES v. MUHAMMAD ALI HAIDAR KHAN*, A. I. R. 1925 Cal. 1246; 42 C. L. J. 131; 26 Cr. L. J. 1524 **308**

— **ss. 544, 547**—*Diet money due to witness, whether can be recovered by suit.*

Where a witness pursuant to an agreement with the complainant in a criminal case attends the Court to give evidence and the Court directs the complainant to pay the witness a certain sum as his expenses, if such sum is not paid the witness is entitled to recover it from the complainant by a civil suit.

Suhrawardy, J.—Section 514, Cr. P. C., does not empower a Court trying a complaint to order payment of diet money of witnesses produced before it by the parties. Therefore, such money cannot be recovered under s. 547, Cr. P. C., but it can be recovered by the witness in a civil suit. *C KAMAL MANDALINI v. PARAMASUKH CHAKRABUTTY*, 29 C. W. N. 1033; A. I. R. 1926 Cal. 289 **488**

— **s. 545**—*Payment of money as indemnity—Order directing payment, whether legal.*

There is no provision in Ch. XLIII or s. 545 of the Cr. P. C. for ordering the payment of a sum of money to the owner of the article stolen by way of indemnity. *N BHURA v. EMPEROR*, 26 Cr. L. J. 1495; A. I. R. 1926 Nag. 89 **151**

Criminal trial—Evidence—Witness belonging to same caste as party producing him, whether must be disbelieved.

It is not a sound ground for disbelieving a witness that he is of the same caste or community as the person in whose favour he deposes. *PAT BARHAMDEORAI v. EMPEROR*, 26 Cr. L. J. 1559; A. I. R. 1926 Pat. 36; 7 P. L. T. 272 **439**

— **Misjoinder of charges—Offences committed at different times—Single trial—Irregularity—Procedure—Striking out of one charge and conviction for the other, legality of.** See Cr. P. C., 1898, s. 231 **914**

— **Stolen goods in possession of accused—Presumption—Rebuttal—Jury, charge to—Misdirection.**

In a case where the evidence of the guilt of an accused as a thief or dacoit rests upon discovery of stolen property from his possession and which is tried by the Jury, the proper course is to direct that the Jury are entitled to take the explanation offered by the accused of his possession. It is not necessary that such claim by the accused must be proved. There may be a case in which it is impossible for the person who is in possession of the property to prove how he obtained possession of it and if he states the

Criminal trial--concl'd.

circumstances under which he obtained it the Jury as a Court of fact may accept it; and in that case it will be their duty to acquit the accused.

It is not the law that if the prosecution succeeds in proving possession by the accused of recently stolen goods, it is his duty to prove his innocence, and that the presumption raised of his guilt cannot be rebutted by mere denial. Such a statement of the law laid down by a Judge in his charge to the Jury amounts to a misdirection which vitiates the charge. **C KARATULIA v. EMPEROR**, 42 C. L. J. 212; 26 Cr. L. J. 1582; A. I. R. 1925 Cal. 1241 **542**

Crown Debt—Competition between Crown and other creditor—Moveables—Priority.

Where there is competition between the claims of the Crown and that of another creditor as regards the moveable of the debtor the Crown has priority. **O SECRETARY OF STATE FOR INDIA v. BISHAN NARAIN BHARGAVA**, A. I. R. 1926 Oudh 44 **524**

Custom—Estate of male—Female heir, estate of male proprietor in hands of—Estate, whether liable for satisfaction of decree passed against previous male holder—Widow, whether reversioner.

Under the Customary Law of the Punjab property in the hands of the mother of a deceased proprietor is liable to attachment in execution of a decree obtained by a creditor in respect of a debt incurred by a previous male holder of the estate.

A female heir who derives her title to the estate of a deceased male proprietor by virtue of her marriage into the family of the deceased holder of the estate cannot be regarded as a reversioner of the deceased. **L DHANPAT RAI v. GOPAL KAUR**, 2 L. C. 124; A. I. R. 1926 Lah. 7 **1052**

Succession—Brahmans of Damun Chak, Tehsil Kharian, District Gujrat—Burden of proof.

Brahmans are essentially Hindus and non-agriculturists and the burden of proving that they have in any particular departed from their personal law and have adopted rules prevailing among their agricultural neighbours rests upon those who make the assertion.

Dat Brahmans of village Damun Chak in the Kharian Tehsil of Gujrat District are governed by Hindu Law in matters of succession. **L KHAZAN CHAND v. PARAS RAM**, 7 L. L. J. 459; 6 L. 524; A. I. R. 1925 Lah. 646 **1045**

Julahas of Ichhra near Lahore.

Julahas of Ichhra near Lahore who have held land in the village with a share in the shamilat since a generation before the 1856 Settlement and have lived partly by agricultural and partly by other means, do not follow agricultural custom in matters of succession. **L KARAM DIN v. MEHR DIN**, A. I. R. 1925 Lah. 409; 7 L. L. J. 185 **161**

Wajib-ul-arz, entry in, value of.

Where it is not shown by reliable evidence that the officer engaged in compiling a wajib-ul-arz neglected to perform his duty or was misled in recording a custom, and it does not appear that a statement of custom in the wajib-ul-arz is ambiguous, the record of the custom in the wajib-ul-arz is most valuable evidence of the custom. **O JAMNA PERSHAD v. RAMLAL**, A. I. R. 1926 Oudh 24 **327**

Debtor, transferee of, liability of, whether a separate suit necessary.

Obiter.—The liability of the transferee of a debtor's liability is a question on which the Court can adjudicate without referring the plaintiff to a separate suit. **M MURUGAPPA CHETTIAR v. L. K. S. S. FIRM**, A. I. R. 1926 Mad. 135 **721**

Debtor and creditor—Tender, refusal of, effect of—Interest, cessation of—Deposit in Court, whether necessary.

Where a valid tender of the amount of a loan is made by a debtor to his creditor and is improperly refused by the latter, interest ceases to run on the loan from the date of the tender and the debtor is not bound to follow up the tender by a deposit of the amount in Court. **C GAJENDRA NARAIN MAITY v. SITA NATH DAS**, A. I. R. 1926 Cal. 310 **637**

Declaratory suit—Title, proof of. See **BURDEN OF PROOF** **480**

Decree, ex parte, application to set aside—Order conditional on payment of costs—Facts alleged in petition not found to be true or false—Legality of order.

In determining whether an ex parte decree should be set aside or not, it is the duty of the Court to come to a finding whether the facts set forth in the petition are true or false.

It is not proper that the Court should pass a conditional order on payment of costs and to refuse to set aside the decree if costs are not paid. **O SANT BAKHSI v. OUDH RAM**, A. I. R. 1926 Oudh 118 **745**

Deed, recitals in, value of. See **HINDU LAW—DEBTS** **404**

Defamation—Report of crime to Police—Honest belief in truth of report—Suit for damages—Qualified privilege—"Honest belief," whether something as "reasonable and probable cause."

A report of a crime to the Police carries with it a qualified privilege with regard to defamation. That qualified privilege amounts to this, that it is sufficient that if the defendant had an honest belief that what he said was true. An honest belief does not, however, come to the same thing as reasonable and probable cause.

Therefore, where there is theft in the house of the defendant, and he makes a report that the plaintiff was concerned in it, in the honest belief that the plaintiff was so concerned, the plaintiff's suit for recovery of damages for defamation is not maintainable. **O SAJJAD HUSAIN v. MUL CHAND**, 2 O. W. N. 822; A. I. R. 1926 Oudh 18 **951**

Definition—"Avyavaharika," "Rina." See **HINDU LAW** **165**

—"Darepatrak," meaning of. See **EVIDENCE ACT**, s. 33 **38**

—"De novo trial, meaning and object of. See **CR. P. C.** 1898, s. 350 **668**

—"Kaimi Mourashi," meaning of. See **BENGAL TENANCY ACT**, 1885, s. 49 **104**

—"Kharij jama," meaning of. See **LANDLORD AND TENANT** **777**

—"Malik," use of, effect of. See **HINDU LAW** **757**

—"Moghli," meaning of. See **CONSTRUCTION OF DOCUMENT** **352**

—"Raiyat, meaning of. See **BENGAL TENANCY ACT**, 1885, s. 49 **104**

Easement—Grant—Presumption.

When the enjoyment of easement can be traced to a distant past and has continued ever since or at least down to the time of the obstruction complained of, the Court should refer such a long enjoyment to a legal origin, and presume a grant or an agreement. **PAT. ABDUL GHANI v. HARNAM SINGH**, (1925) Pat. 250; A. I. R. 1925 Pat. 748; 7 P. L. T. 260 **356**

Easements Act (V of 1882), s. 13 (f)—Easement—Increased burden.

The plaintiff and defendant were owners of two

Easements Act—concl'd.

adjoining sites with houses thereon which fell to them on a family partition. The water from the plaintiff's site drained off across the defendant's site, and without flowing in any channel across the defendant's land used to be absorbed as it spread over the whole area. Subsequent to the partition, between the two sites a wall was built by both the parties in common and the plaintiff claimed the right to drain off the water from his house and site through a hole in the wall across the yard in the defendant's house to the street :

Held, (1) that the easement enjoyed before partition was of a different nature to that claimed, namely, collecting all the water into one spot and directing it on to the defendant's land in a concentrated form ;

(2) that the easement right not being necessary for enjoying the plaintiff's share as it was enjoyed when the partition took effect, and the burden cast upon the defendants being a more onerous burden now than it was before, plaintiff's claim must fail. **M SINNANNA GOUNDAN v. VEERAPPA GOUNDAN**, (1925) M. W. N. 282; A. I. R. 1925 Mad. 681

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——— **s. 18—Customary right, proof of.**

A Court should not decide that a local custom exists unless the Court is satisfied of its reasonableness and its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted or by stealth or by force and that it has been openly enjoyed for such a length of time as suggests that originally by agreement or otherwise, the usage had become a customary law of the place in respect of the persons and things which it concerned.

Per *Kanhaiya Lal, J.*—A customary right may arise by agreement or prescription and may be deduced from long and open user. Its existence may be inferred from long enjoyment not exercised by permission, stealth or force.

There is no statutory period of enjoyment provided during which, in order to establish a local custom, it must be proved that the right claimed to have been enjoyed, has, by local custom, been so enjoyed. **A CHANNU DUTTA VYAS v. SWAMI GYANNANDJI MAHARAJ**, A. I. R. 1926 All. 130

976

——— **s. 28—Right of way, extent of—Method of user—Dominant and servient owners, mutual rights of.**

A person entitled to a right of way cannot make an excessive user of the right, much less can he act arbitrarily and in a high handed manner so as to render the beneficial enjoyment by a servient owner of his own premises impossible or fraught with many difficulties. The latter is not on the other hand entitled to use the premises in a manner interfering with the enjoyment by the former of his right of way within reasonable limits. **N DADU v. EMPEROR**, 26 Cr. L. J. 1493; A. I. R. 1926 Nag. 221

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Ejectment of trespasser—Suit by one co-sharer on behalf of all—Maintainability of suit.

One co-sharer can sue a trespasser in ejectment on behalf of himself and his other co-sharers. **O HARI HAR BAKSH SINGH v. MOHAMMAD USMAN KHAN**, A. I. R. 1926 Oudh. 144

804

Election Petition—Election rules—Voter writing candidate's name on ballot paper—Vote, validity of—Misconstruction of rule—Refusal to apply rule—Revision—Interference by High Court—Civil Procedure Code (Act V of 1908), s. 115.

Election Petition—concl'd.

One of the rules regulating the conduct of elections in Madras is that the voter should only place his mark on the ballot paper against the name of the candidate for whom he wants to vote and should not write his own name or the name of the candidate on the ballot paper. A voter who writes the name of the candidate on the ballot paper against the space left for the cross-mark commits a breach of the election rules. These rules are not merely directory but mandatory and a violation of these rules nullifies the vote and such a vote should be declared invalid.

The fact that a lower Court in dealing with an election dispute has misconstrued an election rule, is not a proper ground for interference with its decision in revision. Where however, the Court has refused to apply a certain rule on the ground that the rules should not be strictly construed in the case of illiterate voters its decision is open to revision. **M VENKATARAMIAH v. SUBBIREDDI**, 22 L. W. 24; A. I. R. 1925 Mad. 1173

1055

Estates Partition Act (VIII B. C. of 1876), s. 119

—*Partition between proprietors—Proprietor holding tenure, whether affected by partition.*

Where in the course of a partition proceeding under the Estates Partition Act any question arises as to the extent or otherwise of a tenure, the tenure-holder is not in any way affected by the decision which may be arrived at by the Revenue Authorities for the purposes of the partition between the proprietors, and it is immaterial that the tenure-holder happens to be one of the proprietors and is a party to the proceedings in that character.

A partition under the Estates Partition Act deals with the rights of the proprietors and so far as *raiya* lands are concerned they are only entitled to a distribution of the rents. It is not the intention of the Act that the rights of tenants should be conclusively determined by the Record of Rights prepared for the purposes of the partition. **PAT SUBEDAR RAI v. RAMBILAS RAI**, 5 Pat. 8; 7 P. L. T. 257

817

Estoppel. Lease of homestead land—Agreement not to eject lessee. See **BENGAL TENANCY ACT, 1885, s. 49**

104

——— **Oudh Rent Act (XXII of 1886), s. 108 (10)—Civil Procedure Code (Act V of 1908), O. VII, r. 10—Suit to recover possession of land filed in Rent Court—Objection to jurisdiction of Court—Order directing return of plaint for presentation to proper Court—Suit instituted in Civil Court—Defendant, whether can object to jurisdiction of Civil Court.**

A suit for the recovery of a plot of land and for damages was instituted in the Rent Court as a suit falling under s. 108 (10) of the Oudh Rent Act. The defendants objected to the jurisdiction of the Rent Court to entertain the suit with the result that the Rent Court returned the plaint to be presented to the Civil Court. The suit was accordingly laid before the Civil Court and the defendants objected that the Civil Court had no jurisdiction to entertain the suit :

Held, that the Rent Court having returned the plaint for presentation to the Civil Court as the result of the defendants' objection to the jurisdiction of the Rent Court, they could not be permitted to turn round and object that the Civil Court had also no jurisdiction to entertain the suit. **O SITA RAM SINGH v. ANSARI LAL**

38

——— **Setting up inconsistent cases.**

In the absence of proof that a party acted on the

Estoppel—concl'd.

faith of any representation by the other party, no question of estoppel can arise.

A contention put forward in a prior suit in support of a legal argument cannot by itself afford a foundation for an estoppel.

A person is not precluded from setting in a litigation a case inconsistent with the one set up by him in a prior litigation. **M SHYAMA BHAI v. PURSHOTAMA-DOSS**, 21 L. W. 551; A. I. R. 1925 Mad. 645 124

Trust—Trustee, whether can deny validity of trust. See **TRUST** 835

Evidence—Witness belonging to same caste as party producing him, whether must be disbelieved. See **CRIMINAL TRIAL** 439

Evidence Act (I of 1872), s. 6—Penal Code (Act XLV of 1860), ss. 149, 325—Rioting—Statements made by members of unlawful assembly prior to occurrence, whether admissible.

Where a procession attempts to pass through certain streets of a town in defiance of an order of the Superintendent of Police prohibiting it from passing through such streets, and a collision takes place between the members of the procession and the Police force resulting in a riot, evidence led on behalf of the prosecution in the riot case to prove statements made by the members of the procession showing their determination to force their way into the streets into which their entry was prohibited in spite of the resistance of the Police is admissible as forming part of the *res gestæ* and indicating that the intention of the members of the procession was to ignore the order of the Superintendent of Police. **R MAUNG TOK v. EMPEROR**, 3 R. 352; A. I. R. 1925 Rang. 354; 26 Cr. L. J. 1622 918

ss. 6, 8, 9—Abduction case—Evidence of search prior to alleged abduction, whether admissible.

The accused, who were alleged to have abducted a woman at midnight, produced a witness who gave evidence that he had seen certain other women of the abducted woman's household searching for something at dusk the same evening, the suggestion being that the woman was actually missing in the evening and could not have been abducted at midnight. The women were not examined as witnesses:

Held, that the evidence of the witness was inadmissible and neither s. 6, nor s. 8, nor s. 9 of the Evidence Act was applicable. **C FAZARUDDIN v. EMPEROR**, 42 O. L. J. 111; 26 Cr. L. J. 1553; A. I. R. 1926 Cal. 105 433

s. 9—Identification of accused in Jail, evidence of—Person identified not specified—Magistrate conducting identification, evidence of, whether admissible.

In order to enable the Court to rely on the evidence of a person who identified the accused in Jail, but failed to do so in Court, the fact of the Jail identification must be stated in the witness' evidence. An identification in Jail is in essence a statement by the witness, "I saw this man who is now before me taking part in the offence." That statement can be used to corroborate his evidence given in Court. If the witness says in his evidence, "a number of persons were shown to me at the Jail and from among them I pointed out those persons whom I had seen committing the offence," it is permissible under s. 9 of the Evidence Act to call independent evidence, such as that of the Magistrate who conducted the identification, to prove the identity of the persons whom he picked out at the Jail, even though the witness himself

Evidence Act—cont'd.

may not correctly remember who they were. **O CHHUT-KAU v. EMPEROR**, 28 O. C. 258; 26 Cr. L. J. 1564; A. I. R. 1926 Oudh 36 444

s. 21. See **CONTRACT ACT**, 1872, s. 233 487

s. 21—Admission of co-defendant, value of
The fact that a co-defendant took part in certain *batwara* proceedings in which the land in dispute was measured and a map was prepared in which the plaintiff's title was admitted, is admissible in evidence though it is not binding as an admission on the other defendants who claim under an independent title. **C ABDUL HAMID CHOUDHURI v. BROJENDRA KUMAR ROY, A.** I. R. 1926 Cal. 290 643

s. 25—Confessional statement recorded as First Information Report, admissibility of.

If after committing a murder the murderer proceeds straight to the Police Station and there makes a confessional statement, which is recorded as the First Information Report, the statement is inadmissible in evidence as being a confession made to the Police. **L NUR MUHAMMAD v. EMPEROR**, 26 Cr. L. J. 1492 148

s. 30—Confession of co-accused, when admissible.

The statement of one accused cannot be taken as evidence against another accused under s. 30 of the Evidence Act unless the parties are admittedly in *pari delicto*, that is, when a confessing accused implicates himself to the full or as much as his co-accused whom he is criminating. Statements which inculcate the maker more than, or equally with, others alone can afford any satisfactory guarantee of their truth. Less weight must be attached to statements which implicate the maker in a lesser degree than others. Where the principal blame is laid on others the statement is self-serving according to the ideas of the person making it and is entirely excluded from consideration. There is absolutely no guarantee whatever as to its truth where the statement entirely exonerates the maker. Such a statement cannot be held admissible as against the co-accused. **N SHEOCHARAN v. EMPEROR**, 21 N. L. R. 88; 26 Cr. L. J. 1537; A. I. R. 1926 Nag. 117 385

s. 32 (2). See **BENGAL TENANCY ACT**, 1885, s. 50 564

s. 33—Deposition of witness made before Committing Magistrate, whether admissible at trial—Death of witness, proof of.

Where the deposition of a witness made before the Committing Magistrate is sought to be admitted in evidence at the trial in the Sessions Court, under s. 33 of the Evidence Act, the death of the witness must be first proved. In the absence of such proof the statement is not admissible in evidence under s. 33. **L SAJJAN SINGH v. EMPEROR**, A. I. R. 1925 Lah. 418; 6 L. J. 437; 7 L. L. J. 259; 26 Cr. L. J. 1489 145

s. 35—Landlord and tenant—Occupancy tenancy—Custom of transferability—Village note, entry in, admissibility of—Presumption of correctness—Appeal, second—Finding of fact, interference with.

An entry in a village note prepared by the Settlement Officer relating to the custom of transferability of occupancy rights is admissible in evidence under s. 35 of the Evidence Act, but it is only a piece of evidence and there is no presumption of correctness attached to it.

A finding of fact based upon evidence on the record cannot be disturbed in second appeal. **PAT BHAGWAN SINGH v. LACHUMAN PRASAD SAHU**, 3 Pat. L. R. 225; A. I. R. 1925 Pat. 751 579

Evidence Act—contd.

—s. 35—Map prepared for purposes of partition affecting public revenue, admissibility of—Boundary dispute—Commissioner, report of, value of.

A map prepared for the purposes of a partition which affects the public revenue, is admissible in evidence, though it may be for a limited purpose only.

Ordinarily in a boundary dispute the Commissioner's report is of great importance, but the report cannot be of much help to the Court where the findings of the Commissioner are inconclusive. **C ABDUL HAMID CHAUDHURI v. BROJENDRA KUMAR ROY**, A. I. R. 1926 Cal. 290 **643**

—s. 35—Perepatraks, value of—Admissibility.

The very underlying idea of preparing *Perepatraks* is to know year by year how much land has been under crop and how much left fallow, with a view to know the actual state of cultivation in each village.

Perepatraks are, therefore, admissible in evidence for the purpose of showing the area under crop. **N SITARAM v. HIMATRAO**, A. I. R. 1926 Nag. 161 **38**

—s. 78 (6)—Copies of registers kept by officers of Native State, admissibility of.

Copies of entries in registers kept by the officers of a Native State are not admissible in evidence having regard to the provisions of s. 78 (6) of the Evidence Act. **PAT SHAMSHER NARAIN SINGH v. MOHAMMAD SALE**, A. I. R. 1926 Pat. 29 **329**

—s. 90—Document more than 30 years old—Presumption as to genuineness—Proper custody, production from, proof of.

A *chitta* relating to a private partition among certain persons of certain property and purporting to be more than 30 years old was produced in Court by an officer of the Collectorate who stated that the document had been handed over to him by the record keeper to be produced in Court:

Held, that the genuineness of the document could not be presumed under s. 90 of the Evidence Act inasmuch as (a) there was nothing to show that the document was actually in the custody of the Collectorate before it was produced in Court, and (b) there was nothing to show that the custody of the Collectorate was proper custody within the meaning of the section. **C PURNA CHANDRA SINGHA v. RADHIKA MOHAN DEY**, A. I. R. 1926 Cal. 370 **722**

—s. 92, application of. See EVIDENCE ACT, 1872, s. 115 **875**

—s. 92—Intention of parties, evidence as to, cannot be given—Non-existence of agreement can be proved.

Evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is no agreement at all is admissible.

Under s. 92 of the Evidence Act, as between the parties to an instrument, oral evidence of intention is not admissible for the purpose, either of construing deeds or of proving the intention of the parties.

Section 92 merely prescribes a rule of evidence; it does not fetter the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances. **PAT RAMDHANI SINGH v. KEWAL MANI BIBI**, (1926) Pat. 29; 7 P. L. T. 145 **929**

—s. 92—Mortgage-debt, discharge of—Oral evidence, whether admissible.

Evidence is admissible to prove an oral agreement of satisfaction or discharge of a mortgage-debt. **N KRISHNAJI v. KASHIRAO**, A. I. R. 1926 Nag. 220 **450**

Evidence Act—contd.

—s. 92—Promissory note payable on demand—Agreement to show that executant was not personally liable, whether can be proved.

Where a contract is founded on consideration and the party who has received the consideration writes down and signs the terms on which he has received it, it is not open to him to raise the plea that he did not agree to those terms.

The executant of a promissory-note cannot, under the provisions of s. 92 of the Evidence Act, be permitted to prove a separate agreement according to which the sum specified in the note is not, as expressed therein, payable on demand but represents merely a portion of the capital of a partnership into which the parties had entered for the purposes of a certain business. **L HIRA LAL v. BENARSI DAS**, 6 L. 411; 2 L. C. 114; A. I. R. 1925 Lah. 576; 7 L. L. J. 453 **982**

—s. 92—Promissory-note—"On demand," meaning of—Oral agreement re exigibility, whether admissible—Oaths Act (X of 1873), scope of—Agreements between parties in pending suits—Court, powers of—Civil Procedure Code (Act V of 1908), O. XXIII, r. 3.

A subsequent oral agreement varying the terms of a promissory-note as regards its exigibility on demand is inadmissible in evidence and cannot be proved under s. 92 of the Evidence Act.

An acceptance of the challenge by a party to a suit on a promissory-note to make the declaration about the existence of such an agreement on oath and the making of such a declaration on oath in pursuance thereof cannot override the provisions of the Evidence Act, as the powers of the Court to record agreements under O. XXIII, r. 3, C. P. C., are restricted to lawful agreements only and cannot be extended to one which is not legally provable.

The usual import of the words "on demand" in the promissory note is that the debt is due and payable immediately.

The provisions of the Oaths Act are not intended to be utilized in such a manner as would abrogate the provisions of the Evidence Act. **N JAMU v. MUHAMMAD IBRAHIM**, A. I. R. 1926 Nag. 194 **378**

—s. 92—Registered deed—Evidence that property comprised in deed is different from that mentioned in deed, whether admissible.

Where a mortgage is effected by means of a registered deed the parties are precluded by the provisions of s. 92 of the Evidence Act from giving evidence that the property comprised in the deed is different from that which on the face of the deed appears to have been mortgaged. **PAT MUSI KAZIM v. HAJI MUTASADDI** **841**

—s. 92, proviso (3)—Pro-note payable on demand—Oral agreement postponing enforceability of pro-note—Admissibility in evidence.

Where a promissory note, on the face of it, purports to be payable on demand, parol evidence is not admissible, under proviso 3 of s. 92, Evidence Act, to show that at the time of making it, it was agreed that it should not be payable till a particular event happens. **M SUBRAMANIA IYER v. NARAYANASWAMI IYER** (1925) M. W. N. 601; 22 L. W. 445; A. I. R. 1925 Mad. 1240 **1020**

—s. 92, proviso (3), scope of—Post-dated cheque—Stamp, necessary—Oral agreement that cheque is not to be presented till after the happening of a certain contingency, whether can be proved.

Evidence Act—contd.

A post-dated cheque is admissible in evidence although it bears a stamp representing duty payable in respect of a cheque and not the *ad valorem* duty payable in respect of a Bill of Exchange.

Oral evidence to contradict or vary or alter the terms of a negotiable instrument, the execution of which and the consideration for which are admitted, cannot be adduced having regard to the provisions of s. 92 of the Evidence Act.

The provisions of proviso (3) to s. 92 of the Evidence Act are inapplicable in a case in which an obligation under the written contract has attached. If the effect of the alleged contemporaneous oral agreement is merely to suspend the performance of the obligation contained in the written contract, evidence of such oral agreement cannot be admitted. On the other hand, it is permissible to adduce evidence of a contemporaneous oral agreement under which the parties to the written contract agree that until the happening of a certain event no obligation whatever under the written agreement should attach, or, in other words that until the condition precedent has been fulfilled, the written agreement should be and remain inoperative and of no effect.

Defendant gave a post-dated cheque to the plaintiff on the understanding that the cheque was not to be presented for payment until and unless a certain dispute between the parties had been decided in a certain manner. Plaintiff brought a suit to recover the amount of the cheque from the defendant without taking steps to have the dispute decided:

Held, (1) that the effect of the agreement between the parties was not to contradict or to vary the terms of the cheque but to create a condition precedent to the attachment of any obligation under the cheque which would remain inoperative until after the adjudication of the dispute had taken place;

(2) that the agreement, therefore, fell within the purview of proviso (3) to s. 92 of the Evidence Act and could be proved;

(3) that consequently the plaintiff's suit must be dismissed as premature. *C. WALTER MITCHEL v. A. K. TENNENT*, 52 O. 677; A. I. R. 1925 Cal. 1007 59

— s. 110. See *BERAR LAND REVENUE CODE*, 1896, s. 96-I 196

— s. 112—*Child born during continuance of marriage between mother and alleged father—Legitimacy—Presumption.*

The fact that a person was born during the continuance of a valid marriage between his mother and a certain man is, under s. 112 of the Evidence Act, conclusive proof that he is the legitimate son of that man, unless it is proved that the latter had no access to his wife at any time when the child could have been begotten. It is immaterial how soon after the marriage the child was born. The only question in such a case is whether his mother had no access to the man whom she married at any time when the child could have been begotten. *L. KAHAN SINGH v. NATHA SINGH*, A. I. R. 1925 Lah. 414; 7 L. L. J. 184 123

— s. 115—*Attestation of document in token of consent—Estoppel.*

Where a document recites that a certain person has put his thumb impression thereto in token of his consent and it appears that the document was read over to such person at the time of registration and that he again put his thumb impression to the document, this is not a mere attestation of the document but amounts to distinct and clear acquiescence which binds the

Evidence Act—contd.

person so thumb-marking the document and estops him from questioning its validity. *L. SUNDAR SINGH v. BHAN SINGH*, 2 L. C. 155; A. I. R. 1926 Lah. 62 1032

— s. 115—*Execution of decree—Decree for rent—Sale—Purchaser believing that he is purchasing free from encumbrances—Co-sharer party to decree, whether estopped from challenging character of decree—Execution of rent-decree by co-sharer—Notice to other co-sharers, necessity of.*

The obligation of serving co-sharers with notice of the execution of a rent-decree and the sale thereunder is not sufficiently carried out by serving notices on some of them.

Where a co-sharer landlord, who is a party to a decree for rent obtained by another co-sharer, stands by and allows the purchaser at the auction-sale in execution of the decree to purchase the holding under the impression that the decree is a rent decree and that he is purchasing the holding free from encumbrances, the co-sharer who stands by is estopped from subsequently challenging the character of the decree as a rent-decree and asserting that the sale was not free from encumbrances. *G. JABED ALI TALUKDAR v. SURENDRA NATH BANDOPADHYA*, 42 C. L. J. 477; A. I. R. 1926 Cal. 351 333

— s. 115—*Suit for money due by deceased member of family—Plea of division of status—Decree against assets—Execution of decree—Plea of survivorship, whether competent—Estoppel.*

Where in a suit to recover money due by a deceased member of a joint Hindu family, the defendants plead a division of status with the deceased and a decree is passed against the assets of the deceased in the hands of the defendants, it is not open to the latter afterwards in execution of the decree to contend that the properties in their hands are not liable since they have succeeded to the properties by survivorship. *M. PONNAPPA REDDI v. THIRUVENGADA PILLAI & Co.*, 49 M. L. J. 104; 22 L. W. 455; A. I. R. 1925 Mad. 1179; (1925) M. W. N. 713 509

— ss. 115, 92—*Sales, two, of same property—First vendee attesting second sale-deed—Disclaimer of purchase—Estoppel—S. 92, application.*

The doctrine of estoppel is that if a man either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of those who have so given faith to his words or to the fair inference to be drawn from his conduct.

The terms of s. 115 of the Evidence Act did not enact as law in India anything different from the law of England on the subject of estoppel.

Where a vendee of property subsequently attests a sale-deed relating to the same property executed by his vendor in favour of another person, he holds out that the sale-deed in his own favour was inoperative, and that he is willing that the property should be dealt with as if it were at the absolute disposal of his vendor, and if a third person on the faith of this representation purchases that property from the vendor, the vendee making the representation is estopped from claiming title to the property.

In such a case as the above, there is no conflict between s. 92 and s. 115 of the Evidence Act. There is no question of the admission of any oral evidence to rescind the earlier sale. The question simply is whether or not there was a representation made and acted upon.

Evidence Act—concl'd.

Sections 92 and 115, Evidence Act, deal with two entirely different topics. When a party seeks to give evidence of a subsequent oral agreement modifying the terms of the written grant, he puts forward that agreement as true and relies upon the truth of that agreement. In the case of an estoppel, the party who pleads it does not profess to show that the representation made is true. On the contrary, his case very probably is that the representation is false but that the person who made it should not be allowed to show that it is false. **M MUHAMMAD BATCHA SAHIB v. ARUNACHALLEM CHETTIER**, (1925) M. W. N. 596; 49 M. L. J. 396; A. I. R. 1926 Mad. 39 **875**

— **s. 145**—*Previous statement of witness—Statement, use of, to discredit witness.*

A previous statement of a witness made before a Magistrate who first started to try the case cannot be used to discredit the evidence given by the witness at the eventual trial before another Magistrate, unless the statement has been brought into evidence after cross-examination. **L SAWAN SINGH v. EMPEROR**, A. I. R. 1925 Lah. 499; 7 L. L. J. 339; 26 Cr. L. J. 1585 **657**

— **s. 167**. See C. P. C., 1908, s. 151 **678**

— **s. 167**—*Inadmissible evidence, effect of.*

Where a Court erroneously holds that certain documents are admissible in evidence but in arriving at its finding it does not base its decision upon those documents alone and arrives at its finding independently of such documents, its finding cannot be said to be vitiated by reason of the fact that it has relied upon inadmissible evidence in arriving at that finding. **PAT SHAMSHER NARAIN SINGH v. MOHAMMAD SALE**; A. I. R. 1926 Pat. 29 **329**

Execution of decree—Application filed on last day of limitation—Particulars, want of, effect of.

An application for execution of a decree was filed on the last day of limitation and the necessary particulars were either omitted or were entered incorrectly. The omissions were pointed out to the applicant and the Court returned the application so that the omissions may be supplied. A week later the application was re-filed without the order of the Court having been fully complied with. The Court gave another opportunity to the applicant to remove the defects but he failed to do so. When most of the particulars had been supplied it was discovered that the application had originally been filed on the last day of limitation;

Held, that the original application filed was a mere scrap of paper and did not amount to an application for execution and that, consequently, no application for execution had been made within limitation. **PAT BHUPENDRA NARAIN MANDER v. JANESWAR MANDER** **761**

— *Application for execution made by person having no title—Title subsequently acquired, whether can support application.*

Where a person who has no title whatever to execute a decree makes an application for execution of the decree, he cannot remedy the defect by completing his title after the date of the application, and then try to execute the decree by virtue of that title. **B PANDU JOTI KADAM v. SAVLA PIRAJI KATE**, 27 Bom. L. R. 1109; A. I. R. 1925 Bom. 472 **561**

— *Attachment—Occupancy holding, whether liable to sale.*

The transfer for value of the whole or part of an occupancy holding, apart from custom or local usage,

Execution of decree—cont'd.

is operative as against the *raiyat* whether it is voluntary or involuntary. The principle is of general application and applies to creditors other than the landlord. **C NABIN CHANDRA BISWAS v. ABDUL AZIZ**, A. I. R. 1926 Cal. 337 **998**

— *Res judicata—Implied decision, whether binding on parties in subsequent stages—Civil Procedure Code (Act V of 1908), s. 11.*

Section 11 of the C. P. C. does not in terms apply to execution proceedings but an order in execution may be as binding between the parties and those claiming under them as an interlocutory order in a suit is binding upon the parties in every proceeding in that suit, or as a final judgment in a suit is binding upon them in carrying the judgment into execution. Where, therefore, a point has once been expressly decided in the execution department, the decision binds the parties in all subsequent stages of the proceeding. Where a point has not been directly decided but is such as must be deemed to have been necessarily decided before the order for execution was passed, the decision has a similar binding force.

Plaintiff obtained a decree for an injunction restraining the defendants from erecting any building on the land in dispute. Plaintiff subsequently put in an application for execution of the decree complaining that the defendants had constructed a pavement on the land in dispute and asking for its removal. The defendants objected that the parties had compromised their dispute after the decree had been passed and that the pavement had been constructed in pursuance of that compromise. There was no objection taken that the construction complained of was not in defiance of the injunction. The Execution Court after taking evidence held that no compromise had been proved and dismissed the objection and directed that the pavement should be removed. After this order was carried out the defendants filed a set of objections complaining that the pavement was not a structure of the nature the construction of which had been prohibited by the decree and that the plaintiff having wrongfully obtained the removal of the pavement should be directed either to restore the pavement or to pay damages to the defendants:

Held, that the defendants having failed to take the objection in answer to the application for execution that the pavement was not a structure the construction of which was prohibited by the decree, were estopped from raising the objection at a subsequent stage inasmuch as the order of the Execution Court directing execution must be taken to have necessarily decided that the construction of the pavement was in defiance of the decree. **A DIP PRAKASH v. DWARKA PRASAD**, L. R. 6 A. 606 Civ.; 24 A. L. J. 91; A. I. R. 1926 All. 71 **83**

— *Sale—Identity of property sold, determination of—Sale proclamation and sale certificate, conflict between—Mixed question of law and fact.*

An auction sale like any other contract comprises an offer and acceptance. The offer is made by the Court and is advertised by the proclamation of sale. So far as the identification of the property to be offered for sale is concerned, this is the only declaration which is authorised or required. Unless, therefore, there is something to show that the Court sold something less than was advertised for sale, the sale proclamation is conclusive as to the identity of the property sold.

In granting a sale certificate, it is the duty of the Court not to determine what property is to pass by

Execution of decree—concl'd.

the sale, but merely to record the already accomplished fact of a transaction that has taken place and to state what has been sold. The Court has no power to do more or to alter the fact of the sale which has actually taken place. Its action in granting the certificate is ministerial and not judicial.

In the case of a conflict between the sale proclamation and the sale certificate subsequently granted, the property sold must be determined by reference to the terms of the sale proclamation. **PAT CHRISTIAN v. PRASAD RAUT**, (1925) Pat. 220; A. I. R. 1925 Pat. 615; 4 Pat. 760; 4 P. L. T. 280 **501**

Family arrangement, what amounts to.

A family arrangement is an arrangement arrived at between the members of the same family in settlement of doubtful claims where there is uncertainty as to the rights of the various claimants, the dispute being composed by a settlement based upon the acknowledgment of pre-existing title in the parties concerned. There must be a *bona fide* dispute which has to be settled by a private family settlement without having recourse to law. The mere fact that the agreement is entered into by persons who are relations of each other does not make such an agreement a family settlement so as to be binding on persons who are not even parties thereto. **A MITTAR SAIN v. DATA RAM**, 24 A. L. J. 185; A. I. R. 1926 All. 191 **1000**

Family settlement—Oral agreement to maintain existing possession with title—Bona fide dispute—Settlement—Consideration.

Where a person is already in possession of property and has a title to it, an oral agreement to maintain him in that right is quite sufficient and no conveyance is necessary.

The existence of a *bona fide* dispute is a good and sufficient consideration to support a contract even though the claim which caused the dispute turns out afterwards to have no foundation. **O RAM CHARAN v. SIRTAJI**, 2 O. W. N. 849; A. I. R. 1926 Oudh 22 **766**

Fatal Accidents Act (XIII of 1855), ss. 1, 2—Death caused by collision on Railway—Damages, suit for—Remote damages, whether can be recovered—Money carried by deceased, loss of—Railway, liability of.

The Fatal Accidents Act is primarily intended to give the legal representatives of a person whose death has been caused by the wrongful act, neglect or default of another person, a right to recover compensation from the latter for the pecuniary loss resulting from the death to the deceased's children or other relatives enumerated in the first section of the Act. The second section of the Statute also allows the legal representatives to include in their action a claim for "any pecuniary loss to the estate of the deceased occasioned by such wrongful act, neglect or default." The Act contemplates two sorts of damages: pecuniary loss to the estate of the deceased resulting from the accident and pecuniary loss sustained by the members of his family through his death.

The cardinal principle in cases of this character is whether the damage claimed is the natural and reasonable result of the defendant's act. A damage will assume this character if it can be shown to be such a consequence as, in the ordinary course of things, would flow from the act. The damage will be remote when, although arising out of the cause of action, it does not so immediately and necessarily flow from it that the offending party may be made responsible

Fatal Accidents Act—concl'd.

for it; for instance, when it results from the wrongful act of a third party such as could not be naturally contemplated as likely to spring from the defendant's conduct.

Every cause leads to an infinite sequence of effects but the author of the initial cause cannot be made responsible for all the effects in the series. He is liable only for those which immediately flow out of his wrongful act.

If any personal injury is caused to a passenger by the negligence of a Railway Company, not only the immediate pain and expense caused by the accident, but also any consequent incapacity to attend to business would be a natural sequence of the wrongful act. If any loss is caused to his business by reason of the injured man's incapacity to attend to it, it is a loss to the estate and can be recovered by the injured person if he is alive and by his representatives if he dies.

Where a person is killed as the result of a Railway collision which is due to the negligence of Railway servants, his legal representatives are entitled to recover damages caused to them or to the estate of the deceased by the death of the deceased, but they are not entitled to claim from the Railway Company a sum of money which the deceased was carrying on his person at the time of the collision and which was not found on his person after the collision, unless it can be proved that the loss of the money was due directly to the collision. **L SECRETARY OF STATE v. GOKAL CHAND**, 6 L. 451; 2 L. O. 99; A. I. R. 1925 Lah. 636 **1026**

First Information Report, based on hearsay, value of—Admission of guilt by several persons, proof of—General statement, value of.

A First Information Report based entirely on hearsay cannot be tendered in evidence by the prosecution.

A First Information Report can only be used by the prosecution for the purpose of corroborating in the witness-box the person who supplied the information contained in the report. Where, however, the person who gave the First Information Report can himself only speak from hearsay, the report cannot be used to corroborate such inadmissible evidence.

A general statement by a witness that a number of persons admitted having committed a crime is valueless without some indication as to which of the persons made the admission in question with some particulars of what was actually said. **L SAJJAN SINGH v. EMPEROR**, A. I. R. 1925 Lah. 418; 6 L. 437; 7 L. L. J. 259; 26 Cr. L. J. 1489 **145**

Foreigners Act (III of 1864), s. 2—Cession of territory—Allegiance, whether affected—Election by subject, what amounts to—Common Law of England, applicability of, to India.

Under s. 2 of the Foreigners Act the burden of proving that a person alleged to be a foreigner is not a foreigner and is not subject to the provisions of the Act, lies upon such person.

Where there is a State, the ordinary idea of Constitutional Law is that there are subjects in that State who are ruled by the Sovereign and when territory is ceded the inhabitants of that territory will ordinarily become subjects of the Sovereign to whom the territory is ceded.

In the absence of an express provision in a treaty of cession regulating the future nationality of the inhabitants of the ceded territory, a relinquishment of the Government of a territory is not only a relinquishment of the right to the soil of the

Foreigners Act—concl'd.

territory but also of the right over the inhabitants of the country.

It is open to a subject of the ceded territory, unless the treaty expressly forbids, to elect to continue his former nationality and to prove such election. The burden of proving such election, however, lies on the person who asserts that he has made such election. It is not enough for him to merely assert, when the question arises, that he has elected to remain within the allegiance of his former Sovereign, there must be conduct on his part such as leaving the ceded territory and going to reside permanently in his former Sovereign's dominions, to indicate his previous election.

The Common Law of England which was formerly administered by the Supreme Court is part of the law to be administered by the High Courts unless it is superseded by Statute or otherwise. This Common Law can only be applicable when it is properly applicable to the society and circumstances of India. There is no department of law in which the Common Law of England is more applicable than that part of Constitutional Law which governs the question of nationality and the question of the status of British subjects. **B JAGARDEO RAMSUMER TEWARI v. EMPEROR**, 27 Bom. L. R. 1043; A. I. R. 1925 Bom. 489; 49 B. 804; 26 Cr. L. J. 1526 **310**

Fraud. See **TRANSFER OF PROPERTY ACT**, 1882, s. 52 **251**

Decree obtained by fraud, whether void or voidable—Sale held in execution of fraudulent decree, whether void or voidable. See **LIMITATION ACT**, 1908, SCH. I, ART. 95 **866**

Suspicion—Circumstantial evidence.

Fraud is not presumed or inferred lightly.

Circumstances of mere suspicion should not be taken as proof of fraud, there must be sufficient evidence to overcome the natural presumption of honesty and fair dealing.

Circumstantial evidence is not only sufficient but in many cases it is the only proof that can be adduced to establish fraud. **C RAKHAL CHANDRA BARDHAN v. PROSAD CHANDRA CHATTERJEE**, A. I. R. 1926 Cal. 73 **229**

Government of India Act, 1915, (5 & 6 Geo. V, c. 61), s. 107. See **C. P. C.**, 1908, s. 115 **445**

Guardians and Wards Act (VIII of 1890), s. 12—*Civil Procedure Code (Act V of 1908)*, O. XLI, r. 1—*Application for temporary custody of minor's property—Receiver, appointment of—Appeal, whether competent.*

Where an application is made to a Court for temporary custody of the property of a minor under s. 12 of the **Guardians and Wards Act**, it may appoint a guardian temporarily. Another course open to the Court is to appoint a Receiver under the provisions of the **C. P. C.** When the Court adopts the latter course and appoints a Receiver the order is appealable. **L CHANDRA WATI v. JAGAN NATH SINGH**, A. I. R. 1925 Lah. 489; 7 L. L. J. 281 **611**

Hindu Law—Adoption by widow—Conditions imposed on adopted son, legality of—Agreement entered into by adopted son, whether binding—Stranger, whether can enforce agreement—Trust—Charge—Contract Act (IX of 1872), s. 2—Transfer of Property Act (IV of 1882), s. 100.

A Hindu widow is not entitled when making an adoption to her deceased husband to impose any conditions on the adopted son which would diminish

Hindu Law—cont'd.

the value of the ancestral estate in the hands of the adopted son for the benefit of the widow's relatives.

Per *Sulaiman, J.*—In such a case, however, the adopted son, if of age, would not be prevented from undertaking a liability upon himself for consideration. He would be bound by his agreement not because the widow has power to impose such conditions on him before adopting him but because he has himself entered into an agreement in lieu of consideration. The binding force of the agreement would be derived not from the authority of the widow to impose such conditions but from the act of the adopted son himself.

The agreement of the widow to adopt a certain person is a good consideration for an agreement entered into by the latter to hand over a portion of the estate belonging to the adoptive father to certain nominees of the widow. The nominees themselves, however, not being parties to the arrangement, would not be entitled to bring a suit against the adopted son to enforce the terms of the agreement.

Although under the **Contract Act** it is not necessary that the consideration for an agreement should move from the promisee himself, it is nevertheless necessary under s. 2 of the Act that the proposal should be made to the promisee and the latter should signify his assent thereto. Therefore, a stranger cannot enforce a contract to which he was himself no party, unless the agreement amounts to a family arrangement or creates a trust or creates a charge.

A Hindu widow at the time of making an adoption to her deceased husband executed a deed reciting the fact that she was about to make the adoption and stating that the adopted son would pay a certain sum of money to a person named by her and that if the money was not paid the latter would be entitled to obtain payment through Court by causing the property of the widow to be sold at auction or by any other way he liked. The adopted son also executed an agreement binding himself to abide by all the conditions specified in the deed executed by the widow:

Held, (1) that there was no trust created in favour of the nominee of the widow inasmuch as no money belonging to the widow had been expressly entrusted to the adopted son for the purpose of payment to her nominee;

(2) that there was no charge created on any portion of the estate of the widow's deceased husband inasmuch as the widow had no power to create a charge which would enure for the benefit of the chargeholder beyond her lifetime and the adopted son had merely accepted the condition laid down in the deed but had not himself purported to create any charge on the estate;

(3) that, therefore, it was not open to the nominee, who was himself a stranger to the arrangement, to sue the adopted son for the recovery of the sum mentioned in the deed. **A MITTAR SAIN v. DATA RAM**, 24 A. L. J. 185; A. I. R. 1926 All. 194 **1000**

Adoption, kiritrima form of—Karta putra, rights of—Natural born son, whether excludes karta putra from inheritance—Mithila School.

Under the *karta putra* form of adoption the adopted son does not lose his status in his natural family, although he acquires a status as a son of his adoptive father. No ceremonies or sacrifices are necessary to the validity of this particular form of adoption. All that is necessary is the consent of the adoptee

Hindu Law—contd.

which involves the adoptee being an adult. Although such an adoptee does not lose his rights of inheritance in his natural family and takes the inheritance of his adoptive father, he does not succeed to the property of his adoptive father's father or other collateral relations nor of the wife of his adoptive father or her relations. In the case of such an adoption there is no contract that the adopted son would in all events succeed to the property of his adoptive father.

Under the *Mithila School* of Hindu Law a natural born son is entitled to exclude every other kind of son, including a *karta putra*, from sharing with him in the estate of his father. **Pat** KANHAIYA LAL SAHU v. SUGA KUER, 6 P. L. T. 593; 4 Pat. 824; A. I. R. 1926 Pat. 90 65

——— **Custom—Succession—Stridhan property of woman married in karao form—Customary marriage, validity of—Approved form—Presumption—Burden of proof.**

The rule of succession to *stridhan* property left by a woman married in the *karao* form ought, in the first instance, to be determined with reference to the particular custom of the caste. Where the incidents of such custom can be traced they must be given the force of law.

The Hindu Law recognizes custom as a matter of paramount importance, and custom if it is established can override the written law. There may, therefore, be customary forms of marriage which are perfectly valid and which do not strictly come within the definition of any of the eight forms of marriage mentioned in the *Mitakshara*.

When a customary form of marriage is allowed it may be in any one of the eight forms mentioned in the *Mitakshara*, or an approach to any one of them. It is not correct to say that unless it is shown that a customary marriage was in the *asura* form, it must always be conclusively presumed that it was in the *brahma* form. When the particulars of a customary form of marriage are known then the question of the presumption that it was in the *brahma* form becomes of very little importance. That presumption substantially arises only when all that is known is that a marriage did take place. In such cases the presumption is that the marriage was in the *brahma* form no matter what the caste of the parties be. But when the incidents and the circumstances attending the customary form of marriage are known the presumption can no longer be applied and the Court must find of what form it is. When facts are proved the question of what form the marriage is becomes a question of law.

Where re-marriage of widows is allowed by the custom of a caste such a marriage may not have any disapprobation attaching to it, on the other hand even among castes which allow the validity of widow re-marriages such marriages may be regarded as not a praiseworthy and superior form but a blameworthy and inferior form of marriage. The rule of succession to the *stridhan* property of a widow who had re-married ought, therefore, to vary according as the marriage is or is not blameworthy. For instance if a virgin widow has not passed out of her parent's family and is still under its control and her parents or other legal guardians in pursuance of the caste custom which allows such marriages give her away in marriage a second time as if she were a maiden the marriage though a widow marriage would undoubtedly be in the *brahma* form if there is no social censure attaching to it. On the other hand if a widow, who is not a

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virgin, herself enters into a matrimonial alliance in a form considered blameworthy by the caste, though recognised by custom as valid, and there is no gift of her by her legal guardians it may be difficult to see any analogy between such a marriage and the *brahma* form of marriage even though there be no consideration paid to her guardians. It may rather be an approach to the *gandharba* form where the marriage takes place with the mutual desire of the parties. In this latter case, it would be of an inferior form, particularly when such a marriage is looked down upon by the caste people; but if such a marriage is not considered the least blameworthy, it would be deemed to be of the *brahma* form.

When a particular form of marriage is recognised by custom it is to be presumed that the caste approves of it and no social censure attaches to it, unless the contrary is established. The burden lies on the person who asserts the contrary.

Per Daniels, J.—Under the Hindu Law a marriage is presumed to be in an approved form unless it is shown to be in a disapproved form. If a marriage is valid at all, the natural presumption is that it is valid in all respects and carries the full privileges and obligations of an approved marriage, and the burden of proving that its results fall short of this is on the person who asserts it. This rule applies equally to marriages which derive their validity from custom. **A** KISHAN DEI v. SHEO PALTAN, L. R. 6 A. 557 Civ.; 23 A. L. J. 931; A. I. R. 1926 All. 1 358

——— **Daughter succeeding to estate of father, position of—Alienation—Necessity—Alienee, whether entitled to partition.**

A Hindu daughter inheriting her father's estate is a limited owner and is not entitled to alienate the property absolutely without there being legal necessity therefor. She cannot bind the inheritance for her own personal debts or private purposes as against reversioners, but she can alienate the property for her own life and effect can be given to such alienation by partition sought at the instance of the alienee. **Pat** SAHDEO SINGH v. KISHUN BEHARI PANDY, (1925) Pat. 292; A. I. R. 1925 Pat. 820; 7 P. L. T. 47 559

——— **Debts, antecedent, existence of—Appeal, second—Finding of fact—Recitals in deed, value of.**

The question whether an antecedent debt did or did not exist is one of fact and cannot be agitated in second appeal. The fact that the lower Appellate Court has declined to accept the recitals in the deed of transfer as evidence of the existence of an antecedent debt, does not vitiate its finding as to the existence of such a debt.

Under ordinary circumstances and apart from Statute, recitals in deeds can only be evidence as between the parties to the conveyance and those who claim under them. Such recitals cannot by themselves be relied upon for the purpose of proving the assertions of fact which they contain. **O** BHAGWATI PRASHAD v. LALL BAHADUR, A. I. R. 1926 Oudh 33 404

——— **Decree against father for mesne profits—Sons' liability to pay such decree—Joint family property, whether liable to pay decree for mesne profits against father—Liability of sons in general for father's debts.**

Under the Hindu Law the sons are bound to discharge a decree for mesne profits passed against their father and the joint family property in their hands is liable to be attached in execution of such decree.

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Per *Venkatasubba Rao, J.*—The expression "Avyavaharika," means "grossly immoral or flagrantly unjust."

The sons are not liable, where the moneys were originally obtained by the father by the commission of an offence; the son's liability is, on the other hand, recognised where, in its origin, the debt was not immoral, but there was supervening dishonest act of the father.

If the debt is in its inception not immoral, subsequent dishonesty of the father does not exempt the son.

It is not every impropriety or every lapse from the right conduct that stamps the debt as immoral. The son can claim immunity only when the father's conduct is utterly repugnant to good morals, or is grossly unjust or flagrantly dishonest.

The liability for mesne profits is not in the nature of "danda" or fine.

The word "rina" as used in the texts has a much wider application than a mere debt or loan, and the obligation to pay mesne profits is in the nature of a "rina."

The conduct of the father in remaining in unlawful possession of another's property cannot be said to be honest but at the same time it cannot be characterised to be so grossly unjust or immoral, or so flagrantly dishonest as to make the debt "Avyavaharika" within the meaning of the Hindu Law.

Per *Madhavan Nair, J.*—Under the Hindu Law the liability of a son to pay the father's debt rests upon the well-known pious obligation on the part of the son to relieve his father from punishment in a future state, for the non-discharge of debts. The general rule is that the son should discharge his father's debts unless the debts fall within the well-recognised exceptions.

An examination of the nature of the debt, at its inception, is a necessary condition, for finding out whether a particular debt is an immoral debt.

A debt, which is not immoral at its inception, is binding on the son, though subsequently it may be tainted by dishonesty and immorality.

Improper, imprudent, unreasonable, or dishonest debts are not necessarily immoral.

The son's liability arising by the commission of offences by the father has been always held to be immoral; and the test of benefit to the estate is not a material question for consideration as "the liability of the son depends upon the nature of the act."

The term "rina", strictly understood, means "what is taken under a promise to re-pay," namely, a debt or a loan. But in view of the judicial decisions, it is impossible to give the term this restricted significance.

A decree for mesne profits is in the nature of a "debt" as understood in Hindu Law.

Decree for mesne profits is not in the nature of "danda" or fine. *M RAMASUBRAMANJA PILLAI v. SIVAKAMI AMMAL*, 21 L. W. 656; (1925) M. W. N. 371; A. I. R. 1925 Mad. 841 165

——— **Debts, incurred by father—Pious obligation of son to pay off father's debt, extent of—Misappropriation by father, effect of.**

Where a Hindu father appropriates money belonging to another person under circumstances which do not render the taking of the money itself a criminal offence, a subsequent misappropriation by the father cannot discharge his sons from their liability arising out of their pious obligation to satisfy the debt. But the

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position is different if the money is taken by the father and misappropriated under circumstances which render the taking itself a criminal offence.

One *J* was plaintiff's *patwari* and owed the plaintiff a sum of money in respect of the collections made by him on behalf of the plaintiff and being unable to pay the amount he arranged with *A* that the latter should execute a mortgage-bond in favour of the plaintiff to discharge the debt. After *A*'s death plaintiff brought a suit to enforce the mortgage-bond against *A*'s son:

Held, (1) that it was *J*'s duty to account for the money which had come into his hands to the plaintiff and his failure to do so involved on his part a breach of civil duty and that even if he had misappropriated the money it was a subsequent act which did not render the original taking of the money by *J* a criminal offence and that, therefore, *J*'s debt in discharge of which *A* had executed the mortgage-bond in suit was not tainted with illegality or immorality, and *A*'s son was under a pious obligation to discharge the debt secured by the mortgage-bond;

(2) that the plaintiff was not, however, entitled to a mortgage-decree inasmuch as the debt was not incurred by *A* for the benefit of the family;

(3) that the plaintiff was entitled to a simple money-decree for the amount of the mortgage-bond with interest and could recover the amount of the decree out of the entire ancestral property in the hands of *A*'s son. *PAT RAMESHWAR SINGH BAHADUR v. DURGA MANDAR*, 7 P. L. T. 42; A. I. R. 1926 Pat. 14

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——— **Debts, previously secured on joint family property, whether antecedent.**

A debt previously borrowed on the security of the joint family property is an antecedent debt for which the joint family property is liable. *N CHOTURAM BHIKRAJ v. NARAYAN*, A. I. R. 1926 Nag. 49 210

——— **Son's liability to pay father's debt—Antecedent debt.**

Under Hindu Law a son is bound to satisfy the debts of his father out of the ancestral property provided they are neither illegal nor immoral and a son cannot avoid this liability on the ground that there was no necessity for borrowing or that the transactions were reckless and extravagant in that the money could have been borrowed at a cheaper rate of interest.

The sons are liable not only to pay their fathers' debt upon a mortgage but also the interest due thereon.

A person who holds a mortgage decree against a deceased Hindu has two remedies open to him. He may either bring a fresh suit for enforcement of his charge against the interest of the sons in the property or he may seek out execution against the property of the deceased in the hand of the sons and leave it to them to take whatever objections they choose to take.

Obiter.—The doctrine of "antecedent debt" is a compromise between the rule that the father cannot alienate ancestral property for his own purposes and the rule that the son is under a pious obligation to discharge his father's debts. *PAT GAYAN NATH SAHI v. MALHIJI VAIDYA*, (1925) Pat. 160; 6 P. L. T. 507; A. I. R. 1925 Pat. 588 276

——— **Guardianship and minority—Alienation of minor's property by mother—Legal necessity—Plea, whether open to vendee—Transference of reversioner, position of.**

Hindu Law—contd.

The mere fact that the sale-deed of a minor's property has been executed by the mother of the minor as guardian does not preclude the vendee from urging or getting the benefit of the plea of legal necessity.

The transferee of a reversioner is in no worse position than the reversioner himself and can raise the plea of legal necessity. *N SHEIKH MUHAMMAD v. RAMCHANDRA*, A. I. R. 1926 Nag. 179 74

—Guardianship and minority—Minor when bound by acts of guardian—Test.

A minor will be bound by the act of his guardian, if the act is such as the infant might reasonably and prudently have done for himself if he had been of full age. *N DULICHAND v. SONI*, A. I. R. 1926 Nag. 75 239

—Inheritance—Daughter's grandson, whether heir—Test—Dayabhaga—Spiritual benefit.

The foundation of the theory of inheritance as propounded in the *Dayabhaga* proceeds on the doctrine that only those can inherit who can confer spiritual benefit on the owner whose property they claim to inherit.

A daughter's grandson, being unable to confer spiritual benefit, is not an heir under the *Dayabhaga* School of Hindu Law. Nor does he become heir on the ground of propinquity, even if there is nobody alive who can confer spiritual benefit on the deceased owner. *C NEPALDAS MUKHERJEE v. PROBHAS CHANDRA MUKHERJEE*, 42 C. L. J. 221; 30 C. W. N. 357; A. I. R. 1926 Cal. 460 499

—Joint Family (General). See HINDU LAW—RELIGIOUS ENDOWMENT 829

—Alienation—Necessity, proof of—Extent of money required for necessity—Knowledge of lender—Money spent on building house required for education of children, whether spent on necessary purpose.

Where money is borrowed on the security of family property for a necessary purpose it is difficult for the lender to know the exact extent of the legal necessity in respect of which he advances the money, and where it is found that all the facts were not within the lender's knowledge the test to be applied to his case must necessarily be less strict than that which would be applicable if all the facts surrounding the alienation and of the necessity therefor were within his knowledge.

Money spent on erecting a house, the building of which is necessitated by the educational requirements of the children of the alienor, cannot be said to have been spent for legal necessity. *C JOGESH CHANDRA GHOSH v. CHAPALA SUNDARI BASU*; A. I. R. 1926 Cal. 383 594

—Alienation of family property—Repairs to family dwelling house—Necessity.

Money required for the purpose of effecting repairs to the family dwelling house is required for a necessary purpose which would justify an alienation of family property. In such a case the alienee is not required to have an estimate prepared of the sum required for the proposed repairs. If the evidence shows that on making enquiries the alienee was satisfied that repairs were about to be made, any sum reasonably necessary for such repairs would be regarded as having been advanced for necessity. *L SALIGRAM v. MOHAN LAL*, A. I. R. 1925 Lah. 407; 7 L. L. J. 470 143

—Alienation by father—Suit by son to set aside alienation—Legal necessity—Consideration,

Hindu Law—contd.

insignificant portion of, not proved to be for legal necessity, effect of.

Where in a suit by a Hindu son to set aside a sale of family property by the father on the ground of want of consideration and legal necessity, the portion of the consideration for the sale for which legal necessity is not established is, as compared with the total consideration, insignificant, the sale ought not to be set aside. *A LAL BAHADUR LAL v. KAMLESHAR NATH*, A. I. R. 1925 All. 624; L. R. 6 A. 591 Civ.; 24 A. L. J. 52 988

—Joint family—Alienation—Mortgage by father—Necessity—Enquiry by mortgagee—Mortgagee, whether bound to see to application of money—Loan not sufficient to meet necessity, effect of—Appeal, second—Necessity, whether question of fact or law.

A person who lends money on the security of joint family property is bound to enquire into the necessity for the loan and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. If he does so enquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge. Under such circumstances he is not bound to see to the application of the money lent by him.

A finding as to the existence of necessity is a finding of fact. When a Court finds in favour of the existence of family necessity for a loan but holds that the lender is not protected on the ground that he did not see to the application of the money, the finding becomes a ground of law and a second appeal is maintainable.

A lender is not obliged to ascertain that the amount of money which he advances is equal in amount to the entire debt which constitutes the family necessity. If there exists a necessity which would justify the use of the whole money borrowed, the lender is then justified in making the advance whether or not other funds will be necessary for the same purpose.

The fact that the interest on a mortgage is higher than the Court interest on the decree for payment of which the mortgage is executed does not vitiate the mortgage, nor does the fact that the amount of the property mortgaged is larger than the amount which was about to be sold under the decree. *O SHEO BEHARI v. SHEO RATAN SINGH*, A. I. R. 1925 Oudh 740 345

—Alienation by father (manager)—Mortgage—Redemption fixed after 40 years—Necessity, proof of—Suit to set aside mortgage by father—Major and minor sons—Cause of action, accrual of—Mortgage—Redemption suit—Accounts filed by mortgagee, proof of—Mortgagor failing to object, effect of.

A term of 40 years fixed for redemption of a usufructuary mortgage executed by the manager of a Hindu joint family is one that on the face of it calls for proof of necessity.

In a redemption suit the omission of the plaintiff to expressly deny the accuracy of the accounts filed by the mortgagee does not justify the inference that the accounts are admitted. It is the mortgagee's duty to support his accounts by evidence.

Obiter.—In a suit by Hindu sons to challenge an alienation by their father of ancestral property, the cause of action arises in favour of the major son and the minor sons can only take advantage of the same

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cause of action. **O KANIZ FIZZA BIBI v. DATA DIN**, 2 O. W. N. 650; A. I. R. 1925 Oudh 678 **184**

——— **Joint family—Alienation—Mortgage by manager—Interest, high rate of—Necessity—Burden of proof—Finding by Trial Court—Appellate Court, interference by.**

The manager of a Hindu joint family, whether the father or not, is not entitled in law to borrow money at an exorbitant rate of interest unless there is necessity for such a rate, and, if the rate of interest is excessive, the onus will be on the lender to show that there was necessity for such an onerous rate; that is, where the rate is shown to be onerous, it must be shown that there was pressing necessity at the time of the loan for such an onerous rate. The actual result brought about by the mounting of interest, if not paid, to a crushing figure cannot affect the principle. A Court is not entitled to presume that any particular rate of interest is onerous. A rate *prima facie* harsh may, considering the nature of the security offered, its dubious title or its exigious nature, be perfectly reasonable when the facts are known. Those attacking the transaction must first show *prima facie* that the rate of interest is unnecessarily high for the circumstances of the case, although in certain cases the rate may be *prima facie* so excessive that proof is practically unnecessary.

Where the Trying Court has not considered it necessary to call on the lender to explain the rate of interest, and no issue has been framed, therefore, a Court of Appeal should not interfere without giving an opportunity to the party affected to explain it, unless the rate is so monstrous as to be unconscionable in any conceivable set of circumstances.

Where a mortgage of family property was executed by a Hindu father at 12 per cent. compound interest consolidating a series of prior simple money loans at 12 and 18 per cent. simple interest:

Held, that the fact that the money due on the mortgage had aggregated to a very large sum on account of non-payment of interest was insufficient to render the rate of interest excessive or not binding on the sons. **M KRUTHIVENTI PERRAJU GARU v. SITARAMACHANDRA**, 48 M. L. J. 584; A. I. R. 1925 Mad. 897; 22 L. W. 568 **458**

——— **Joint tenancy—Females.**

The principle of joint tenancy appears to be unknown to Hindu Law, except in the case of co-parcenary between the members of an undivided family.

Hindu females taking property under an instrument take as tenants-in-common, where it is not shown that they were intended to take as joint tenants. **C GOUR CHANDRA DAS v. SUBASHINI DAS**, 42 C. L. J. 200; 30 C. W. N. 39; A. I. R. 1926 Cal. 240 **523**

——— **Manager, power of, to charge joint family property—Benefit, test of.**

The manager of a joint Hindu family has no authority to charge any portion of the joint family property in order to enable him to embark on speculative transactions, but he can do so only in case of need or for the benefit of the estate.

The question of benefit must be determined by reference to the nature of the transaction and not by the result thereof, the test being whether it is a transaction into which a prudent man would enter. **PAT RAM CHANDRA SINGH v. JANG BAHADUR SINGH**, 7 P. L. T. 52; A. I. R. 1926 Pat. 17; 1926 Pat. 70; 5 Pat. 198 **553**

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——— **Joint family—Property granted to two members, nature of.**

Under the Hindu Law, as interpreted in Madras, where there is a grant to two persons, members of a joint Hindu family, the ordinary presumption is that the grant is to them as co-parceners. **M SHYAMA BHAI v. PURSHOTAMADOSS**, 21 L. W. 551; A. I. R. 1925 Mad. 645 **124**

——— **property—Self-acquired property, when becomes joint property.**

Self-acquired property may be impressed with the character of joint property if it is dealt with as joint family property. **M SHYAMA BHAI v. PURSHOTAMADOSS**, 21 L. W. 551; A. I. R. 1925 Mad. 645 **124**

——— **Limited Owner—Bequest in favour of females—"Malik", use of, effect of. See HINDU LAW—WILL** **757**

——— **Maintenance. See HINDU LAW—MARRIAGE** **732**

——— **Concubine, right of.**

A permanent concubine is entitled to maintenance from the family property of her deceased paramour provided that she is the mother of illegitimate children and continues chaste.

The question is not really so much one of the legal relationship between a man and a woman as of equity that a woman who has been kept for a number of years and given a position almost equal to that of a wife should not be left to starve after the death of the man who kept her. Thus it is a matter not of a contract during the lifetime of the parties but of obligations arising out of the personal law of Hindus as defined by their religious texts.

The rule in favour of the maintenance of concubines is not limited to cases where there are no other heirs and the property would otherwise escheat to the Sovereign. **M RAMA RAJA THEVAR v. PAPAMMAL**, 49 M. L. J. 348; 22 L. W. 710; 48 M. 805; A. I. R. 1925 Mad. 1230 **983**

——— **Marriage, customary, validity of. See HINDU LAW—CUSTOM** **358**

——— **Widow—Alienation—Legal necessity—Marriage expenses of daughter of co-parcener. See HINDU LAW—WIDOW—ALIENATION** **732**

——— **Widow, re-marriage of—Ceremonies, necessary—Anand marriage, validity of—Anand Marriage Act (VII of 1909), applicability of.**

The Anand Marriage Act of 1909 is an enabling and not a disabling Act and it does not follow that because that Act does not apply to a particular marriage solemnized according to the Anand ceremony, the marriage is not a valid one.

It is not necessary for the validity of the marriage of a *Khat*ri widow that all the usual ceremonies which have to be performed in the case of a *Khat*ri girl on her first marriage should be performed. In such a case if the parties go through such ceremonies as they can reasonably arrange for and clearly and unequivocally express their intention to enter into the marriage relation with each other and as a fact thereafter live together as husband and wife, such union is a valid marriage. **L RAM RAKHI v. DAULAT RAM**, 2 L. C. 132; A. I. R. 1926 Lah. 31 **1056**

——— **Partition. See HINDU LAW—WIDOW—CO-WIDOWS** **881**

——— **Mitakshara—Step-mother, whether entitled to share.**

Under the Mitakshara School of Hindu Law a step-mother is entitled, on partition of her deceased

Hindu Law—contd.

husband's estate, to a share in the estate equal to that of a son. **L TEGH INDAR SINGH v. HARNAM SINGH**, 6 L. 457; A. I. R. 1925 Lah. 563; 7 L. L. J. 421

1035

——— **Religious endowment**—Charitable trust created by Will—Undivided sons appointed trustees—Sons, whether take as joint tenants or tenants-in-common—Will, construction of.

When a Hindu father makes a gift of self-acquired property to his sons who are members of a joint family, unless a tenancy-in-common is inferred from the grant, the presumption is that the sons take as joint tenants with rights of survivorship. This principle applies with greater force to cases where the father creates a trust and appoints his sons as trustees with hereditary rights, since the presumption is that in cases of trust property, trustees are to be ordinarily treated as joint tenants.

A Hindu by his Will bequeathed certain properties to charity and appointed his two sons who were members of a joint family as trustees thereof. The Will provided that "the lands mentioned herein as relating to the said charities should not in any way be alienated by the above-mentioned two persons or their heirs by means of sale, etc., but they should enjoy them hereditarily and conduct the above-mentioned charities," etc. There was a partition by the brothers later by which the management of the trust properties was to continue as before:

Held, that on a construction of the Will, the sons took the trusteeship and the management of the trust properties as members of a joint family with rights of survivorship and not as tenants-in-common. **M SALAKSHI AMMAL v. DORAIMANIKA NADAN**, 49 M. L. J. 341; (1925) M. W. N. 582; 48 M. 827; A. I. R. 1926 Mad. 31

829

——— **Debutter property**—Mohunt's powers of alienation—Unavoidable necessity—Burden of proof—Tenant under mohunt, whether can acquire right by adverse possession.

The power of a mohunt to alienate debutter property is limited to cases of unavoidable necessity.

A person deriving title from the holder of a limited interest in property is bound to prove the authority of the limited owner to make the alienation and ordinarily the onus would be on him to prove the validity of the transaction.

A mohunt is incompetent to create any interest in respect of the muth property to endure beyond his lifetime. The tenant or transferee acquires a right similarly limited.

If the successor of a mohunt permits the tenant to continue in possession and receives rent from him during his life, the tenancy thus created will be a new tenancy created by himself for his lifetime.

It is within the power of every successive trustee to continue the tenancy during his lifetime and consequently the possession of the tenant never becomes adverse to the successor of the last mohunt. **C BEHARI LAL MANNA v. MURALI DHAR**, A. I. R. 1926 Cal. 287 567

——— **Stridhan** property of woman married in *karao* form. See **HINDU LAW—CUSTOM** 358

——— **Widow**, alienation by—Necessity—Marriage of co-parcener's daughter.

Where a person takes property either by inheritance or survivorship under the Hindu Law he is bound to provide for the maintenance, education, marriage, *shrads* and other usual religious expenses of the co-parceners and of such members of their family as they are, or were when alive, legally or morally bound to

Hindu Law—contd.

maintain, and a female heir is under exactly the same obligation to maintain the members of the family as a male would have been by virtue of succeeding to the same estate. Therefore, a Hindu widow who has succeeded to the property of a childless son is bound to provide for the marriage expenses of the daughter of a deceased co-parcener and is for that purpose entitled to alienate the property. **PAT BALNATH RAI v. MANGLA PRASAD NARAYAN SAHL**, (1925) Pat. 271; 6 P. L. T. 731; A. I. R. 1926 Pat. 1

732

——— **Widow**—Construction of document—Deed conveying full proprietary rights to widow—Estate taken.

If a deed purports to convey full proprietary rights to a Hindu widow it will be construed to convey such rights to her unless there is something in the context or surrounding circumstances to qualify such a meaning. It is not so qualified by the mere fact that the transferee is a widow. **O JAI KARAN SINGH v. UMRAI KUNWAR**, 2 O. W. N. 751; A. I. R. 1925 Oudh 749

674

——— **Co-widows**—Nature of estate—Partition, right of—Survivorship—Alienation by one widow—Necessity—Reversioner, whether bound—Amendment of plaint.

One of two Hindu co-widows who have inherited the properties of their husband cannot alienate the share of the other even for purposes beneficial to the estate without the consent of such other.

The estate of co-widows or other co-heiresses in Hindu Law is a joint estate, but, unlike other joint estates, it cannot be divided so as to create separate estates, such that each sharer is the owner of her share and at her death, the reversioner's estate falls in.

Such partition as is permissible is merely for the convenience of enjoyment by the widows; and may be of two kinds (a) so as to last during the lifetime of both the widows, (b) so as to bind them until the death of all of them. In the latter case if one of the widows dies before the other without alienating the property, it passes to the heirs of her private property and not to the other co-widow or their reversioners.

There can be no survivorship if the partition is of the second kind. But if it is of the first kind, it cannot affect the right of survivorship of the other.

One of the co-widows can alienate her share which may be defined or undefined according as there is a partition or not. If the alienor dies before the co-widow, the alienation ceases to be operative if there is no partition or if the partition is of the first kind, the property goes to the co-widow by survivorship. But if the partition is of the second kind, the property continues to be enjoyed by the alienee until the other co-widow dies.

Except in the case of an alienation for the limited purposes mentioned above, i.e., during the lifetime of the alienee, in a partition of the first kind, or during the lifetime of all the co-widows, in a partition of the second kind, there can be no alienation by a widow of her interest and whether there is necessity or not, an alienation by one co-widow cannot bind the reversioners.

If an alienation for necessity is to bind the reversioners, all the co-widows must join in it.

Where one of two co-widows alienates certain properties of her husband for discharging a simple money-debt, payable by him, the other widow in a suit against the alienee for possession after the death of the alienating widow, is entitled to an uncondi-

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tional decree and is not bound to pay the amount utilised for discharging the husband's debt. **M VAL-LURU APPALASURI v. SASAPU KANNAMMA NAYURALU**, 22 L. W. 287; (1925) M. W. N. 622; 49 M. L. J. 479; A. I. R. 1926 Mad. 6 **881**

—**Widow**—*Letters of Administration—Position of Hindu widow as administrator.*

A Hindu widow obtaining Letters of Administration of the estate of the last male owner is in the same position as any other administrator and a sale effected by her with the sanction of the District Judge cannot be questioned on any ground not available against any other administrator. **C RAKHAL CHANDRA BARDHAN v. PROSAD CHANDRA CHATTERJEE**, A. I. R. 1926 Cal. 73 **229**

—*Surrender—Bona fides, finding as to.*

A surrender by a Hindu widow of her estate to the nearest reversioner of her husband is not rendered invalid by the mere fact that some provision is made for the benefit of the surrenderer.

A surrender by a Hindu widow to be valid must be *bona fide* and not merely a device to divide the estate with the reversioner. A finding that the transaction was not a device to divide the estate with the reversioner, does not necessarily involve the conclusion that the surrender was *bona fide*, since want of good faith may be evidenced by other circumstances. **M SIVA SUBRAMANIA PILLAI v. PIRAMU AMMAL**, 49 M. L. J. 128; A. I. R. 1925 Mad. 1111 **1024**

—*Will of property inherited by widow, validity of—Occupancy holding, devise of.* See C. P. Tenancy Act, 1920, s. 11 **247**

—**Will—Construction—Brahmins to be fed from income of property—Dedication of corpus—Trust.**

Where a Will provided that the testator's nephew "shall enjoy permanently" certain property and with its income shall feed not less than 10 Brahmins and that after him his younger brother shall conduct the charity:

Held, that as the word "enjoy" was not restricted to a life-estate, the words "shall permanently enjoy" gave the nephew a fee simple, that there was no dedication of the corpus and that consequently the property was not constituted as trust for the purpose of the charity. **M SIVASWAMI IYER v. TIRUMUDI CHETTIAR**, 49 M. L. J. 665; A. I. R. 1925 Mad. 1057; (1925) M. W. N. 541 & 841 **593**

—*construction of—Bequest in favour of female—"Malik," use of, effect of.*

The word "malik" is not a term of art and does not, when used in a Will, necessarily define the quality of the estate taken by a devisee.

A Hindu testator devised certain property in favour of a female stating that she would be "*malik mokamil*" thereof and then proceeded to state that at times of real necessity she would be at liberty to mortgage the property or otherwise deal with the same and out of the income and produce of the property to find means for her livelihood:

Held, that the testator intended to confer on the devisee not an absolute estate but the estate of a Hindu woman subject to a power of alienation only in the event of legal necessity. **PAT SHEO DANI KUER v. RAMJI UPADHYA**, A. I. R. 1926 Pat. 76 **757**

—*Joint tenancy—Second appeal—Question of fact.*

A joint tenancy is not unknown to Hindu Law.

Hindu Law—concl'd.

A Hindu testator can create a joint tenancy by Will. The question of the testator's intention has to be considered with reference to the language of the Will and the circumstances of each particular case.

The finding as to whether a Will creates a joint tenancy or a tenancy-in-common is one of fact and as such it cannot be challenged in second appeal. **M MUTHUKARUPPA MUTHIRIAN v. SIVABHAGYATHAMMAL**, 49 M. L. J. 358; 22 L. W. 511; A. I. R. 1926 Mad. 33 **880**

Hundi, Shah Jog—Bearer, a minor—Suit to recover amount.

A minor who is the bearer of *Shah Jog Hundi* is entitled to maintain a suit to recover the amount of the *hundi*. **B RAMPRASAD SHIVLAL v. SHIRINIVAS BALMUKUND**, 27 Bom. L. R. 1122; A. I. R. 1925 Bom. 527 **685**

Identification of accused in jail, evidence of. See EVIDENCE ACT, 1872, s. 9 **444**

Income Tax Act (XI of 1922), ss. 23 (2), 63 (2)—Unregistered firm—Return filed by one partner—Notice, service of, on another partner, whether sufficient.

It is not necessary that in the case of an unregistered firm a notice under s. 23 (2) of the Income Tax Act should be served on the member of the firm who made the return. It is sufficient if under s. 63 (2) of the Act it is served on any member of the firm.

The word 'person' in s. 63 (2) of the Income Tax Act includes a firm as provided by the General Clauses Act, 1897; and when the return is made on behalf of the firm by a partner, it is the firm that is the person who makes the return. **M THE COMMISSIONER OF INCOME TAX v. THILLAI CHIDAMBARA NADAR**, 49 M. L. J. 124; 22 L. W. 206; 48 M. 602; A. I. R. 1925 Mad. 1048 **549**

—**s. 66 (2)—Reference to High Court—Application presented more than one month after date of order—Jurisdiction to make reference.**

Where an application to the Commissioner of Income Tax to make a reference to the High Court under s. 66 (2) of the Income Tax Act, is made more than a month after the date of the order which has given rise to the application, the Commissioner has no jurisdiction to make the reference and a reference made by the Commissioner in such a case will not be acted upon by the High Court. **L BANJI LAL v. EMPEROR**, 6 L. 373; 2 L. C. 163; A. I. R. 1925 Lah. 615 **1018**

Incorporated Law Society, Calcutta, whether can move the High Court. See ATTORNEY **468**

Injunction, temporary—Principles applicable—Municipal election—Injunction, restraining elected Councillor from sitting in Municipality pending civil proceedings—High Court, jurisdiction of.

It is impossible to lay down an exhaustive rule as to the grant of temporary injunctions but generally speaking such injunctions should be confined to preserving the status quo ante, to preventing irreparable damage or loss to the property in the suit, or to averting substantial injury.

No injunction can ordinarily be granted at the instance of an unsuccessful candidate for Municipal election restraining his duly elected rival from taking his seat in the Municipality, pending the disposal of civil proceedings regarding the election.

Quære.—Whether the High Court has jurisdiction to grant injunction in such a case as the above? **M GOPALAKRISHNA KONAR v. VILANGA KONAR**, A. I. R. 1926 Mad. 132 **819**

Interpretation of rulings.

A ruling should be construed on the facts on which it is based. **C PRIA NATH CHATTERJEE v. LAKSHMI NARAYAN BHATTACHARJYA**, 42 C. L. J. 100; A. I. R. 1925 Cal. 1139 **835**

Interpretation of Statutes. See **CR. P. C.**, 1898, s. 263 **434**

An Act by which the jurisdiction of the ordinary Courts of Judicature is taken away must be construed strictly. **N GANESHDAS v. HARILAL**, A. I. R. 1926 Nag. 212 **279**

The meaning of an Act is not to be interpreted with reference to what its framers intended to do but with reference to the language which they did in fact employ. **L NUR MAHOMMAD v. LALCHAND**, A. I. R. 1925 Lah. 436; 7 L. L. J. 201 **254**

Joint Trial. See **CR. P. C.**, 1898, ss. 239, 235 **297**

Jurisdiction—Appeal—Appellate Court's power to determine value of appeal—Revision.

It is the duty of a Court of Appeal, when an appeal is presented to it, to determine the jurisdictional value of the appeal and if it comes to the conclusion that the value exceeds its jurisdiction to return the appeal for presentation to the proper Court; and as in doing so the Court does not act without jurisdiction, its order is not open to revision. **PAT LADLI BEGUM v. RAM DAS**, (1925) Pat. 167; A. I. R. 1925 Pat. 488; 6 P. L. T. 448 **321**

Appeal, third, whether lies—Assistant Collector of Second Class, decree of.

No third appeal lies from a decree of an Assistant Collector of the Second Class. **A CHAUDHURI MUHAMMAD ABDUL HAMID KHAN v. UDA**, L. R. 6 A. 131 Rev. & 212 Rev.; A. I. R. 1926 All. 161 **996**

Jurisdiction of Civil Courts—

See **BENGAL VILLAGE SELF-GOVERNMENT ACT**, 1919, s. 51 **700**

See **BOMBAY DISTRICT POLICE ACT**, 1890, ss. 25, 25A **13**

See **CRS ACT**, 1880 **621**

See **PROCEDURE** **82**

Jurisdiction of Civil or Revenue Courts—

See **AGRA TENANCY ACT**, 1901, ss. 196, 197 **353**

See **C. P. TENANCY ACT**, 1920, ss. 11 to 14 **247**

See **C. P. TENANCY ACT**, 1920, s. 100 **279**

See **ESTOPPEL** **38**

See **MADRAS ESTATES LAND ACT**, 1908, ss. 3 (2) (d), 189 **269**

Jury Trial—Court, whether can express opinion on facts.

In a Jury trial, there is no harm in the Trial Judge expressing his opinion on facts, and in fact it is his duty to do so to assist the Jury, provided he is careful to express his opinion in such a way as not to interfere with the duties of the Jury to finally decide according to their own view of the facts. **C FAZARUDDIN v. EMPEROR**, 42 C. L. J. 111; 26 Cr. L. J. 1553; A. I. R. 1926 Cal. 105 **433**

Land Acquisition Act (I of 1894), ss. 4, 6 (3)—

City of Bombay Municipal Act (III of 1888), s. 63 (k)—Compulsory acquisition of land—Declaration by Local Government, whether conclusive as to purpose for which land required—Suit to challenge nature of purpose, whether maintainable—Erection of quarters for Municipal servants, whether public purpose—Erection of shops, effect of.

A declaration by the Local Government under s. 6 (3) of the Land Acquisition Act that a certain piece of land is required for a public purpose is not conclu-

Land Acquisition Act—concl'd.

sive with regard to the character of the purpose for which the land is required and it is open to a person who is likely to be affected by the acquisition of land in pursuance to the declaration to institute a suit to have it declared that the land in question cannot be acquired by compulsion inasmuch as it is not required for a public purpose.

Under the provisions of s. 63 (k) of the City of Bombay Municipal Act a Municipality is empowered to acquire land for the purpose of building quarters for Municipal servants, as that is a measure likely to promote public safety, health, convenience or instruction.

Where a Municipality determines that a certain measure is likely to promote public convenience within the meaning of s. 63 (k) of the City of Bombay Municipal Act, it is not open to a Court of Law to interfere with the exercise of that discretion.

Where a Municipality proposes to acquire a piece of land for the purposes of a school, a play ground, recreation park and for erecting residential quarters for Municipal servants, it cannot be said that the acquisition is not being made for a public purpose merely because as a part of the scheme the Municipality proposes to erect certain shops on a portion of the land to be acquired in order to recoup itself for the expenses to be incurred in connection with the scheme. **B MUNICIPAL CORPORATION v. RANCHORDAS VANDARAVANDAS**, 27 Bom. L. R. 1130; A. I. R. 1925 Bom. 538 **695**

s. 54—Valuation, question of—Appeal to Privy Council—Interference with decision of Indian Courts—Practice.

The value to be placed at a given moment on a plot of land, which is not in the market or the subject of bargain and sale, but owes a large part of any value it possesses to the prospective results of development work, to be undertaken thereafter at an uncertain time and at an estimated cost, is not only in its essence a question of fact but is one upon which, almost above any other, opinions will differ, without its being possible to give irrefragable reasons for any particular conclusion.

The Privy Council will not review the decree of an Indian Appellate Court merely upon a question of valuation. Where their Lordships have neither the materials nor the experience on which to found an opinion of their own, in a matter where the opinions of competent Courts in India differ (and *a fortiori* where they concur), it is not their practice to interfere as an Appellate Tribunal, unless there appears to be some error in law or miscarriage of justice. **P O NOWROJI RUSTOMJI WADIA v. GOVERNMENT OF BOMBAY**, 23 A. L. J. 803; 2 O. W. N. 691; A. I. R. 1925 P. C. 211; 49 M. L. J. 233; 27 Bom. L. R. 1140; 42 C. L. J. 143; L. R. 6 A. (P. C.) 154; 49 B. 700; 23 L. W. 46; 30 C. W. N. 386; (1926) M. W. N. 278; 52 I. A. 367 **48**

Landlord and tenant—Bagat land—Lease for term of years—Ejectment—Tenant, liability of.

Where a lease is granted of a piece of bagat land for a term of years containing no indication that the tenant is to be treated as a *raiya* or that the purpose of the tenancy is agricultural or horticultural, the lessee is bound by the contract which he has made and must give up possession of the land after the expiry of the term of the lease. **C RAJ KRISTO GHOSE v. BATA KRISTO GHOSE**, A. I. R. 1926 Cal. 354 **114**

Co-sharer landlords—Suit to recover rent for excess land by some co-sharers, whether maintainable. Where a tenant has been paying a certain rent in

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past years for the land in his occupation, it is not open to some of the co-sharer landlords to file a suit seeking to recover from the tenant a larger amount of rent than has been paid in the past. Whether the claim made is one for enhanced rent, or a claim for rent for excess land taken in occupation by the tenant, the principle is the same, that the question must not be at the mercy of one sharer, but it must be decided between the tenant and the whole body of the sharers entitled to claim rent as landlords. **B VAGHA JESANG v. JAGJIVAN AMRITLAL DESAI**, 27 Bom. L. R. 1107; A. I. R. 1925 Bom. 542 **558**

— *Co-sharers—Suit by one co-sharer to recover rent of entire holding, maintainability of—Person interested in particular area of holding, whether co-sharer.*

A holding cannot be split up or sub-divided without the consent of the tenant and a tenant has a right to insist that his holding should be kept intact in the state in which it was first created. There is, however, nothing to prevent a co-sharer landlord from bringing a suit for the entire rent of the holding with a prayer that out of the entire rent decreed he may be allowed to recover his share of the rent, provided he makes the other co-sharers parties to the suit.

So far as a tenant is concerned he is liable to pay rent for the entire holding to the persons who have got the superior interest, although as between themselves the co-sharers are entitled to make a division of area and of the rent.

A person who has got an undivided share in the holding as well as a person who has become interested in a particular area of the holding are both co-sharers in the holding and are entitled to maintain a suit to recover the entire rent of the holding making the other co-sharers parties to the suit. **C MOHINI MOHAN SAHA CHOWDHURY v. MEAJAN**, A. I. R. 1926 Cal. 333 **673**

— *Dispossession of tenant from portion of holding—Rent, suit for, whether maintainable.*

Where a tenant has never been put in possession of the whole area comprised in the demise but has taken possession of a portion thereof, the Court has power to fix a rate of rent for the area actually taken possession of by the tenant, to be paid by the tenant, on the ground that although he has contracted for the whole area he has elected to go into possession of a portion only of the area. Where, therefore, under circumstances over which the landlord had no control the tenant has not been given possession of the whole area, the Courts have decreed the rent in proportion to the area of the land of which the tenant has obtained possession.

Where, however, a tenant has been in possession of the whole demised area and has subsequently been deprived of a portion thereof by the action of the landlord, it is not open to the landlord to come to Court and ask the Court to fix the rent for the portion of the area which remains in the possession of the tenant. In such a case the landlord is not entitled, after dispossessing the tenant from a portion of the demised area, to sue for rent in respect of the whole or of any portion thereof, where the rent is fixed for the whole holding and not at so much per *bigha*. **C SURESH CHANDRA SAMADDAR v. MATHURA NATH GAIN**, 42 C. L. J. 66; A. I. R. 1925 Cal. 1187 **47**

— *"Kharij jama," meaning of.*

Prima facie the expression "*kharij jama*" imports

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that the owner of the *kharij jama* land is an independent proprietor and does not hold under the *zemindar*. **PAT RAMKHELAWAN SAHU v. KULDIP SAHAY**, A. I. R. 1926 Pat. 152 **777**

— *Land outside water-spread of tank—Rain water, use of, for raising nanja crops—Sarasari, ryots' liability to pay.*

In the case of lands outside the water-spread of a tank and which are cultivated purely by rain water, the landlord is not entitled to charge the tenant with *sarasari* for raising wet crops. The tenant is liable to pay only the usual *punja* rates.

A tenant is entitled to catch and use rain water as it falls on his land and the landlord has no right to it till it leaves the tenant's land and flows in to his tank or into a channel which leads water into his tank. **M VAVARU AMBALAM v. PRESIDENT, TALUK BOARD**, 21 L. W. 274; A. I. R. 1925 Mad. 620 **803**

— *Occupancy holding—Usufructuary mortgage of holding—Sale of holding for arrears of rent—Mortgagee, whether can maintain suit for declaration that sale was brought about by fraud.*

A usufructuary mortgagee of an occupancy holding is entitled to recover possession of the holding from the landlord, unless the landlord can establish that after the execution of the usufructuary mortgage the *raiya* had abandoned the land. A usufructuary mortgagee of an occupancy holding, therefore, has *locus standi* to maintain a suit for a declaration that a sale of the holding at the instance of the landlord in execution of a decree for arrears of rent was brought about by fraud. **C HARI BARMAN v. KHATIJAN**, A. I. R. 1926 Cal. 348 **737**

— *Raiyati holding—Sale in execution of decree for rent—Interest, high rate of, mentioned in kabuliyat—Auction-purchaser, whether bound by rate of interest.*

Where a permanent *raiya* holding is sold in execution of a decree for arrears of rent and the sale processes contain no indication of the stipulation about payment of interest on arrears of rent contained in the *kabuliyat* executed by the previous tenant, the auction-purchaser is not liable to pay interest at the rate mentioned in the *kabuliyat*, as the rate of interest is not an ordinary incident of a tenancy of which the auction-purchaser can be presumed to have had knowledge. **C SASHI MOHAN TARKASASTRI v. MEAJAN HAJI**, A. I. R. 1926 Cal. 255 **570**

— *Rent in excess of that allowed by law—Repeal of law, effect of—Rent, whether can be recovered.*

Where the rent fixed is excessive and contrary to law as in force at the time when it is fixed, the subsequent repeal of the law has not the effect of enabling the landlord to recover the amount of such rent. **O RAM ASREY v. QUBUL AHMAD**, A. I. R. 1926 Oudh 183 **103**

— *Rent not enhanced for long period—Inference—Holding held at fixed rent in perpetuity.*

The fact that a holding has been held for a long period at a rent which has not been changed is a factor to be considered in deciding whether the holding is held in perpetuity at a fixed rent, but the fact that a landlord may not have thought fit to enhance the rent for a long number of years does not by itself make the inference inevitable that the holding is held at a rent fixed in perpetuity. **C SATISH CHANDRA GHOSH v. DEBENDRA NATH DE**, A. I. R. 1926 Cal. 264 **820**

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——— *Rent suit, whether maintainable against some heirs of deceased tenant—Liability to pay rent—Tenants-in-common, rights and liabilities of—Joint and several liability—Contract Act (IX of 1872), s. 43, applicability of—Civil Procedure Code (Act V of 1908), O. I, rr. 6, 9, 10 (2)—Court's duty—Amendment—Dismissal.*

By the Full Bench (C. C. Ghose and Mukerji, JJ. dissenting):—A suit for rent is maintainable against some of the heirs or successors-in-interest of a deceased tenant without bringing all the heirs and successors-in-interest on the record.

The liability of a tenant to pay rent arises from the fact of possession of the land as a tenant, where there is no express contract, and all persons in possession of land as tenants are under an implied obligation to pay the rent for the land to the landlord, whether they get into possession by right of succession or assignment.

The heirs of a deceased tenant do not take the tenancy as an entire body forming as it were a partnership or a corporation, the individual members of which have no definite interest. They take as tenants-in-common, each having a definite share in the whole.

A tenant-in-common is entitled to possession of every part of the estate and there is a privity of estate between him and the landlord in the whole of the leasehold. Again, as, on the basis of the privity of estate a tenant-in-common is liable for all covenants running with the land and as his estate is an estate in the whole of the leasehold, he is liable for the entire rent.

Whether a contract is implied for payment of rent by all tenants-in-common in possession of a leasehold, or whether the law be held to impose the liability for payment of rent by reason of privity of estate, any one of such tenants may be sued for entire rent due to the landlord. This may be either in accordance with the provisions of s. 43 of the Contract Act, or under general law based on privity of estate.

A decree in such a suit will not have the effect of a decree for rent under Ch. XIV of the Bengal Tenancy Act.

Per Mukerji, J.—Section 43 of the Contract Act has no application except in the case of original lessees or persons who were party to the contract and it makes, as far as the liability under a contract is concerned, all joint contracts joint and several.

Persons who are under a joint liability to pay rent are necessary parties in a suit for rent. But a decree obtained in the absence of some of the cotenants is not necessarily a nullity. It is a valid decree but is effective only as a decree for money. If, however, objection is taken at the right moment to the maintainability of the suit, the Court must proceed under O. I, r. 10 (2), O. P. C., to make an order for the addition of such of the persons as are not already on the record as defendants and it is only in the event of the necessary amendments not being made that the suit is liable to be dismissed. **C KAILASH CHANDRA MITRA v. BROJENDRA KUMAR CHAKRAVARTI**, 29 O. W. N. 1000; 42 C. L. J. 232; A. I. R. 1925 Cal. 1056 211

——— *Suit by landlord against tenants as trespassers—Occupancy rights, plea of—Burden of proof—Appeal, second—Finding of fact.*

Where in a suit by the landlord to eject a tenant from the lands held by him, the tenant sets up a

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defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such right lies upon the tenant.

In the Presidency of Madras when a tenancy commences under a terminable contract there is nothing to prevent the landlord from ejecting the tenant at the end of the term from the lands which have been let to him.

Where in a suit for damages for use and occupation by a landlord, on the footing that the defendants were holding over and were trespassers in law, the latter plead permanent rights of occupancy, the burden of making out occupancy rights lies on the defendants.

Where the tenants by *muchilikas* undertook to surrender the lands at the end of the term, and there was constant change of tenants and enhancement of rent, and alienations by the tenants were few in number and of recent times:

Held, that a finding that the tenants had no occupancy rights was justified and that the High Court would not in second appeal interfere with the finding. **M ANNAMDEVULA TATA v. AHAMADULLA KHAN SAHIB BAHADUR**, 48 M. L. J. 701; A. I. R. 1925 Mad. 890; 22 L. W. 528 401

——— *Transfer by tenant, effect of—Suit for ejectment against transferee—Defendant, whether can set up another transfer.*

In answer to a landlord's suit for ejectment against a transferee on the ground that a particular transfer of an absolute occupancy holding is voidable for want of consent, it is open to the defendant to contend in the alternative, that even if the transfer sought to be avoided, be voidable, he is entitled to retain possession under another transfer which is binding as against the landlord.

Ordinarily, the tenant-right, as between the tenant mortgagor and his transferee becomes transferred absolutely to the latter the moment the final decree for foreclosure is passed, and nothing remains which the tenant can claim to be his own.

If the mortgage on the basis of which such foreclosure is obtained, is a legal, or a consented or ratified mortgage, then, the transferee's position is secure, not only against the tenant, but also against the landlord.

But if the mortgage is neither legal nor consented to by the landlord, nor subsequently ratified by the acceptance of rent by the landlord from the transferee as such the latter's position is nothing better than that of a mere trespasser liable to be ejected by the landlord.

By consenting to a mortgage the landlord consents to a foreclosure also provided it takes place so long as the tenant-right is subsisting. The consent does not enure for the benefit of the transferee if he has not worked out his rights under the transfer so long as the tenant-right subsisted.

If the tenancy is determined by forfeiture the mortgage even if valid as against the landlord is also determined. **N SHEOBUX v. JAGANNATH**, A. I. R. 1926 Nag. 184 364

Land Registration Act (B. C. VII of 1876), ss. 28, 29, 30—Proceedings before Land Registration Collector, whether civil proceedings. See **LIMITATION ACT**, 1908, s. 14 244

——— *s. 78, scope of—Unregistered proprietor—Lessee, if can sue for rent—Assignee of rent, position of—Khatian, entry in—Part acceptance.*

Section 78 of the Land Registration Act is no bar to a lessee of land recovering rent from the tenants,

Land Registration Act--concl'd.

although the person who should have been registered as the proprietor, and through whom he claims, has not been so registered.

Section 78 of the Land Registration Act is, similarly, no bar to recovery of rent by an assignee from an unregistered proprietor.

It is open to a Court to accept a part of the entry in the *khatian* and not to accept the rest of the entry. **C PRASANNA KUMAR DE MAHAJAN v. NANIGOPAL DE**, 42 C. L. J. 134; A. I. R. 1925 Cal. 1175 561

Lease—

See LANDLORD AND TENANT.

See TRANSFER OF PROPERTY ACT, 1882, ss. 105 to 117.

————— *Hereditary non-transferable - Execution of money-decree against lessee—Lease, whether can be sold—Lessee, whether can object.*

The condition against alienation in a hereditary non-transferable lease in Oudh is inserted for the benefit of the superior proprietor and it is not competent to the transferor of the interest, in a suit between himself and the transferee, to raise the plea that the transfer is void. Where, however, an attempt is made to sell the interest of the lessee in execution of a money-decree against him, not only the lessee can raise the objection that his interest under the lease is not transferable but he is bound to do so. If he allows the lease to be transferred in execution of a decree he would be liable to the *taluqdar*. **O MOHAN DEI v. BALMUKAND RASTOGI**, 12 O. L. J. 543; 2 O. W. N. 737; A. I. R. 1925 Oudh 702 256

————— *Two leases, grant of, to same person—Implication of surrender of first—Indian and English Law, difference between.*

The rule of English Law that the acceptance of a new lease operates as a surrender of a prior lease to the same person of the same property is applicable only in cases where there is such incompatibility between the enjoyment under the new lease and the enjoyment under the prior lease that the second will involve a surrender of the first.

The plaintiff, a landlord, leased to the defendant a large plot of land for purposes of coffee cultivation for a period of 91 years. Less than 20 years thereafter, the plaintiff again granted 20 acres out of the same area to the same person on lease for gold washing purposes for a period of 36 years. The lessee specifically agreed to pay rent on both the leases without any abatement. On the expiry of the period of the second lease, in a suit by the landlord for damages for use and occupation in respect of the 20 acres of land and for value of buildings and machinery alleged to have been wrongly carried away:

Held, (1) that the grant of the second lease was not inconsistent with the continuation of the first;

(2) that the plaintiff was not, during the existence of the first and the longer lease, entitled to ask for relief on the ground of expiry of the second lease.

Per *Ramesam, J.*—Under the Indian Law, where there are two leases to the same person, a surrender of the first lease need not necessarily be implied from the grant of the second.

Even where the leases are of the same kind and they are overlapping and the terms of the second are somewhat inconsistent with the terms of the first, all that is necessary to imply is a cancellation of the first only for a period which is overlapped by the second.

Unlike under the English Law, delivery of possession by the lessor to the lessee is not a necessary

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part of the transaction of a lease in India and the implication on a second lease of the surrender of the first lease is, therefore, not also necessary under the Indian Law. **M NILAMBUR THARAKAVIL v. PARRY & Co. LTD.**, 49 M. L. J. 390; 48 M. 815; A. I. R. 1925 Mad. 1277 729

Legal Practitioner. See ATTORNEY. 50

Letters Patent (Lah.), cl. 12—“Suit for land,” what is—*Suit for management of trust, whether suit for land.*

A suit for the accounts of the management of a trust and for its administration is not a “suit for land” within the meaning of cl. 12 of the Letters Patent of the Madras High Court, though the whole of the immoveable property belonging to the trust may be outside the local limits of the jurisdiction of the High Court in its Original Side.

Per *Srinivasa Iyengar, J.*—The expression “suit for land” must be construed as an action the primary object of which is to establish claims regarding title to property or possession of property and no suit can be described as a “suit for land” as the result of the decision in which the title to, or possession of, immoveable property will not in any manner or measure be directly affected. **M KRISHNADOSS VITTALDOSS v. GHANSHAMDOS**, (1925) M. W. N. 395; 22 L. W. 160; 49 M. L. J. 311; A. I. R. 1925 Mad. 1081 188

Letters Patent (Ran.), cl. 13—Civil Procedure Code (Act V of 1908), O. XXXVIII, r. 5, order under, wheher “judgment” — Appealable order, whether “judgment.”

An order under O. XXXVIII, r. 5, C. P. C., requiring an appellant to give security, is not a “judgment” within the meaning of cl. 13 of the Letters Patent (Rangoon), because it is merely an interlocutory order which does not affect the merits of the dispute between the parties by determining some right or liability which is in controversy between them in the suit.

Semble.—Where an appeal against an order actually is given by the C. P. C., it might well be argued that the order ought to be regarded as a “judgment” within the meaning of the Letters Patent. **R MENGHA SINGH v. SUCHA SINGH**, A. I. R. 1925 Rang. 267; 3 R. 307; 4 Bur. L. J. 108 995

————— **cl. 13—“Judgment,”** what is—*Order refusing to issue commission for examination of witness, whether judgment—Appeal, whether lies.*

An order which does not affect the merits of the dispute between the parties by determining some right or liability which is in controversy between them in the suit is not a “judgment” within the meaning of the word as used in cl. 13 of the Letters Patent of the Rangoon High Court.

An order refusing to issue a commission for the examination of a witness is a purely interlocutory order and is not a “judgment” and is not, therefore, appealable under cl. 13 of the Letters Patent of the Rangoon High Court. **R MAHOMED HUSSAIN v. HOOSAIN HAMADANES & Co.**, 3 R. 293; A. I. R. 1925 Rang. 290; 4 Bur. L. J. 103 967

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See BENGAL LAND REVENUE SALES ACT, 1859, ss. 2, 3, 33 40

See CHOTA NAGPUR TENANCY ACT, 1908, 214, 231, 252 325

————— *law applicable.*

The Law of Limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding, unless there is a distinct

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provision to the contrary. **A BEGAM SULTAN v. SARVI BEGAM**, 23 A. L. J. 977; L. R. 6 A. 582 Civ.; A. I. R. 1926 All. 93 **274**

Limitation Act (IX of 1908), s. 3. See **LIMITATION ACT**, 1908, SCH. I, ART. 11A **827**

— **s. 5.** See C. P. C., 1908, O. IX, R. 8 **610**

— **s. 5—Appeal filed beyond limitation—Extension of time—Diligence of appellant.**

In a case, judgment was given by the First Court on 30th May 1923. The period of limitation for appeal was 30 days. 31st May was the last working day of the Court. Application for copy was made on 2nd July 1923, the day on which the Court re-opened. The copy was ready for delivery on 14th August but it was despatched by post and received by the applicant on 17th August. The Court was again closed on that date, and the appeal was filed before the District Judge on 27th August, the day on which the Court re-opened:

Held, that the appellant acted with due diligence and was entitled to have the time extended under the provisions of s. 5 of the Limitation Act. **O SRIPAT v. HUBDAR**, 2 O. W. N. 678; A. I. R. 1925 Oudh 643 **115**

— **s. 5—Civil Procedure Code (Act V of 1908), O. XXII, rr. 4, 9—Abatement, application to set aside—Questions to be considered.**

In an application to set aside an abatement the Court should investigate whether the plaintiff was lawfully prevented from making the application for substitution within the statutory period and should direct its attention to the question whether the plaintiff is entitled to the benefit of s. 5 of the Limitation Act. **C JANAKINATH SINGHA ROY v. NIRODE BARAN ROY**, A. I. R. 1926 Cal. 175 **811**

— **s. 5**, whether applies to a petition for insolvency. See **PROVINCIAL INSOLVENCY ACT**, 1907, s. 6 (4) **254**

— **ss. 5, 12—Appeal, second—Appeal filed after expiry of period of limitation—Time spent in obtaining copy of Trial Court's judgment, whether can be excluded.**

Where under the rules of the High Court a copy of the judgment of the Trial Court is required to be attached to a memorandum of second appeal, and it appears that several days were spent in obtaining such copy, whereas copies of the judgment and decree of the lower Appellate Court were obtained within a comparatively short time, the appellant is entitled to the indulgence of the Court under s. 5 of the Limitation Act if the appeal is filed after the expiry of the period of limitation, provided it appears that he acted with diligence. **R MAUNG PO AUNG v. U BYA**, 3 R. 310; A. I. R. 1925 Rang. 344 **910**

— **s. 6—Minor's assignee, whether protected.**

An assignee cannot take advantage of s. 6 of the Limitation Act. **O SITLA BUX SINGH v. RAM NIWAZ**, 2 O. W. N. 811; A. I. R. 1926 Oudh 20 **741**

— **ss. 6, 9, Sch. I, Art. 120—Custom—Alienation by widow—Declaration, suit for—Limitation, commencement of—After-born reversioner, rights of—Minority, effect of.**

Under the Customary Law of the Punjab the right to sue for a declaratory decree that a certain alienation shall not affect the rights of the reversioners is vested in the whole body of reversioners in existence at the time of alienation jointly and severally and begins to run simultaneously against them all and no subsequent disability of any of the reversioners

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stops the running of limitation. Time in such suits begins to run from the date of alienation and a reversioner born subsequent to the date of alienation cannot avail himself of an extension of time under s. 6 of the Limitation Act. **L CHIRAG DIN v. ABDULLAH**, 6 L. 405; 2 L. C. 117; A. I. R. 1925 Lah. 654 **1022**

— **s. 12—Application for leave to appeal to His Majesty in Council—Time taken in obtaining copy of judgment to be appealed against, whether may be excluded.**

In the case of an application for leave to appeal to the Privy Council, the time requisite for obtaining a copy of the judgment appealed against is excluded in calculating limitation.

In the case of an application for leave to appeal sub-s. (3) of s. 12 of the Limitation Act really means "when a decree is sought to be appealed from." **M In re SECRETARY OF STATE FOR INDIA**, 49 M. L. J. 418; 22 L. W. 330; (1925) M. W. N. 788; A. I. R. 1925 Mad. 1241; 48 M. 939 **601**

— **s. 14—Land Registration Act (B. C. VII of 1876), ss. 28, 29, 30—Proceedings before Land Registration Collector, whether "civil proceedings"—Land Registration Collector, whether "Court."**

The term "civil proceeding" used in s. 14, Limitation Act, is not meant to cover an application made under ss. 28 and 29 or s. 42 of the Land Registration Act nor can the Land Registration Deputy Collector be called a "Court" within the meaning of s. 14, Limitation Act, for the purpose of deciding cases under those sections of the Land Registration Act. **PAT RAMJEE PRASAD v. BISHUNDUTT**, 7 P. L. T. 61; A. I. R. 1926 Pat. 194 **244**

— **ss. 15 (2), 29.** See **BOMBAY DISTRICT MUNICIPAL ACT**, 1901, s. 167 **44**

— **s. 19—Suggestion to settle matter, whether extends limitation.**

A suggestion made by a defendant that the matter might be settled, headed "without prejudice," does not operate to extend limitation, as it cannot be treated as an admission of liability. **N AGENT, G. I. P. Ry. Co. v. JASRUPI SHRINATH**, A. I. R. 1926 Nag. 57 **135**

— **s. 20—Interest, payment towards—Character of payment, proof of—"As such", "person liable to pay," meaning of—Co-mortgagor, payment by—Extension of limitation.**

Where a payment is made towards a debt but there is nothing to show whether it was made in respect of principal or interest, the Court is entitled to find out on the evidence for what purpose the payment was made.

The expression 'as such' in s. 20 of the Limitation Act means that the payment must be made on account of interest which may be proved from the circumstances of the case from which payment as interest may be distinctly inferred and may be established by evidence.

The expression 'person liable to pay' in s. 20 of the Limitation Act does not mean the entire body of persons liable to pay the debt but each individual debtor who would be liable for the whole debt. Under the law each co-mortgagor is liable for the entire debt secured by the mortgage, and a payment by any one of them towards interest would operate to extend limitation. **C ACHOLA SUNDARI DEBI v. DOMAN SUNDARI DEBI**, A. I. R. 1926 Cal. 150 **774**

— **s. 22—Defendant made co-plaintiff, effect of—Limitation, whether affected.**

Sub-section (1) of s. 22 of the Limitation Act has no application to a case where a party who was originally

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impleaded by the plaintiff as a defendant to the suit is transferred in that suit as a co-plaintiff. **PAT RAJ KISHORE LAL NAND KEOLYAR v. ALAM ARA BEGUM** A. I. R. 1926 Pat. 28 **82**

— **s. 22**—*Suit against joint Hindu family described as firm—Amendment of title of plaint after expiry of limitation, effect of.*

The plaint in a suit to recover the amount of a *hundi* described the defendants as a firm but it was subsequently discovered that the defendants were not a firm but a joint Hindu family doing business under the name by which they were described in the plaint. The title of the plaint was thereupon amended by substituting the names of the members of the family for the name of the firm. On the date when the substitution was made the suit had become barred by time:

Held, that there was no addition of parties within the meaning of s. 22 (1) of the Limitation Act but a mere substitution in order to correct a misdescription and that, therefore, the suit was not barred by time. **B RAMPRASAD SHIVLAL v. SHRINIVAS BALMUKAND**, 27 Bom. L. R. 1122; A. I. R. 1925 Bom. 527 **685**

— **s. 22**—*Suit, frame of—Railway Company—Suit against Manager—Misdescription—Amendment of plaint, when to be allowed.*

Where there are two known persons in existence and the plaintiff brings the suit against one of them and afterwards applies to have the other brought on the record as defendant on the ground that he all along intended to sue the other and in substance he sued the other, the case is not one of misdescription but of substitution, and s. 22 of the Limitation Act would apply.

No amendment of plaint should be allowed where it is applied for at a very late stage and will have the effect of adding a new party to the suit and s. 22 of the Limitation Act would apply.

Where instead of the Railway Company, its Agent is sued, the suit is not framed properly and is not, therefore, maintainable. **C AGENT, B. N. RY. v. BEHARI LAL DUTT**, 29 C. W. N. 614; A. I. R. 1925 Cal. 716; 52 C. 783 **426**

— **s. 26.**

Section 26 of the Limitation Act is remedial and is neither prohibitory nor exhaustive. Its object is to make more easy the establishment of rights of easement and not to exclude or interfere with other titles and modes of acquiring easements, such as by grant either proved or implied. **PAT ABDUL GHANI v. HARNAM SINGH**, (1925) Pat. 250; A. I. R. 1925 Pat. 748; 7 P. L. T. 260 **356**

— **s. 29.** See BOMBAY DISTRICT MUNICIPAL ACT, 1901, s. 167 **44**

— **Sch. I, Art. 7.** See LIMITATION ACT, 1908, SCH. I, ART. 102 **120**

— **Art. 11A—Civil Procedure Code (Act V of 1908), O. XXI, rr. 100, 101, 103—Landlord and tenant—Decree for arrears of rent—Sale of holding—Purchase by landlord—Order under r. 101 restoring person dispossessed to possession—Suit by landlord to recover possession of holding on ground of abandonment—Limitation.**

The suit contemplated in r. 103 of O. XXI of the C. P. C. is a suit by a person who is kept out of possession of property purchased in execution of a decree and claims possession under his auction-purchase. The rule does not concern itself with any other cause of action which such person, apart from

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his character as auction-purchaser, may have against the defendant. If a suit is brought under r. 103 within the statutory period, the right to bring a suit to establish the claim of the plaintiff as auction-purchaser for possession of the property is lost. But if he has any other cause of action against the defendant it cannot be said that the rule bars his suit based on such cause of action.

Plaintiff obtained a rent-decree against a tenant and in execution of that decree purchased and obtained possession of the holding of the judgment-debtor. Defendant thereupon made an application under r. 100 of O. XXI of the C. P. C. alleging dis-possession in execution of the decree and praying for restoration of possession. This application was allowed and more than a year after the date of the order allowing the application plaintiff brought a suit for possession of the holding on the allegation that his tenant having parted with the holding wrongfully, the plaintiff was entitled to re-enter:

Held, that plaintiff's suit was not one under the provisions of r. 103 of O. XXI of the C. P. C. but was based on an entirely different cause of action and that, therefore, it was not governed by Art. 11A of Sch. I to the Limitation Act and was consequently not barred by time. **C AMBIKA CHARAN BHAKTA v. RAM PROSAD CHATTERJEE**, 30 C. W. N. 163; 42 C. L. J. 578; A. I. R. 1926 Cal. 377 **575**

— **Sch. I, Art. 11A, s. 3—Civil Procedure Code (Act V of 1908), O. XXI, rr. 100, 103—Execution of decree—Sale—Possession delivered to auction-purchaser—Application for restoration of possession, dismissal of—Suit for possession—Limitation—Appeal—Suit discovered to be barred by time—Appellate Court, duty of.**

Defendant purchased certain property in execution of a rent-decree and took possession of it through Court. Plaintiff made an application under r. 100 of O. XXI of the C. P. C., for restoration of possession but the application was dismissed. More than a year after the date of the dismissal of the application plaintiff instituted a suit to recover possession of the property:

Held, that the suit was one under r. 103 of O. XXI of the C. P. C., and was barred by the operation of Art. 11A of Sch. I to the Limitation Act.

An Appellate Court is bound to dismiss a suit if it finds that it is barred by limitation, even though limitation has not been set up in defence. **C KUMUD CHARAN ROY v. SAMBHU CHANDRA GHOSH** **827**

— **Art. 14—Santhal Parganas—Death of proprietor—Settlement of lands by prodhan—Heir of deceased, objection by, dismissal of—Suit for declaration—Limitation.**

On the death of a Hindu widow who had succeeded to the estate of her husband in the Santal Parganas the Sub-Divisional Officer passed an order that as no heir of the deceased was traceable the *prodhan* might settle the lands according to the village Record of Rights. The *prodhan* subsequently reported that he had settled the lands with certain persons and on that report the Sub-Divisional Officer recorded an order "File." The heir of the deceased subsequently appeared and filed an objection but his claim was rejected and an order was passed that he should go to the Civil Court and that if he succeeded in establishing his claim he would be entitled to get possession of his land. Shortly thereafter the heir who had filed the objection died and his sons filed a suit for a

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declaration that they being the next reversioners of the deceased widow were entitled to get the lands left by her and that the defendants with whom the lands had been settled by the *prodhan* were not entitled to retain the lands under the guise of a settlement at *fouti*. This suit was filed more than a year after the date of the order rejecting the objection filed by the plaintiffs' father:

Held, that the suit was not one for setting aside the order of the Sub-Divisional Officer and was consequently not governed by Art. 14 of Sch. I to the Limitation Act. **PAT HARO MANDAL v. DHIRANATH DAS**, (1925) Pat. 288; A. I. R. 1925 Pat. 784; 7 P. L. T. 67

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— **Sch. I, Art. 31—Goods entrusted to Railway for carriage—Non-delivery—Damages, suit for—Limitation.**

Where compensation is claimed for non-delivery of goods entrusted to a Railway Company for carriage, the suit, whether laid in tort or contract, is governed by Art. 31 of Sch. I to the Limitation Act and must be brought within one year from the date when the goods ought to have been delivered. **PAT AGENT OF THE BENGAL NAGPUR RAILWAY COMPANY LTD. v. HAMIR MULL CHAGAN MULL**, 6 P. L. T. 565; A. I. R. 1925 Pat. 727; 5 Pat. 106; (1926) Pat. 114

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— **Art. 31—Suit against carrier to recover damages for non-delivery—Limitation.**

A suit against a carrier for compensation for non-delivery of goods irrespective of whether failure to deliver is due to a tort or to a breach of contract is governed by Art. 31, Sch. I to the Limitation Act. **AGENT, G. I. P. Ry. Co. v. JASRUP SHRINATH**, A. I. R. 1926 Nag. 57

135

— **Arts. 36, 49—Deterioration of goods—Suit for compensation—Limitation.**

Article 36 and not Art. 49 of Sch. I to the Limitation Act is applicable to a suit for compensation against the *ijaradar* of a market, where as a result of a quarrel between the plaintiff and the *ijaradar* about the payment of tolls, the plaintiff's goods are detained at the Police Station and there deteriorate. **C ANANDA CHANDRA KACHARU v. BARADA KANTA DEY**, 42 C. L. J. 203; A. I. R. 1926 Cal. 177

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— **Art. 95. See CHOTA NAGPUR TENANCY ACT, 1908, s. 214**

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— **Art. 95—Decree obtained by fraud, whether void or voidable—Sale held in execution of fraudulent decree—Suit to set aside decree and sale—Limitation.**

A transaction tainted with fraud is voidable and not void. A decree obtained by fraud, collusion or any other unlawful means, is a pronouncement of a Court of Justice and cannot be treated as waste paper. The only objection that can be made to a decree as being void or a nullity must be on the ground that it was passed without jurisdiction. Where a decree is passed by a Court which had jurisdiction over the subject-matter of the suit, a plaintiff will not succeed in obtaining any relief in respect of it unless he gets it vacated.

A sale held in execution of a fraudulent decree is not a void but a voidable sale, till vacated by an appropriate proceeding; the rights created thereby are effective. Consequently where the right to have a decree set aside as fraudulent has become barred by limitation, no decree can be passed setting aside

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the sale only as made in execution of a fraudulent decree.

A suit for a declaration that a decree and an auction sale thereunder are not binding on the plaintiff, is not a mere declaratory suit but in substance a suit to set aside the decree on the ground of fraud and is governed by Art. 95 of Sch. I to the Limitation Act. **C FAZLUDDIN MAHAMMAD v. KHETRA GHORAI**, 30 C. W. N. 59; A. I. R. 1926 Cal. 167

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— **Sch. I, Arts. 102, 7—Weighman's wages, suit for—Limitation.**

A weighman employed to work at a shop is not a house-hold servant, nor is he an artisan, nor a mere labourer. He may be regarded in fact as a shop-keeper's assistant. A suit by a weighman for his wages is, therefore, governed by Art. 102 and not by Art. 7 of Sch. I to the Limitation Act. **A MUTSADDI LAL v. BHAGWAN DAS**, L. R. 6 A. 596 Civ.; 23 A. L. J. 1059; A. I. R. 1926 All. 172

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— **Art. 120 See LIMITATION ACT, 1908, s. 6**

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— **Art. 126—Mortgage—Suit for redemption—Term fixing period of redemption challenged—Article 126, applicability of.**

Where in a suit for redemption of a mortgage executed by the manager of a Hindu joint family any term embodied in the mortgage-deed, such as the period fixed for redemption, or the interest stipulated, is challenged, it does not change the character of the suit for redemption into one for setting aside the mortgage. The object of such a suit is to obtain relief under the mortgage and not in spite of the mortgage, and Art. 126 of Sch. I to the Limitation Act cannot be invoked in bar of the relief claimed. **O KANIZ FIZZA BIBI v. DATA DIN**, 2 O. W. N. 650; A. I. R. 1925 Oudh 678

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— **Art. 132. See MADRAS ESTATES LAND ACT, 1908, s. 5**

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— **Art. 132—Mortgage—Money payable by instalments—Entire amount becoming due on default in payment of one instalment, effect of—Option of mortgagee—Waiver—Limitation.**

Where a mortgage-bond provides for the payment of the mortgage-money by instalments and there is a condition attached that if default is made in payment of any one of the instalments the mortgagee would be entitled to demand the full amount secured by the bond with interest, the mortgagee has the option to demand the entire amount if there is default in payment of any one of the instalments. It is, however, open to the mortgagee to avail himself of this right or to waive it. He can exercise his option and demand payment of the entire amount on default of any one of the instalments or he can, under the terms of the bond, wait until the last instalment falls due. It is not obligatory for the mortgagee to bring a suit for realization of the entire amount as soon as any one of the instalments falls due. If he waits until the expiry of the time for payment of all the instalments, his claim would not be barred in so far as the instalments which are within the period of limitation from the date of the institution of the suit are concerned. **PAT RAMSEKHAR PRASHAD SINGH v. MATHURA LAL**, (1925) Pat. 215; A. I. R. 1925 Pat. 557; 4 Pat. 820

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— **Art. 132—Mortgage—Mortgage amount payable on fixed date—Option to enforce payment on default of payment of interest—Suit to enforce mortgage—Limitation.**

Where a mortgage-deed, by which the principal

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amount was to be paid on a fixed date, provided that if the mortgagor should fail to pay the interest on the due date, the mortgagee would be at liberty to recover the whole amount together with principal and interest:

Held, on a construction of the document, that an option was reserved to the mortgagee to enforce the clause at his pleasure, and that the period of limitation for a suit to enforce the mortgage under Art. 132 of Sch. I to the Limitation Act started to run not on the date of default in the payment of interest but when the money became due under the terms of the main contract. **M MUTHIA CHETTIAR v. VENKATASUBBAYULU NAIDU**, 22 L. W. 67; 49 M. L. J. 394; A. I. R. 1926 Mad. 160 **1033**

Sch. I, Art. 134—Mortgage—Transfer by mortgagee—Suit by mortgagor to recover possession of mortgaged property—Limitation, commencement of—Mortgagee put in possession—Allegation of absolute transfer in favour of mortgagee—Burden of proof.

Article 134 of Sch. I to the Limitation Act cannot be pleaded in defence to a suit to recover possession of mortgaged property unless the person pleading it has had 12 years' possession of the property in suit. The Article refers to cases in which the subsequent transfer has been with possession and applies only to suits to recover possession of immoveable property.

Where land is mortgaged without possession and possession of it subsequently passes to the mortgagee the burden of proving that the transfer in which possession was given was an outright sale lies on the person alleging it. **R A. T. A. R. M. M. CHETTY FIRM v. MAHOMED KASIM**, 3 R. 367; A. I. R. 1925 Rang. 377 **1011**

Art. 144—Transfer of Property Act (IV of 1882), ss. 105, 111 (g)—Landlord and tenant—Tenant-at-will—Adverse possession, ingredients of—Limitation, commencement of.

It is possible for a tenant-at-will without first surrendering his tenancy and without effecting a new forcible entry on the land to set up a claim to hold by efflux of time so that his claim so to do may be ultimately uncontestable. To such cases the period of limitation applicable is that provided in Art. 144 of Sch. I to the Limitation Act and the time from which the period of limitation begins to run is the date when the possession of the defendant becomes adverse to the plaintiff.

As a general rule failure to pay rent by a tenant-at-will is apt to be regarded as the starting point of limitation, because that in itself amounts to a forfeiture of the tenure and if the tenant refuses to pay the rent the landlord has unmistakably notice and an opportunity if he wishes to eject the tenant and if he does not eject the tenant and allows him to remain in possession limitation begins to run against him. Mere failure, however, on the part of the landlord to exact from the tenant the rent due would not enable the tenant to assert that he was holding adversely. In a case in which the tenant is by virtue of his agreement with the landlord not liable to pay any rent, the mere failure to pay rent cannot form the starting point of limitation.

The fact that a tenant-at-will has made structural alterations on the land of his tenancy to the knowledge of the owner does not convert the possession of the tenant into adverse possession, inasmuch as such construction or alteration by even a tenant-at-will is not necessarily wholly incompatible with his position as a tenant.

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The entry of the name of a tenant as owner of the land of his tenancy in the Municipal records is not necessarily by itself such a proceeding as to amount to clear manifestation of the intention of the tenant to set up his own title to the land. Such an entry might well be made with the permission of the landlord on grounds of convenience.

An assertion in a public circular, however, by a person in permissive occupation of land and not paying rent or rendering services to the landlord, to the effect that the land belongs to him amounts to an assertion of adverse title and converts his possession into adverse possession and limitation begins to run against the landlord from the date of such assertion.

Per *Aston, A. J. C.*—Section 111 (g) of the Transfer of Property Act has no application to a permissive tenancy which does not fall within the purview of s. 105 of the Act.

In the case of a monthly tenant or a tenant from year to year something more than a mere assertion of adversity would be required to determine the tenancy. Such an assertion merely gives the landlord the option to evict the tenant and the tenant must still prove some act on the part of the landlord indicating that the tenancy has been determined before he can claim that his possession was not that of a tenant but was adverse.

In the case of a permissive tenancy or a tenancy-at-will, however, it is an ingredient of the tenancy that it is terminable on the will either of the landlord or the tenant and in such a case the possession of the tenant becomes adverse to the landlord when he sets up a title of ownership in the property. **S SIDIK HAJI YACUB v. MAHOMED FARUQ**, A. I. R. 1926 Sind 71 **1007**

Sch. I, Art. 148. See CONSTRUCTION OF DOCUMENTS **763**

Art. 154. See CR. P. C., 1898, s. 476 **529**

Art. 182—Decree for sale—Properties situated in different Districts—Transfer certificate, application for—Step-in-aid of execution.

In the case of a decree for sale of two sets of properties situated in different districts, an application for grant of a certificate of transfer of the decree from one district to the other cannot operate to save limitation in respect of an application for execution relating to the properties in the other district. **A BEGAM SULTAN v. SARVI BEGAM**, 23 A. L. J. 977; L. R. 6 A. 582 Civ.; A. I. R. 1926 All. 93 **274**

Art. 182 (5)—Civil Procedure Code (Act V of 1908), ss. 50, 99—Execution of decree—Decree transferred for execution—Death of judgment-debtor—Substitution, application for, where to be made—Application made in Court to which decree has been transferred, validity of—Legal representative, name of, incorrectly described, effect of—Step-in-aid of execution—Limitation, extension of.

An application for the substitution of the names of the legal representatives of a deceased judgment-debtor on the record in place of the deceased may be made to the Court to which the decree has been transferred for execution, and operates to extend limitation under cl. (5) of Art. 182 of Sch. I to the Limitation Act. In any case the fact that the application is not made to the Court which passed the decree is a mere irregularity which is covered by s. 99 of the C. P. C., and does not render the application altogether invalid for the purposes of extending limitation.

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Where in such an application the name of the legal representative of the deceased judgment-debtor is not correctly given under a *bona fide* mistake, the application is nevertheless one to take a step-in-aid of execution within the meaning of cl. (5) of Art. 182 of Sch. I to the Limitation Act and operates to extend limitation. **L BEGUM BIBI v. BULAQI SHAH & SONS**, 2 L. C. 121; A. I. R. 1926 Lah. 34 **1050**

— **Sch. I, Art. 182 (5)—Execution of decree—Application asking for attachment and sale of property outside jurisdiction of Court—Good faith—Extension of limitation—“For execution,” “step-in-aid of execution,” meaning of.**

The words “for execution” and “step-in-aid of execution” in cl. (5) of Art. 182 of Sch. I to the Limitation Act mean “for the purpose of obtaining execution” and “step taken for the purpose of obtaining execution” respectively.

The *bona fides* or *mala fides* of an earlier application for execution is an important ingredient in determining whether that application is effective for the purpose of saving limitation under cl. (5) of Art. 182 of Sch. I to the Limitation Act for a later application, though the *bona fides* or *mala fides* of the later application cannot be judged at the time when it is presented from anything that has gone before and, therefore, cannot at the time of presentation be entered into.

An application for execution which asks the Court for a relief which the Court cannot grant, for instance the attachment and sale of property outside the jurisdiction of the Court, is not an application in accordance with law within the meaning of cl. (5) of Art. 182 of Sch. I to the Limitation Act and does not operate to extend limitation under that clause. **A SHEO PRASAD v. NARAINIBAI**, A. I. R. 1926 All. 95; 24 A. L. J. 137 **938**

— **Art. 182 (5), (6)—Civil Procedure Code (Act V of 1908), O. XXI, rr. 11, 12, 13, 14, 22—Execution of decree—Application for execution made by one of several joint decree-holders, whether in accordance with law—Notice under r. 22 of O. XXI, issue of, whether extends limitation.**

An execution application is one made in accordance with the law within the meaning of Art. 182 (5) of Sch. I to the Limitation Act if the particulars required by rr. 11 to 14 of O. XXI, of the C. P. C. are mentioned in the application. The mere fact that the application is made by one of several joint decree-holders does not take it out of the purview of cl. (5) of Art. 182.

Even where an application for execution is not one in accordance with the law a notice issued under r. 22 of O. XXI of the C. P. C. upon such application would be a step which would give a fresh start for limitation under cl. (6) of Art. 182 of Sch. I to the Limitation Act. **PAT JOGENDRA PRASAD NARAYAN SINHA v. MUNGAL PRASAD SAHU**, (1925) Pat. 315; A. I. R. 1926 Pat. 160 **847**

— **Art. 182, s. 29 (1) (b)—Bengal Tenancy Act (VIII of 1885), Sch. III, Part III, Art. 6—Execution of decree—Sale in execution—Sale set aside—Fresh application for execution, nature of—Limitation.**

Respondent, a co-sharer landlord, obtained a decree for rent against the appellant on 24th July 1920. On 21st May 1923 respondent presented a petition for execution of the decree and for certain reasons the Executing Court held that the decree could not be executed as a rent-decree and execution was allo-

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to proceed as for a money-decree. On 19th November 1923 some property belonging to the appellant-judgment-debtor was sold. The sale was confirmed on 20th December and the case was dismissed on full satisfaction. On the same day the appellant put in a petition to set aside the sale under the provisions of O. XXI, r. 90 of the C. P. C., and the sale was eventually set aside on the 8th March 1924. On 24th March 1924 respondent applied once more to execute his decree as a rent-decree.

Held, (1) that the second application for execution was one in continuation of the first application inasmuch as the prayer in both the applications made by the respondent was that the decree should be executed as a rent-decree;

(2) that in any case the sale in execution of the first decree having been set aside, the respondent's right to execute the decree revived and the second application having been made within three years of the date on which the sale had been set aside was not barred by limitation. **PAT DEONARAYAN SINGH v. RAM PRASAD**, A. I. R. 1926 Pat. 143 **799**

— **Sch. I, Art. 183—Execution of decree—Decree-holder, death of—Legal representative, substitution of, whether necessary—“Payment,” whether must be by judgment-debtor or his agent—Limitation.**

On the death of a decree-holder, it is not necessary that his legal representative should bring himself on the record in the place of the deceased before applying to execute the decree. No such process is contemplated by the procedure laid down either in the Procedure Code or in the rules on the Original Side. All that is necessary is that the person who becomes by operation of law entitled to have execution should make an application for execution.

A payment to save limitation and give rise to a fresh starting point under Art. 183 of Sch. I to the Limitation Act must be for the judgment-debtor or on his account. It is not necessary that it should be either by the debtor himself or by some person acting on his behalf.

Where the holder of a decree on the Original Side of the High Court died without drawing from the Court a sum of money ordered to be paid to him and on his death the Administrator-General, as Administrator *pendente lite* in an Administration suit relating to the estate of the deceased, applied for payment out of the amount and the Court directed the payment and within 12 years therefrom an assignee of the decree applied to execute the decree:

Held, that the application was not time-barred under Art. 183 of Sch. I to the Limitation Act.

(Per **Srinivasa Iyengar, J.**)—**Quære**.—Whether a Court of Law can be deemed to be an agent duly authorised on behalf of a debtor to make any such payment as would save limitation. **M ARJEE PRABAPPA CHETTY v. KONETI DESIKACHARI**, 49 M. L. J. 101; 22 L. W. 78; A. I. R. 1925 Mad. 1131; (1925) M. W. N. 554 & 703 **1028**

— **Lunacy Act (IV of 1912), s. 65—Person of unsound mind—Finding as to incapacity to manage himself and his affairs, whether necessary—Person of weak memory, whether of unsound mind and incapable of managing himself and his affairs.**

Under s. 65 of the Lunacy Act what the Court has to decide is whether the person before it is of unsound mind and is incapable of managing himself and his affairs, and it is open to the Court to find under

Lunacy Act—concl'd.

that section that a man is of unsound mind so as to be incapable of managing his affairs but that he is capable of managing himself and is not dangerous to himself or to others.

A person whose mental condition has been affected by a stroke of paralysis as a result of which his memory has become seriously defective but who is able to answer questions with regard to his family and his estate with a certain amount of intelligence cannot be said to be of unsound mind and incapable of managing himself and his affairs within the meaning of s. 65 of the Lunacy Act. **C UPENDRA MOHON ROY CHOUDHURY v. NARENDRA MOHON ROY**, 30 C. W. N. 180; A. I. R. 1926 Cal. 155

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Madras Abkari Act (I of 1886), ss. 31, 34, 55

—*Penal Code (Act XLV of 1860), s. 188—Criminal Procedure Code (Act V of 1898), s. 190 (1) (b)—Sale of arrack in contravention of Collector's order and terms of license—Offence—Abkari Inspector's report, absence of, effect of—Jurisdiction of Magistrate to take cognizance—Conviction—Procedure.*

A person selling arrack in his shop at an hour in contravention of an order promulgated by the District Collector does not commit an offence under s. 188 of the Penal Code. In such a case there is no question of causing or tending to cause obstruction, annoyance or injury to any one, and it does not follow, as a matter of course, that selling drinks will lead to riots or disturbance.

The Madras Abkari Act is not self-contained in the matter of the procedure for the investigation of offences under s. 55 of the Act. In such a case the procedure to be followed is laid down in s. 5 (2) of the Cr. P. C. to be under that Code. There is nothing in the Act to indicate what is the procedure to be followed when an offender is sent under s. 31 of the Act direct to a Magistrate, nor is there a provision at all for a case where the offender is not placed under arrest.

Where in a prosecution under s. 31 of the Abkari Act the accused is neither arrested nor bailed out before the trial begins, the Police has authority to send him direct before a Magistrate. It is, therefore, a case to which s. 190 (1) (b) of the Cr. P. C. will apply. The absence of a report by an Abkari Inspector in such a case does not debar a Magistrate from taking cognizance of an offence under s. 55 of the Act and a conviction by him is not open to objection.

Where a case investigated by a Police Officer includes in addition to an offence under s. 55 of the Abkari Act a non-cognizable offence under the Penal Code, the Police Officer would be correct in taking up the more serious offence as the principal offence, that is, the one in which he could arrest without a warrant, namely, under s. 55 of the Abkari Act, and following the provisions of that Act, so far as it can be done, rather than of the Cr. P. C., and, if he can follow the provisions of both by ensuring that the accused should appear before a Magistrate, it is obviously his duty to do so. The same procedure will be the proper procedure for a Police Officer to adopt when he is confronted with an offender whose offences are both under s. 55 of the Abkari Act and a cognizable offence under the Penal Code. **M In re YERLAGADDA VENKANNA**, 48 M. L. J. 605; (1925) M. W. N. 396; 22 L. W. 98; A. I. R. 1925 Mad. 856; 26 Cr. L. J. 1556

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Madras Civil Rules of Practice, Appendix A,

r. 1, cl. II—*Emergent application for arrest—Process fee—Ordinary fee, whether includes additional fee for extra days of detention.*

Madras Civil Rules of Practice—concl'd.

Under the Madras Civil Rules of Practice, Appendix A, on an application for the emergent issue of process for the arrest of the judgment-debtor, the fee payable is the ordinary fee and half as much again, and ordinary fee includes the extra amount that has to be paid for any further detention beyond the three days under sub-cl. (e) and (f) of cl. II of the rules in the Appendix.

The additional fee for detention beyond three days is as much a portion of the ordinary fee on an ordinary application for arrest of a person as the original fee itself is. **M In re VENKATARAMA IYER**, (1925) M. W. N. 606; 22 L. W. 327; 49 M. L. J. 440; A. I. R. 1925 Mad. 1236

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Madras District Municipalities Act (V of 1920)

—*Rules for decision of disputes as to validity of elections, r. 11—Validity of vote—Returning Officer, whether final authority—Election Court, jurisdiction of—Ballot paper, marks on, effect of—Electoral Roll—Two persons corresponding to description—Voting by one, validity of—Revision.*

Rule 11 of the rules under the Madras District Municipalities Act of 1920 gives the Election Court jurisdiction to decide for itself whether the Returning Officer's rejection or refusal of a vote was proper, and, if it was not proper, and the result of the election has been materially affected thereby, it may set aside the election and order a fresh one, or, if the result of the scrutiny is to give a majority to another candidate, it may declare that candidate duly elected.

In the matter of a decision as to the validity of a vote, the Election Court and not the Returning Officer is the final authority.

The right point of view from which the question of the validity of a vote by ballot is to be considered by the Polling Officer is to see whether any reasonable ground has been shown for concluding that by the marks on the voting paper, the voters might be identified.

Where on a ballot paper, besides the cross mark against the name of one of the candidates, there were lines scoring out the names of the other candidates and the Election Court held that the vote was valid:

Held, on revision, that the decision on the question of the validity of the vote was within the jurisdiction of the Election Court, and that there was neither lack of jurisdiction nor irregular exercise of it, which would give the High Court authority to interfere under s. 115 of the C. P. C.

Where the description of a voter on an Electoral Roll was "Murugesan, fitter" and a person who corresponded to the description presented himself for voting and was allowed to do so but on an election petition it was sought to be shown that there was another person who corresponded to the description in the Electoral Roll and, therefore, the vote as recorded was invalid, but the Election Court held the vote to be valid:

Held, that there was no irregularity and that in the absence of proof that the person who voted was not the voter mentioned in the Electoral Roll, there was no ground for interference in revision. **M MAMUNDI KONAR v. SHAMSUDDIN SAHIB BAHADUR**, 49 M. L. J. 381; 22 L. W. 507; A. I. R. 1925 Mad. 1207

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Rules for decision of election disputes, r. 12

—*Disqualified candidate elected—Objection petition—Next candidate, whether can be declared elected.*

Under r. 12 of the Rules for the decision of disputes as to the validity of an election under the

Madras District Municipalities Act—contd.

Madras District Municipalities Act, if the candidate obtaining the largest number of votes at an election is unseated on the ground that he is interested in a Municipal contract and is, therefore, disqualified from sitting, the candidate obtaining the next largest number of votes cannot be declared elected in the absence of an allegation and proof that the disqualification under which the successful candidate is ultimately found to labour was known to the voters who cast their votes for him.

If a voter throws away a vote by ignoring something which he could have known and which would have told him that he was throwing away his vote because he was giving it for a person who could never succeed in the election, then his vote is to be taken as wiped out of the election and the man who has the next highest number of votes can be declared duly elected; but, if the votes were given in ignorance of the disqualification under which the candidate of his choice was in fact labouring, then it would be inequitable to allow the votes to be thrown away for that reason and the only proper course is to order re-election. *M. GOPALA IYENGAR v. MAHOMED IBRAHIM ROWTHER*, 22 L. W. 320; 48 M. 509; 49 M. L. J. 606; (1925) M. W. N. 783 & 824; A. I. R. 1925 Mad. 1119

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s. 4 (a)—Rules for conduct of Elections, rr. 4, 32—Rules for decision of election disputes, r. 11—Vice-Chairman of Municipality acting as Chairman and passing his own nomination paper—Breach of rule—Election, validity of—Result of election, whether materially affected—"Vice-Chairman," whether "officer"—Erroneous interpretation of rule—Revision—Interference by High Court.

Under the rules framed under the Madras District Municipalities Act, relating to the decision of election disputes, a breach of the Election Rules will not in itself justify an Election Court holding that the election is invalid. It must be further proved that the breach of the rules has materially affected the result of the election.

The result of the election must be affected in some other way than by the mere breach of the rule; the breach must have resulted in and produced some other result which has in itself the effect of invalidating a candidature or a nomination or an election.

The Vice-Chairman of a Municipality is not an "officer" within the meaning of s. 4 (a) of the Madras District Municipalities Act and is not incompetent to stand for election to the Municipal Council.

Where a Vice Chairman of a Municipality, who was acting as Chairman during the temporary absence of the Chairman, himself scrutinised and passed his own nomination paper in the matter of nomination of candidates for a vacancy in his Municipal ward:

Held, that r. 32 of the rules for the conduct of elections was thereby broken but such breach would not invalidate the subsequent election unless it was proved that the result of the election was materially affected by such breach.

Where a finding by a Court that the result of an election was materially affected by a breach of the Election Rules is based on no evidence and is contrary to a rule governing the conduct of elections, the Court must be held to have exercised its jurisdiction with material irregularity so as to warrant interference by the High Court in revision. But a mere erroneous interpretation of a rule by a subordinate Court unless it is unreasonable or perverse is a matter quite within

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its jurisdiction and would not amount to material irregularity. *M. PALANIAPPA CHETTIAR v. KRISHNASWAMY CHETTIAR*, 48 M. L. J. 696; A. I. R. 1925 Mad. 877; 22 L. W. 429; (1925) M. W. N. 759

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ss. 219 (1), 313 (c)—Chairman's notice for removal of dangerous tree disobeyed—Offender prosecuted—Duty of Criminal Court.

If the Chairman of a Municipality prosecutes a person for non-compliance with a notice for the removal of a dangerous tree, the Criminal Court has only to see whether the notice was properly served and was disobeyed. It has no business to go into the question whether the Chairman was right in thinking the tree to be dangerous. *M. CHAIRMAN, MUNICIPAL COUNCIL, CHICACOLE v. GAJIREDDI SEETHARAMAYYA*, 21 L. W. 280; A. I. R. 1925 Mad. 584; 26 Cr. L. J. 1496

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Madras Estates Land Act (I of 1908), ss. 3 (2)

(d), 189—Shrotriendar, suit by, for rent—Shrotriem, whether estate—Grant of melvaram only to person not owning kudivaram—Jurisdiction of Civil and Revenue Courts—Appeal, second—Mixed question of fact and law.

Where in a suit instituted in the Civil Court for arrears of rent by a shrotriendar, the tenants raise the plea of want of jurisdiction of the Civil Court, on the ground that the shrotriem is an estate, the point for decision is whether at the time of the grant the shrotriendar had not the kudivaram right also. In other words whether it is proved by evidence that at the time of the grant there were any tenants in the village holding lands with any right of occupancy by custom or otherwise. It is immaterial that at the date of suit the shrotriendar may have only the melvaram right.

If the shrotriendar was originally the kudivaramdar and the melvaram also was granted to him, but he subsequently divested himself of the kudivaram right, the village is not an "estate" since on a proper construction of s. 3 (2) (d) of the Madras Estates Land Act, the words "to a person not owning the kudivaram thereof" refer to the time when the inam was granted.

Under the Madras Estates Land Act not all shrotriendars and inamdars are landholders but only those who at the time of the grant did not own the kudivaram, in other words, the share of a tenant with a right of occupancy.

The question whether a grant was of the melvaram only to a person not owning the kudivaram within the meaning of s. 3 (2) (d) of the Madras Estates Land Act is a mixed question of fact and law. *M. CHAKIRI SUBAYYA v. YERADODDI MAL REDDY*, 21 L. W. 694; 49 M. L. J. 126; A. I. R. 1925 Mad. 1081

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ss. 5, 132—Contract Act (IX of 1872), s. 69—Limitation Act (IX of 1908), Sch. I, Art. 132—Payment of rent by one of several joint ryots—Charge on shares of other ryots—Contribution, suit for—Limitation.

Where one of two or more ryots holding a joint patta under a landholder pays the whole rent due to the landholder in order to save the holding from sale, he is, by operation of law, entitled to a charge upon the share of each of his co-sharers for the realisation of the latter's share of the rent. A suit to enforce such a charge is governed by Art. 132 of Sch. I to the Limitation Act.

There is no distinction between a charge given under s. 5 of the Madras Estates Land Act and the charge given under s. 2 of the Madras Revenue Recovery Act.

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Both cases come within the purview of Art. 132 of Sch. I to the Limitation Act.

Section 132 of the Madras Estates Land Act relates only to a question of procedure and does not affect the substantive rights of the parties and does not prohibit a Civil Court from enforcing a charge for rent given by s. 5 of the Act. **M NAGALLA KOTTAYA v. KOGANTI KOTTAPPA**, 49 M. L. J. 117; 23 L. W. 178; A. I. R. 1926 Mad. 141; (1925) M. W. N. 722 **551**

— s. 77—*Rent—Dry and garden lands, irrigation of, with landlord's tank water—Compensation, rate at which, payable—Cess payable to village servants, inclusion of, in patta.*

Under the Madras Estates Land Act, when dry and garden lands are irrigated by the *raiyyat* with tank water with the landlord's permission, there is no invariable rule that the wet rate is the proper rate to fix for such lands. The landlord is entitled to reasonable compensation for the use of his water. The question has to be determined in each case as to the reasonable amount of compensation and the proper method of fixing the rate chargeable.

A provision for payment of a certain cess, not to the landlord but to village servants, should not be inserted in a *patta* tendered to the *raiyyat*. **M KONDAGUNTA MRUTYANJALIAH v. MALLE VENKATAPATHIGADU**, 49 M. L. J. 333; 22 L. W. 734 **834**

— s. 132. See MADRAS ESTATES LAND ACT, 1908, s. 5 **551**

Madras Local Boards Act (V of 1884), s. 73—Limitation Act (IX of 1908), Sch. I, Art. 120—Land-holder, right of, to recover road cess from intermediate land-holder—Limitation.

Under s. 73 of the Madras Local Boards Act of 1884 the land-holder is entitled to recover from an intermediate land-holder the whole of the tax paid in respect of the land held by him less half the tax assessable on the amount of the *poruppu*. The limitation period for a suit to recover it is six years under Art. 120 of Sch. I to the Limitation Act. **M KUPPUSWAMI IYER v. RAJESWARA SETHUPATHI**, 22 L. W. 258; 49 M. L. J. 462; A. I. R. 1925 Mad. 1282 **973**

Malabar Compensation for Tenants' Improvements Act (I of 1900), s. 4—Improvements—Conversion of one crop land into two crop land—Burden of proof.

The effect of s. 4 of the Malabar Compensation for Tenants' Improvements Act is to throw upon the landlord, when once it is shown that one crop land has been converted into two crop land, the burden of proving that this was not due to anything done or spent by the tenant.

In such a case it is unnecessary to prove that the improvement was definitely due to the exertions of the tenant. **M KIZHAKKAPET KRISHNAMADAR v. MARAMBATTE UNNIMAMMU**, 49 M. L. J. 99; 22 L. W. 186; A. I. R. 1925 Mad. 1222 **999**

Malabar Law—Maintenance karar—Allotment of properties in lieu of maintenance to members of tavazhi, existing and future—Subsequent suit for enhanced maintenance—Parties necessary—Frame of suit.

An arrangement for maintenance made by a *karnavan* cannot be set aside by his successor except for good cause.

Where a *karnavan* of a Malabar *tarwad* entered into a *karar* with some members of his *tarwad* by which certain properties were allotted to them and their

Malabar Law—cont'd.

families for their maintenance and it appeared that the document was intended to enure for the benefit not only of the members then in existence but also of persons subsequently born, a suit for enhanced maintenance against a succeeding *karnavan* by the members of the *tavazhi* is not maintainable without the remaining members of the *tarwad* or at least the other members of the *tavazhi* who are in possession of *tarwad* properties in lieu of maintenance being impleaded as parties.

If the members of a *tavazhi* think that the circumstances of their family warrant claim to enhanced maintenance it is not open to them to have the benefit of an allotment for maintenance to their *tavazhi* already made and also seek to add to it a separate allotment for each individual ignoring the benefits which they are already receiving. **M KUNHAHOMED v. SARA UMMA**, 49 M. L. J. 121; A. I. R. 1925 Mad. 1158 **849**

— Nambudri Illom—*Family karar providing for management of properties—Karnavan, restrictions on rights of, validity of—Suit against Anandravan for acts of misconduct—Defendant becoming Karnavan during pendency of suit—Suit, whether can proceed.*

An agreement by an *anandravan* under a family *karar* to have his rights as *karnavan* restricted when he succeeds to the latter office is valid and effective, but the agreement must be clearly expressed.

Ordinarily a suit for the recovery of *tarwad* property must be brought by the *karnavan* and an *anandravan* cannot sue unless the *karnavan* is under some disability. Where, however, a suit is brought to recover *tarwad* property from the *karnavan* himself and for the removal of the latter from his office, the suit must in the nature of things be brought by persons other than the *karnavan*.

Where a defendant is charged with mis-conduct as an *anandravan* the fact that he has become *karnavan* since the institution of the suit cannot absolve him from his liability for such misconduct. The mere fact of his becoming a *karnavan* cannot do away with his responsibility for all his previous acts.

The members of a *nambudri illom* entered into a *karar* by which provision was made for the management of the *illom*. The first plaintiff, who was the *karnavan*, gave up practically all his rights as such. The defendant who was then the senior *anandravan* was appointed manager of one set of properties and the third plaintiff was appointed manager of another set of properties. The *karar* provided in detail for the various acts of management and for succession to the managership. One of the conditions of the *karar* was that it should remain in force until it was set aside by means of a registered document executed by all the adult members of the *illom*. After the defendant had been managing the properties allotted to him for sometime, the first plaintiff and plaintiffs Nos. 2 and 3, who were the only adult males in the *illom*, being dissatisfied with the management of the properties by the defendant called upon him to explain his conduct. He failed to do so and thereupon in accordance with the procedure laid down in the *karar*, the plaintiffs dismissed him from his office and brought a suit for a declaration that the defendant was no longer entitled to manage the properties and for an account and other reliefs. After the suit was filed the first plaintiff died and the defendant became the *karnavan* of the *illom*. He thereupon

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contended that the suit could not proceed against him:

Held, (1) that the *karar* to which the defendant was party was still binding upon him and had not come to an end merely by the death of the previous *karnavan*;

(2) that the defendant having agreed to be bound by the terms of the *karar*, his rights as *karnavan* were restricted in accordance with the terms of the *karar*;

(3) that consequently the suit could proceed against the defendant in accordance with the terms of the *karar*. *M SANKARAN v. VATAKKIMYEDATH KIRANCHAT*, 48 M. L. J. 691; A. I. R. 1925 Mad. 894; 23 L. W. 205

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— Tarwad—*Karnavan, powers of, to demise land on kanom and grant melcharth—Family with small property—Property held by junior members for maintenance—Demise, whether prudent.*

The demising of lands on *kanom* in a Malabar *tarwad* is in the ordinary course of management by the *karnavans* of well-to-do families, and the *karnavan* of a *tarwad* or *tavazhi* has ordinarily full power to demise lands belonging to the *tarwad* or *tavazhi* on *kanom*, and, after the expiry of the period of *kanom*, to give *melcharth*.

But where the family property is small and consists of very few items, which are actually in the possession of the junior members of the family under arrangement with the *karnavan* for maintenance and out of the income of which they maintain themselves and the *karnavan* has no other property with which to maintain them, it is not a prudent act on the part of the *karnavan* to grant the properties on *kanom* to a stranger and thereby dispossess them of the lands. Such a demise is not binding on the members affected. *M CHAMBU v. PAZANI*, 21 L. W. 78; A. I. R. 1925 Mad. 740

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Mamlatdars' Courts Act (II of 1906), s. 23—

Revision—Applicant, whether entitled to be heard.

The ordinary rule is that where the law allows a party to make an application to a Court, the applicant is entitled to be heard either in person or through his Pleader, before his application is rejected.

Therefore, where a person dissatisfied with the decision of a *mamlatdar* under the Mamlatdars' Courts Act applies to the Collector under s. 23 of the Act to revise the order of the *mamlatdar* he is entitled to be heard either in person or through his Pleader before his application is rejected. *B GANPATI KONDAJI SANDBHAR v. MARUTI GANGAJI SANDBHAR*, 27 Bom. L. R. 1115; A. I. R. 1925 Bom. 522

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Minor—Guardian, alienation by, of minor's property

—Discharge of money-decree against both guardian and minor—Benefit, extent of.

Where for the purpose of discharging a money-decree obtained against a minor and his guardian jointly and severally, the guardian mortgaged the properties solely belonging to the minor, in a suit to enforce the mortgage:

Held, (1) that the ultimate liability of the minor under the money-decree was only in respect of half of the decree amount;

(2) that the minor received benefit only as to half the amount and the mortgage was binding only to that extent. *M CHINNATHAMBI CHETTI v. APPAVOO CHETTI*, 22 L. W. 466

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—Guardian ad litem—Gross negligence, test of—Negligence, meaning of—Due care, standard of.

Minor—concl.

A minor has a remedy either by application for review of judgment or by separate suit when either "gross" laches or fraud or collusion is found in the next friend or the guardian *ad litem*, but the negligence or laches of the guardian which entitles the minor to avoid the decree must be of a gross character. The test is whether or not there has been a culpable negligence of the interests of the minor. Has there been in the conduct of the suit any act or omission on the part of the next friend or the guardian *ad litem*, which in the result has wrought prejudice to the minor's interests? That is what is meant by the expression "gross" negligence or laches when used in this context.

Negligence is the breach of a legal duty to take care and unless it is known what that duty is in a particular case it is not possible to predicate whether there has been negligence or not.

The standard of due care in all cases in which a duty to take care exists is the care which would be taken in the same circumstances by an ordinary careful man. The test is the conduct of the average man in like circumstances, with like knowledge and means of knowledge and the amount of care will be different in different cases. *A BRIJ RAJ v. RAM SARUP*, L. R. 6 A. 488 Civ.; 23 A. L. J. 901; A. I. R. 1926 All. 36; 48 A. 44

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Mortgage—Prior and subsequent mortgagees—Suit by prior mortgagee—Puisne mortgagee not made party—Sale in execution of mortgage-decree—Surplus proceeds after discharging prior mortgagee's claims—Puisne mortgagee, right of, whether confined to sale of property—Right to surplus proceeds in prior mortgagee's suit—Attaching creditor, rights of—Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 1, 13.

Where a prior mortgagee makes a puisne mortgagee a party to his suit and brings the property to sale, the puisne mortgagee can only proceed against the balance of the sale-proceeds in Court after satisfying the claim of the prior mortgagee. His right of suit against the mortgagor is taken away by his being made a party to the suit of the prior mortgagee. But where a puisne mortgagee is not made a party to the suit, a sale in execution of the prior mortgagee's decree cannot affect his title. In such a case he has an option either to proceed against the mortgaged property by bringing it to sale or to proceed against the sale-proceeds in Court in the prior mortgagee's suit after satisfying the claims of the prior mortgagee.

Although r. 1 of O. XXXIV of the C. P. C. requires all puisne mortgagees to be brought on the record in a prior mortgagee's suit, r. 13 of the Order does not restrict the right of a puisne mortgagee, not made a party to the suit, to claim any amount in Court on the ground that he has an interest in the mortgaged property.

The right of a subsequent mortgagee to the sale-proceeds of the mortgaged property is only subject to that of the prior encumbrancer, but he has a prior claim over any simple money creditor and the mortgagor. A simple money creditor who attaches the money in Court attaches it as the property of the mortgagor and the mortgagor certainly is not entitled to the money in Court in preference to the mortgagee whose debt he is liable to discharge. *M KRISHNASWAMI BHAGAVATHAR v. THIRUMALAI IYER*, A. I. R. 1926 Mad. 101

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—Redemption—Integrity of mortgage, broken up, effect of—Co-mortgagor, whether can redeem

Mortgage—contd.

more than his own share—Redemption suit—Parties necessary.

Where the integrity of a mortgage has been broken up, a mortgagor is not entitled to claim redemption of more than his own share of the mortgaged property, the reason being that the integrity of a mortgage is necessary for the benefit of the mortgagee alone, and where that has been broken and a redemption has to be allowed, there is no equity in favour of one of the mortgagors to possess the remaining property where it is more than his own legitimate share.

In all redemption cases, which are properly framed, not only the redeeming co-sharers should be made parties but also the mortgagors who have not so far joined in the suit for redemption. The necessity of impleading co-mortgagors is this that the share and the right to redeem of the plaintiff cannot be determined behind the back of the non-redeeming mortgagors. **A AHMAD HUSAIN v. MUHAMMAD QASIM KHAN**, L. R. 6 A. 598 Civ.; 24 A. L. J. 88; A. I. R. 1926 All. 46

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——— *Redemption postponed for long term, whether clog on equity of redemption—Transaction, nature of.*

The postponement of redemption for a long time does not by itself operate as a clog on the equity of redemption.

The true test in such a case is: was the transaction in its essence an advancement of a loan on one side and furnishing of a security for the same on the other? If the answer is in the affirmative, postponing the right to redeem to an inordinate length of time may reasonably lead to the inference that the intention was to kill that right and this will not be permitted by law. If, on the other hand, the transaction is in its reality more than or different from a pure transaction of a loan or security, the equitable doctrine of relief against a clog on the right to redeem has no application. **O NARAIN DAS v. DEBI DIN SINGH**, A. I. R. 1926 Oudh 38

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——— *usufructuary—Profits appropriated to interest on portion of mortgage-money—Balance to carry interest—Redemption on full payment with interest—Clog on redemption—Mortgage—Second mortgage to same mortgagee—Simultaneous redemption, provision for, effect of.*

A mortgage-deed provided that the mortgagee would be entitled to appropriate the profits arising out of the mortgaged property in lieu of interest on a portion of the mortgage-money and that the payment of the balance along with interest at a certain rate shall be compulsory at the time of redemption:

Held, (1) that the agreement with regard to the payment of interest on the balance of the mortgage-money did not operate as a clog on the equity of redemption;

(2) that the intention of the parties was that no redemption should take place without payment of the entire mortgage-money plus interest at the rate provided for in the deed on that portion of the mortgage-money which carried interest.

Obiter.—Where money is borrowed on the security of property which is already mortgaged to the same creditor and there is a stipulation in the subsequent deed that without payment of the two sums the property is not to be redeemed the effect of the clause is to create a further mortgage and to make the property security for the additional debt. **A JEET KOERI v. MATHURA KOERI**, L. R. 6 A. 228 Civ.; A. I. R. 1926 All. 171; 24 A. L. J. 125

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Mortgage—concl'd.

——— *usufructuary—Term fixed for redemption—Mortgagee, failure of, to carry out terms of mortgage—Redemption before expiry of term, whether can be allowed—Accounts, basis of.*

Where under the terms of a mortgage the mortgagee is asked to pay himself the principal and interest out of the rents and profits of the mortgaged property, he is entitled to remain in possession till the mortgage-debt is wiped off from the rents and profits of the property.

When a term is fixed in a usufructuary mortgage-deed and possession is given to the mortgagee, unless there be a clause in the mortgage-deed itself enabling the mortgagor to redeem the mortgage at any time he chooses, the mortgagee is entitled to remain in possession till the close of the term. In such a case it cannot be said that the term fixed in the mortgage-deed is only for the benefit of the mortgagor, it is equally for the benefit of the mortgagee as well as the mortgagor.

The presumption is that the right to redeem and the right to foreclose arise at the same time and where a date is fixed for the payment of the mortgage-debt and the mortgagee cannot foreclose earlier, the mortgagor also cannot redeem before the appointed time.

Where a mortgagee undertakes to pay out of the rents and profits of the land mortgaged to him a certain amount for the expenses of the mortgagor he is bound to carry out the term of the contract and when he undertakes to pay *beriz* on the land, his failure to pay it would amount to a breach of the contract as it would thereby expose the land to be attached and sold for arrears of *beriz*. In such a case if the mortgage-deed fixes a term for redemption, a Court of Equity will grant relief to the mortgagor and allow him to redeem the property before the expiry of the term.

A mortgagee is not bound to accept the mortgage amount from the mortgagor if the latter tenders it before the expiry of the term fixed for redemption. But where the mortgagee is in possession of the mortgaged property, and unless there is a stipulation that all the rents and profits should be applied towards interest, whatever remains over and above the interest due on the mortgage amount is bound to be applied towards the reduction of the principal.

In a suit for redemption of a usufructuary mortgage the plaintiff is entitled to have an account taken of the rents and profits of the mortgaged property. No question of limitation arises in such a case. So long as the relationship of mortgagor and mortgagee subsists, the mortgagee who is in possession of the mortgaged property is bound to account for the rents and profits of the land. But in taking the account, sums which the mortgagee should have paid to the mortgagor but has not paid, must be applied towards the reduction of the mortgage amount. **M DRONAMRAJU LAKSHMI v. IMMANI SESHAYYA**, 48 M. L. J. 363; A. I. R. 1925 Mad. 825; A. I. R. 1926 Cal. 242

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Motor Vehicles Act (VIII of 1914), ss. 5, 18 (2) —Conviction for dangerous driving.

The best way to stop dangerous driving of motors is for the Court, on a conviction of the offender under s. 5 of the Motor Vehicles Act, instead of imposing a fine disproportionate to the pecuniary means of the latter, to exercise its powers under sub-s. (2) of s. 18 of the Act, and to cause particulars of the conviction to be endorsed on the license held by the offender and to cancel or suspend that license, or to declare the offender disqualified for obtaining a license either permanently or for such period as it

Motor Vehicles Act—concl'd.

thinks fit. **B BASAPPA RACHAPPA HUNDEKAR v. EMPEROR**, 27 Bom. L. R. 1056; A. I. R. 1925 Bom. 526; 26 Cr. L. J. 1536

320
Muhammadan Law—Divorce pronounced under compulsion, legality of—Pronouncement of divorce contained in compromise deed, validity of—Hanafi School.

According to the Hanafi School of Muhammadan Law a divorce pronounced under compulsion is valid even when contained in a written document, provided that the document is addressed to the party to be divorced and provided it actually pronounces the divorce and is not merely an acknowledgment of something agreed to under compulsion.

A criminal proceeding was compromised and the compromise deed contained the following clause:—"I release you Akhtar Khatoon from the marital bond by giving you three *talqs* according to the Muhammadan scriptures." The compromise was signed by the husband who pronounced the divorce and by the wife who was divorced and was addressed by the husband to the wife:

Held, that the compromise deed contained not merely an acknowledgment of divorce but an actual pronouncement of divorce and operated as a valid divorce under Muhammadan Law. **C JORINA AKTAR KHATON v. HAFEZUDDIN KHAN**, 30 C. W. N. 178; A. I. R. 1926 Cal. 242

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Gift to daughter-in-law of residential house
—Actual transfer of physical possession, whether necessary.

The fact that a Muhammadan, after making a gift to his daughter-in-law of a house in which both reside, by a registered deed, which recites that possession of the house has been delivered to the donee, continues to live in the same house with the donee for about a month after the date of the gift till his death, does not show that possession was not given to the donee as expressly stated in the deed, and the gift is not invalid on that account.

Actual transfer of physical possession is not necessary to complete the gift in such a case. **L RAHMAT ALI v. DAULAT BIBI**, A. I. R. 1925 Lah. 501; 7 L. L. J. 301

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Marz-ul-maut. See MUHAMMADAN LAW—

WAKF

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Pre-emption—Person entitled to pre-emption associating stranger in suit, effect of—Person qualified to enforce right of pre-emption associating pre-emptor who is not qualified, effect of—Sale of dominant tenement—Owner of servient tenement, whether can pre-empt—Talab-i-ishtishhaad, when to be made—Delay in making demand, effect of.

Where a person entitled to claim pre-emption under the Muhammadan Law joins with himself as co-plaintiff a person who has no such right, he forfeits his own pre-emptive right and the suit must be dismissed as against both.

Where, however, several persons who join as plaintiffs in a suit for pre-emption have an equal right of pre-emption, but some of them have qualified themselves under the Muhammadan Law to enforce such right and the others have not, the suit is maintainable at the instance of the former and is not liable to dismissal merely because some of the plaintiffs have not so qualified themselves.

Where a dominant tenement is sold the owner of the servient tenement has a right to pre-empt the sale under the Muhammadan Law as a *shafi-i-khalit*. The *talab-i-ishtishhaad* required by the Muhammadan

Muhammadan Law—concl'd.

Law of Pre-emption must be made with the least practicable delay and the question whether that formality has been duly and sufficiently observed with regard to the time at which it should have been observed is a question to be decided in each case by the Court which has to deal with the facts.

Unless the purchase price is known to the person entitled to pre-emption, he has not all the facts before him to enable him to decide whether he will exercise his right of pre-emption. He must, however, take immediate steps to ascertain the price and then make the *talab-i-ishtishhaad* forthwith and any unreasonable delay in ascertaining the particulars or in making the demand would operate as a forfeiture of his claim.

PAT TOKH NARAYAN PURI v. RAM RACHHYA SINGH, (1925) Pat. 265; A. I. R. 1925 Pat. 743; 5 Pat. 96; 7 P. L. T. 233

806
Wakf—Marz-ul-maut, what is—Death illness—Paralysis—Possession of senses—Apprehension of death—Mutwalli's misfeasance, whether affects validity of wakf.

An old Muhammadan was attacked in February 1895 by paralysis of the lower limbs rendering him a helpless invalid, permanently confined to his bed. In March he executed a *waqfnama* and died in the following November:

Held, that the doctrine of *marz-ul-maut* applied and that the *waqf* was valid only to the extent of one-third of the *waqif's* assets.

Per Mukerji, J.—The limit of one year in cases of *marz-ul-maut* does not constitute a hard and fast rule.

In order to make the doctrine of *marz-ul-maut* applicable there must be (1) illness, (2) expectation of a fatal issue, and (3) certain physical incapacities which indicate the degree of illness.

Death illness is illness in which death is highly probable whether incapacities exist or not.

The question to be considered in cases of *marz-ul-maut* is whether the donor executed the deed of gift under apprehension of death.

Possession of one's senses and mental faculties is no index of the pressure of sense of imminent death.

Misfeasance or misfeasance of a *mutwalli* does not invalidate a *waqf* which at its creation was a valid one. **C KARIMAN NISSA BIBI v. HAMEDULLAH**, 30 C. W. N. 129; A. I. R. 1926 Cal. 401

218
Mutwalli, if can grant permanent lease—Lessee if can acquire adverse possession—"Istimrari mokarrari," meaning of—Landlord and tenant—Permanent tenure—Burden of proof.

A *mutwalli* of a *wakf* estate cannot create a leasehold interest to endure beyond his life unless authorised by the Kazi.

The lessee of a *mutwalli* acquires no title by adverse possession against the succeeding *mutwalli*, and if the latter recognizes the interest of the lessee, a new tenancy is thereby created.

Where a tenancy created by a *mutwalli* is not challenged for over 70 years and the rent remains unchanged, applications for enhancement having failed, the Court can presume the grant to be of lawful origin and of a permanent and heritable nature.

The words '*istimrari mokarrari*' do not necessarily mean permanent and heritable. The nature of an *istimrari mokarrari* grant is to be determined from the circumstances of the case.

When the relation of landlord and tenant is admitted, the onus of proving a permanent tenure at a fixed rent is on the tenant. **C JABEDA KHATUN v. MAHOMMAD MOZAFFAR ALI**, A. I. R. 1926 Cal. 322

Negligence, meaning of—Due care, standard of. See MINOR 749

Negotiable Instruments Act (XXVI of 1881), s. 6
—Post-dated cheque, whether can be sued upon as cheque.

A post-dated cheque which is not expressed to be payable otherwise than on demand is a cheque within the meaning of s. 6 of the Negotiable Instruments Act and may be sued upon as such after the due date. C WALTER MITCHEL v. A. K. TENNENT, 52 C. 677; A. I. R. 1925 Cal. 1007 59

—s. 9—Pro-note in favour of agent—Suit by principal without endorsement, whether maintainable.

Where a promissory note is executed in favour of a person as the agent of another, such other, as principal, is entitled to maintain a suit on the note without any endorsement from the agent. M SUBRAMANYA IYER v. A. SUBBAN CHETTIAR, 21 L. W. 696; A. I. R. 1925 Mad. 1130 1047

—s. 45, scope of—Negotiable instrument, suit on—Partial failure of consideration, whether can be pleaded.

Per Krishnan, J.—Partial failure of consideration in respect of a negotiable instrument is a defence *pro tanto* against an immediate party when the failure is an ascertained and liquidated amount, but not otherwise, that is, when a collateral enquiry becomes necessary for the purpose. Where a bill is drawn for the price of two bales and only one is delivered, the defence that consideration has failed to the extent of one half is available. Where a *hundi* amount represents the advance price paid for a number of bales, the advance towards each bale being definite and fixed, the consideration for the *hundi* can be pleaded to have failed with reference to the undelivered bales and that is a sum that can be computed without any inquiry. M ARUNACHELAM CHETTY v. KRISHNA IYER, (1925) M. W. N. 324; 22 L. W. 265; 49 M. L. J. 530; A. I. R. 1925 Mad. 1168 481

—s. 118.

The provisions of s. 118 of the Negotiable Instruments Act do not affect the question with regard to the admissibility in evidence of a document, which depends entirely upon the document as it stands. B RAM PARSHAD SHIVLAL v. SHRINIVAS BALMUKAND, 27 Bom. L. R. 1122; A. I. R. 1925 Bom. 527 685

Notice sent to person in occupation of land not to cultivate it—Damages, suit for—Malice—Burden of proof.

The law encourages persons who have *bona fide* rights to give notice to other persons who are likely to be affected by such rights, and it is not the policy of the law to presume either malice or *mala fides* in such cases on the part of the person who gives such notice, but to require clear proof of the same.

Where in consequence of such a notice warning the person to whom the notice is sent to desist from cultivating the land without the permission of the person sending the notice, the person to whom the notice is sent ceases to cultivate the land, he cannot claim damages from the person who sent the notice unless he proves actual malice on his part. If the defendant in such a case proves that he sent the notice in the *bona fide* assertion of his own right, real or supposed, to the property, the action will not lie. R MAUNG PO KA v. MAUNG SAN PE, 3 R. 295; A. I. R. 1925 Rang. 369 907

Oaths Act (X of 1873), scope of. See EVIDENCE ACT, 1872, s. 92 378

—s. 11—Agreement to be bound by oath—Failure to take oath, effect of—Procedure.

Under s. 11 of the Oaths Act, the evidence given on oath is, as against a person who offered to be bound, conclusive proof of the matters stated. But if the party who agrees to take an oath declines afterwards or fails to take the oath, the Court may only take that circumstance into consideration in deciding the case. The absence of an oath or refusal to take the oath would not import into the case evidence which was not otherwise adduced before it.

On an application by the defendant in a suit, to set aside an order refusing to set aside an *ex parte* decree, the plaintiff agreed to abide by the oath of the defendant that he was not aware of the institution of the suit. The oath, however, was not taken on account of plaintiff's default to be present to hear the oath. The Court, thereupon, dismissed the application:

Held, that the Court ought to have called upon the defendant to prove his allegations by oral evidence that on his declining to do so, it should have dismissed the application for want of evidence, and that it was improper to dismiss the application without affording the defendant such opportunity. M BATHCOR GRAMATHIL v. MUNNABETH AMBANAIR, 49 M. L. J. 379; 22 L. W. 487; A. I. R. 1925 Mad. 1264 577

Oudh Civil Courts Act (XIII of 1879), s. 18—Pre-emption claimed on payment of less than Rs. 5,000—Decree on payment of more than Rs. 5,000—Appeal.

In a pre-emption suit the plaintiff claimed decree on payment of Rs. 3,552-12-0 as market value of the property in suit, but the Court granted decree on payment of Rs. 7,410-3-0:

Held, that appeal against the decree lay to the District Judge and not to the High Court. O GANESH PRASAD v. SANT DIN, A. I. R. 1926 Oudh 140 760

Oudh Civil Digest, s. 279—Title claimed by inheritance—Compromise—Antecedent title recognized—"Ancestral land."

If a dispute in which a person claims to succeed to certain landed property by right of inheritance, based on an alleged custom, results in a compromise which recognises the claimant's antecedent title to the property, his interest in such property is "directly or indirectly inherited", and, therefore, "ancestral land" within the meaning of s. 279 (a) of the Oudh Civil Digest. O AMEER MIRZA BEG v. UDIT PERSHAD, 2 O. W. N. 816; A. I. R. 1925 Oudh 709 779

Oudh Estates Act (I of 1869), ss. 13A (2), (3), 22, as amended by Oudh Estates (Amendment) Act (III of 1910)—List II Estate—Will by taluqdar in favour of agnate—Legatee not nearest agnate at time of testator's death—Will, whether governed by sub-s. (2) or sub-s. (3) of s. 13A—Registration, form of—Registration Act (XVI of 1908), ss. 35, 42, 48.
Per Daniels, J. C., and Simpson, A. J. C. (Dalal, A. J. C., dissenting).—A Will made by a taluqdar of an estate entered in List II of the Lists prepared under s. 8 of the Oudh Estates Act, where the succession is governed by s. 22 of the Act, in favour of an agnate who is not the nearest agnate of the testator at the time of the testator's death, is governed by sub-s. (2) of s. 13A of the Oudh Estates Act, as amended by the Oudh Estates Amendment Act of 1910 and, therefore, a Will in favour of such a person duly executed and attested more than three months before the testator's death and

Oudh Estates Act—concl'd.

registered under ss. 42 and 43 of the Registration Act is, in all respects, a good and valid one.

Per Dalal, A. J. C.—The plain meaning of cl. (2) of s. 13A of the Oudh Estates Act is that it includes every kind of heir mentioned in the amended s. 22 of the Act and no one else. Clause (10) of s. 22 provides only for the nearest male agnate and where a person is not such male agnate at the time of the testator's death when the bequest takes effect he does not come under that clause.

In interpreting cl. (2) of s. 13A of the Oudh Estates Act, the Court has to look for possible heirs at the time of the *taluqdar's* death and in cl. (10) of s. 22 the only possible heir can be the nearest male agnate.

Per Daniels, J. C.—The words "in the absence of other heirs" in cl. (2) of s. 13A of the Oudh Estates Act apply just as much to the absence of heirs who might take in priority under cl. (10) as to the absence of other heirs falling under cls. (1) to (9) of s. 22 of the Act.

The classification introduced by s. 13A of the Oudh Estates Act is a perfectly natural and intelligible one, namely, first the immediate heir and one or two persons who are grouped with him, then the remote heir, and lastly the person who is not a possible heir at all, and there is nothing either absurd or improbable in the Legislature enacting that when the estate is bequeathed to a kinsman of the testator it should continue to be governed by the Act, whereas if it passes to a stranger it should not be so governed.

The difference between cls. (2) and (3) of s. 13A of the Oudh Estates Act is that in the case of cl. (2) the Will may be registered by deposit with the Registrar in a sealed cover with the name of the testator and a statement of the nature of the document, whereas in the case of a person falling under the third clause there must be what may be called open registration, that is to say, the document must be registered with the same formalities as any ordinary deed. There is this further difference that by ss. 14 and 15 of the Act a Will in favour of any of the persons mentioned in cls. (1) and (2) of the section leaves the estate still subject to the provisions of the Act, whereas a Will in favour of a person under cl. (3), except where it is in favour of another *taluqdar*, takes the estate out of the Act and brings it under the operation of the ordinary law of succession. **O** ACHAL SINGH v. SHAGHUNATH KUER, 2 O. W. N. 713; 12 O. L. J. 603; A. I. R. 1926 Oudh 2; 29 O. C. 51 **470**

Oudh Laws Act (XVIII of 1876), s. 13—Pre-emption—Duty of Court—Determination of market value—Finding of fact.

When the plaintiff in a suit under Ch. II of the Oudh Laws Act alleges that the price stated in the sale-deed is fictitious and the allegation is denied, the Court, under s. 13 of the Act, has not to determine what the price paid for the property actually is but whether the price stated in the deed is fictitious as alleged and, if so, what the fair market-value of the property is.

The question of the market-value is one of fact and cannot be discussed in second appeal. **O** HAR PERSHAD v. SHRO SHANKER, A. I. R. 1926 Oudh 68 **679**

Oudh Rent Act (XXII of 1886), ss. 32 A, 32 B, 127—Rent, arrears of, suit to recover—Agreement to pay rent—Relationship of landlord and tenant—Defendant not entitled to possession of land—Findings against plaintiff—Suit, whether maintainable.**Oudh Rent Act—concl'd.**

Plaintiff brought a suit to recover arrears of rent from the defendant on the allegation that the defendant held the land under a *kabuliyat* executed by him. It was further alleged that even if the *kabuliyat* was not proved, the defendant had been paying rent to the plaintiff and that the relationship of landlord and tenant existed between the parties. The defendant set up a quasi-proprietary title to the land. He did not admit that he was a tenant of the plaintiff at all and denied the *kabuliyat* and the payments of rent alleged by the plaintiff. It was found that the *kabuliyat* was fictitious and that the defendant had never paid rent to the plaintiff. Plaintiff also failed to show that the defendant was not entitled to possession of the land:

Held, that the plaintiff's suit must fail inasmuch as (a) he could set up no case under s. 32 A of the Oudh Rent Act as it had been found that defendant had never agreed to pay rent to him; (b) he could not proceed under s. 32 B of the Oudh Rent Act as he had failed to prove that the relationship of landlord and tenant existed between him and the defendant; (c) he could not succeed under s. 127 of the Oudh Rent Act as he had failed to show that the defendant was a person not entitled to the possession of the land. **O** TAWAKKUL KHAN v. MUHAMMAD MEHDI ALI KHAN, A. I. R. 1926 Oudh 49 **375**

Pardanashin Lady, conveyance from, proof of.

Any person taking a conveyance from a *pardanashin* lady must prove that the document was explained to her, that she understood what she was doing and that she had independent advice. Where, however, it is established that the lady knew what the nature of the document was that she was executing and that she had independent advice, it is not necessary to prove the formal reading over or explanation of the document. **G** RAKHAL CHANDRA BARDHAN v. PROSAD CHANDRA CHATTERJEE, A. I. R. 1926 Cal. 73 **229**

Partition Act (IV of 1893), s. 4, application of—When and by what Court order can be passed under s. 4—Reconveyance to vendor after order under s. 4—Civil Procedure Code (Act V of 1908), s. 99—Appellant's case weak on merits—Interference with irregular order.

Section 4 of the Partition Act requires the presence of 3 conditions before the Court can take action under it: (i) the dwelling house should belong to an undivided family; (ii) a share thereof should have been transferred to a person who is not a member of such family, and (iii) the transferee should sue for partition.

The operation of s. 4 of the Partition Act comes into play after the Court has found that the stranger transferee is entitled to partition. In fact no order can be passed under the Partition Act before the Court has found that such a transferee has succeeded in establishing his claim for a partition of the undivided homestead.

A Court of Appeal is as much entitled to pass an order under s. 4 of the Partition Act as the Trial Court. The word "Court" in the section is not confined to the Trial Court, and the power conferred by the section may be exercised even by an Appellate Court.

The right conferred by s. 4 may be exercised at any time before the final allotments take place. The section does not indicate as to when the willingness

Partition Act—concl'd.

of a member of a family should be signified to the Judge to enable him to pass an order under s. 4.

In a partition suit by a purchaser from a co-sharer, the Appellate Court finding the purchaser's title as proved, sent back the record of the case to the Trial Court for effecting partition. After the latter Court had taken steps towards the appointment of a Commissioner for partition, the Appellate Court, on an application being made to it, passed an order under s. 4 of the Partition Act:

Held, that the Appellate Court had not lost its jurisdiction to pass the order it did merely because it had sent back the record to the Trial Court and that Court had taken some action in the matter.

Where an appellant's case is extremely weak on the merits, the High Court will not interfere under s. 99, C. P. C., with an irregular order of the Court below.

Where a purchaser reconveyed the property to the vendor after an order had been passed by the lower Appellate Court under s. 4 of the Partition Act the High Court declined to countenance the action, but permitted the vendor, under r. 10, O. XXII, C. P. C., to continue the appeal. **C NIRANKA SASHI ROY v. SWARGANATH BANERJEE**, A. I. R. 1925 Cal. 95 **121**

Partnership—Partners, whether can carry on business privately—Liability to account for profits of business carried on privately.

Unless expressly restricted by agreement, a partner may carry on another business privately so long as it does not compete with and is not connected with the business of the firm and so long as he does not represent it to be the business of the firm. A partner is not bound to account for the profits of a non-competing business even though he may be enabled to push the private trade better than would otherwise be the case, by reason of his connection with the firm. **C MOHAMMED KAMIL v. HEDAYETULLA**, A. I. R. 1926 Cal. 380 **492**

— Suit against firm, nature of—Liability of each partner—Firm having another firm as partner—Dissolution of former, effect of, on latter. See C. P. C., 1908, O. XXX, r. 3 **242**

Part-performance, doctrine of, applicability of. See REGISTRATION ACT, 1908, s. 17 **1016**

Penal Code (Act XLV of 1860), s. 30—Valuable security—Invalid document, whether valuable security.

A document, which upon certain evidence being given may be held to be invalid, but on the face of it creates or purports to create a right in immoveable property, although a decree could not be passed upon it, falls within the purview of the definition of "valuable security" in s. 30 of the Penal Code. **A RAM HARAKH PATHAK v. EMPEROR**, L. R. 6 A. 181 Cr.; 23 A. L. J. 990; 26 Cr. L. J. 1617; A. I. R. 1926 All. 57 **913**

— **s. 34—Criminal act done in furtherance of common intention.**

In order to convict a person for an offence with the aid of the provisions of s. 34 of the Penal Code, it is not necessary that that person should actually with his own hand commit the criminal act. If several persons have the common intention of doing a particular criminal act and if in furtherance of that common intention all of them join together and aid or abet each other in the commission of the

Penal Code—cont'd.

act, then although one of these persons may not actually with his own hand do the act, if he helps by his presence or by other acts in the commission of the act, he would be held to have done that act within the meaning of s. 34. **PAT HARIHAR SINGH v. EMPEROR**, 26 Cr. L. J. 1498; A. I. R. 1926 Pat. 182 **154**

— **ss. 34, 149, 325—Unlawful assembly—Rioting—Common intention under s. 34, proof of.**

Where in a case in which the accused are charged under s. 325 read with s. 149 of the Penal Code, it is not found possible to bring home the offence to the accused with the aid of the provisions of the latter section, *a fortiori* it would be more difficult to bring home the offence to them with the aid of s. 34 of the Penal Code. In order to bring the accused within the scope of s. 34 it is necessary to come to a definite finding that the accused were acting in furtherance of the common intention of all. **PAT BHABATARAN MAHTO v. EMPEROR**, (1925) Pat. 278; A. I. R. 1925 Pat. 706; 26 Cr. L. J. 1601 **705**

— **s. 99—Private defence—Plea, whether can be raised in Appellate Court—Right, when can be exercised.**

It is open to an accused person to raise the plea of private defence in the Appellate Court even though it was not taken before the Trying Court where he altogether denied the offence, but the plea cannot help him when his object in causing the injury was not to save himself but to beat his assailant and when it was not necessary for the purpose of self-defence to have inflicted the injury actually caused. **N RAHIMAN-SHAH v. EMPEROR**, 26 Cr. L. J. 1552; A. I. R. 1926 Nag. 202 **400**

— **ss. 99, 325—Public servant acting without jurisdiction—Right of private defence—Assault on public servant—Grievous hurt.**

Section 99 of the Penal Code has no application to a case where the initial proceeding and the power under which a public servant purports to act are altogether without jurisdiction and entirely *ultra vires*.

A Police Officer noticing one H. going about at night time armed with a long handled hatchet asked him to hand over the hatchet, but H. refused to give it up whereupon the Police Officer laid his hands on the hatchet in order to snatch it from H. The latter resented this and shouted out, on which certain persons came up to his assistance and assaulted the Police Officer causing grievous hurt to him. H. and his companions were tried and convicted of an offence under s. 325 of the Penal Code:

Held, (1) that the act of the Police Officer in trying to snatch away the hatchet from H. was wholly without jurisdiction and that, therefore, s. 99 of the Penal Code was not applicable to the case;

(2) that, however, the accused had no right to assault the Police Officer as they knew that he was not trying to commit a theft of the hatchet nor had they any reason to fear that the Police Officer would cause hurt to H. and that, therefore, they had been rightly convicted. **L HAQ DAD v. EMPEROR**, 6 L. 392; 26 Cr. L. J. 1631; A. I. R. 1926 Lah. 19 **927**

— **ss. 109, 114, 467, 471—Forgery—Using forged document as genuine—Witness deposing that he saw execution of document—Offence.**

Where a party to a judicial proceeding relies on a forged document in support of his case, a witness who states that he saw the execution of the document by the person by whom it purports to have been executed, intentionally aids by his deposition the using of the

Penal Code—contd.

document as genuine and is liable to prosecution for an offence under s. 471 read with s. 109 of the Penal Code, although he could not be charged with abetment of the forgery itself. **O** *EMPEROR v. GAJADHAR PRASAD*, 2 O. W. N. 707; A. I. R. 1925 Oudh 610; 26 Cr. L. J. 1567 **447**

— **s. 121.** See CR. P. C., 1898, s. 239 **297**

— **s. 147—Attempt by Police to arrest persons not engaged in commission of offence—Resistance to arrest—Rioting, conviction for, legality of.**

A party of Policemen, on receiving information that certain persons were waiting near a railway line with the intention of robbing a train, arrived at the scene and found the accused and certain other persons, sitting or roaming about near the railway line. The Police attempted to arrest those present and a fight ensued but the accused were eventually secured and taken to the Police Station. They were subsequently charged with and convicted of an offence under s. 147 of the Penal Code:

Held, that the Police had no justification for attempting to arrest the accused and that consequently in resisting the arrest the accused were not guilty of the offence of rioting.

The detention or arrest of members of the public are not matters of caprice but are governed by and must be conducted upon certain rules and principles which the law clearly lays down. To arrest persons without any justification is one of the most serious encroachments upon the liberty of the subject which can well be contemplated. **PAT RAMPRIAT AHIR v. EMPEROR**, 26 Cr. L. J. 1608; 7 P. L. T. 218 **712**

— **s. 149.** See PENAL CODE, 1860, s. 34 **705**

— **s. 176—Persons legally bound to give information to Police—Omission by some of such persons, whether offence.**

The fact that some persons bound to give information have given that information while other persons who might be bound to give that information have omitted to do so, is no ground for their prosecution and conviction under s. 176 of the Penal Code. **N BHAGWANT-RAO v. EMPEROR**, 26 Cr. L. J. 1489; A. I. R. 1926 Nag. 217 **145**

— **s. 182—"Give," whether means "volunteer."**
See CR. P. C., 1898, s. 154 **316**

— **s. 188.** See MADRAS ABKARI ACT, 1886, s. 31 **436**

— **s. 193—Perjury—False answers to questions which witness could not have been compelled to answer—Offence.**

Where a person answers questions put to him in a judicial proceeding after he has sworn to tell the truth and the answers are not true, he commits perjury, even though the questions which he has answered were such as he could not have been compelled to answer. **PAT TUNIA v. EMPEROR**, 26 Cr. L. J. 1611; A. I. R. 1926 Pat. 168 **715**

— **s. 294A—Chit fund, whether lottery.** See CONTRACT ACT, 1872, s. 23 **420**

— **s. 300 (c)—Loss of temper—Lathi blow causing fracture of skull—Offence.**

A person who loses his temper and strikes another person on the head with a lathi causing extensive fracture of the skull resulting in the death of the deceased within a few hours, is *prima facie* guilty of murder under s. 300, cl. (c), Penal Code. **O SHEO DARSHAN v. EMPEROR**, 26 Cr. L. J. 1503; A. I. R. 1926 Oudh 27 **159**

Penal Code—contd.

— **ss. 300, 302—Death caused by injury sufficient in course of nature to cause death—Murder.**

Where death is caused by an injury which is in fact sufficient in the ordinary course of nature to cause death, the person responsible for having caused the injury is guilty of murder. **O EMPEROR v. BALDEO**, 26 Cr. L. J. 1491; A. I. R. 1926 Oudh 184 **147**

— **s. 366—Abduction—Girl accompanying accused without compulsion—Offence.**

A married girl, 16 years of age, accompanied the accused from place to place under circumstances which did not show that she was acting under compulsion:

Held, that the accused could not be convicted of an offence under s. 366 of the Penal Code, inasmuch as the conduct of the girl showed that there was no abduction. **L KARTAR SINGH v. EMPEROR**, A. I. R. 1925 Lah. 406; 7 L. L. J. 217; 26 Cr. L. J. 1500 **156**

— **ss. 378, III. (j), 380—Article given for repairs—Repairs not finished within fixed or reasonable time—Owner's right to take back article before completion of repairs—Workman's lien for repairs done in part—Removal of article by owner without paying for incomplete repairs—Theft—Contract Act (IX of 1872), ss. 55, 170.**

Where a certain sum is fixed for the repair of an article and there is nothing to indicate that the repairer would be entitled to receive remuneration for a part of the repair, he has no right to retain the article until he receives his remuneration for the amount of work done.

A person who is entrusted to repair a certain article is not entitled to claim lien or to refuse to part with it after doing a certain amount of work which makes no improvement thereupon, and the owner is entitled to recover it from him without paying for such work.

The owner of a kettle gave it to a workman for repairing it within 6 or 7 days for Rs. 6. After 11 or 12 days when the owner demanded return of the kettle the workman said that he had not completed repairs but that he would return the kettle if he was paid Rs. 5 for the part of the work he had already done. The owner refused to pay the amount, took away the kettle from the almirah and walked out of the shop:

Held, (1) that s. 170 of the Contract Act had no application to the case and that the workman had no lien over the kettle;

(2) that even if the owner acted improperly in demanding and taking back the kettle, he was not guilty of an offence under s. 380, Penal Code, as his object was not to cause wrongful loss to the workman or wrongful gain to himself but to recover his kettle after the lapse of reasonable time. **C JUDAH v. EMPEROR**, 29 C. W. N. 1011; 26 Cr. L. J. 1505; A. I. R. 1926 Cal. 464 **289**

— **s. 379—Theft—Servant assisting master in removing goods, guilt of.**

Where a servant knowing perfectly well that his master is removing the goods of another without even a pretence of right assists him in doing so, he acts dishonestly and is equally guilty along with his master of the offence of theft. **PAT BARHAMDEORAI v. EMPEROR**, 26 Cr. L. J. 1559; A. I. R. 1926 Pat. 36; 7 P. L. T. 272 **439**

— **ss. 463, 467—"Intent to defraud," meaning of—Signature, forgery of, as attesting witness—Valuable security, forgery of.**

Penal Code—contd.

The expression "intent to defraud" as it occurs in s. 463, Penal Code, implies conduct coupled with intention to deceive and thereby to injure; in other words "defraud" involves two conceptions, namely, deceit and injury to the person deceived, that is, infringement of some legal right possessed by him but not necessarily deprivation of property.

The signature of an attesting witness does not fix that witness with knowledge of the contents of the document or with any liability under its terms. Therefore, a forgery of the signature of the owner of a property as an attesting witness on an instrument granting a sub-lease of that property, purporting to be executed by the forger as the owner's lessee, does not fall under the definition of the offence under s. 467, Penal Code. **C AHMED ALI v. EMPEROR**, 42 C. L. J. 215; 26 Cr. L. J. 1574; A. I. R. 1926 Cal. 224 **534**

———— **s. 471.** See PENAL CODE, 1860, s. 109 **447**

———— **s. 477—Intention to cause damage or loss, whether necessary.**

In the absence of an intention to cause damage or injury a conviction under s. 477 of the Penal Code cannot be maintained. **A RAM HARAKH PATHAK v. EMPEROR**, L. R. 6 A. 181 Cr.; 23 A. L. J. 990; 26 Cr. L. J. 1617; A. I. R. 1926 All. 57 **913**

• ——— **ss. 499, 500—Defamation—Imputations concerning conduct of members of Police force—Individual member, whether defamed—Truth of imputations, plea of, proof of—Good faith, plea of—Defamatory statement, strict proof of.**

Complainant was the principal officer in charge of a certain Police force which was stationed at a certain place for the purpose of investigating a certain occurrence. There were some complaints against the conduct of the members of the Police force and the accused, after making some enquiries from the villagers, made two speeches at two different places as a consequence of which he was charged and tried at the instance of the complainant for offences under s. 500 of the Penal Code. The charge with regard to the first speech alleged that the accused had stated that not to speak of the Police only but the British Government themselves and the superior officers including from the District Magistrate down to the *daroga* and the *chaukidars* were all beasts and pigs in their conduct, and the charge with regard to the second speech alleged that the accused had stated that the Police force had bitten off the nipple of the breast of a woman and had bitten the cheek of a woman nine months pregnant. In his defence the accused sought to prove the notes taken by him of the statements made to him by the villagers of the ill-treatment accorded to them by members of the Police force, but the notes of statements of those persons who were not called as witnesses at the trial were not admitted in evidence.

Held, (Per **Newbould, J.**)—(1) that the statement by the accused that the members of the Police force were beasts and pigs in their conduct was defamatory of the complainant who was a member of the Police force and that the imputation having been made against the Police force as a whole employed under the complainant the accused was guilty of the offence of defamation in respect of that statement;

(2) that so far as the second charge was concerned it related to definite acts of brutality by individual members of the Police force and inasmuch as the complainant personally was not accused of the brutal conduct alleged, the accused could not be

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convicted of an offence under s. 500 of the Penal Code in respect of the second charge.

Per **Ghose, J.**—(1) that the accused was entitled to prove the notes of the statements made to him by the villagers as evidence of his good faith and that the notes were relevant on the question, although the persons who had made the statements were not examined as witnesses;

(2) that the words in the first charge that not to speak of the Police only but the British Government themselves and the superior officers including from the District Magistrate down to the *daroga* and *chaukidars* were all beasts and pigs in their conduct were too wide to admit of the construction that any particular Police Officer was defamed;

(3) that the second charge related to specific acts of brutality of which the Police force as a body could not have been guilty and that the statement, therefore, referred to the personal conduct of some of the constables and had no reference to the complainant;

(4) that, therefore, the petitioner could not be convicted of an offence under s. 500 of the Penal Code on either charge;

(5) that as the evidence showed that the Police force had been guilty of acts of misconduct, oppression and persecution the accused had reasonable grounds for believing in the truth of the allegations made to him and that the case was, therefore, covered by the 9th Exception to s. 499 of the Penal Code and that on that ground also the accused was entitled to an acquittal.

Per **Buckland, J.**—that there was confusion in the charges between the complainant and the Police force of which he was in charge in relation to the various ingredients of the charges and that consequently there had been no proper trial of the accused and that the accused must, therefore, be re-tried on charges properly framed.

Per **Ghose, J.**—To speak of a person that he is a beast and a pig in his conduct is defamatory.

In a prosecution under s. 500 of the Penal Code the words complained of as constituting the offence must be set out in the charge and proved before the accused can be convicted. When there is a denial the evidence in support of the prosecution must be scrutinized.

When spoken words are alleged to have constituted the offence of defamation, a very slight alteration of a word may give quite a different meaning to the whole statement.

Where the words ascribed to the accused are differently stated by each witness and the petition of complaint also puts them differently it cannot be said to have been proved that the accused spoke the words stated in the charge, and it would not be correct to say that the words given in the different versions have the same meaning.

If a person complains that he has been defamed as a member of a class he must satisfy the Court that the imputation complained of is against him personally and that he is the person aimed at, before he can maintain a prosecution for defamation.

All circumstances which were apparent to the by-standers at the time the words were uttered should be put in evidence so as to place the Court as much as possible in the position of such by-standers, and then it is for the Court to say what meaning such words would fairly have conveyed to their minds.

Where the defamation imputes a crime to the com-

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plainant and the accused pleads justification there must be the same strictness of proof as on a trial for such crime.

Per *Buckland, J.*—In a case in which Explanation II to s. 499 of the Penal Code is properly called into use the identity of the company or association or collection of persons must be maintained throughout with reference to the imputation said to have been made concerning them as such with the intention of harming their reputation so that thereby they are defamed. An imputation concerning a company or association of persons as such cannot by virtue of this Explanation justify a charge of defaming an individual and a charge cannot combine the Explanation with the definition for such a purpose.

The offence of defamation consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it. It may be that an individual is as much defamed by words apparently only of more general application as by words referring to him by name.

The question for the consideration of the Court is whether it thinks that the libel designates the complainant in such a way as to let those who know him understand that he is the person meant. It is not necessary that all the world should understand the libel: it is sufficient if those who know the complainant can make out that he is the person meant. *C PRATAP CHANDRA GUHA ROY v. EMPEROR*, 29 C. W. N. 904; 42 C. L. J. 178; A. I. R. 1925 Cal. 1121; 26 Cr. L. J. 1539 **387**

Pleadings and proof. See PRACTICE 263**Second appeal—Alternative case.**

If the defendant in a case pleads that a certain plot of land does not exist at all and that its inclusion in a *patta* and *kabuliyat* was a fraud on the registration law, and the Trial Court finds accordingly, but the lower Court of Appeal finds the plot in question as "real existing property and not fictitious or non-existent", the defendant cannot be allowed to contend in second appeal that even if the plot did exist there was no intention on the part of the parties to the instrument to deal with that plot. *PAT RAMDHANI SINGH v. KEWAL MANI BIBI*, (1926) Pat. 29; 7 P. L. T. 145; A. I. R. 1926 Pat. 156 **929**

and proof—Both parties failing to prove case set up—Procedure.

Where A comes into Court with an allegation that certain property is exclusively his by reason of its allotment to his share at a partition effected between him and his other co-parcener B, and that it is not, therefore, liable to attachment and sale in execution of a money-decree obtained by a creditor against B, but fails to prove the allotment, and the attaching creditor who similarly contended that the said item of joint property had become the exclusive property of his judgment-debtor by virtue of its allotment to his share, also fails to prove the alleged allotment, and the Court finds that the property is the joint property of the family, it is open to the Court to grant to the plaintiff such relief as flows from the finding and if the Court adopts this procedure it cannot be successfully impeached in second appeal.

In such a case the plaintiff may be given a decree that the attachment and sale would not affect his undivided interest in the property in dispute. *N BEHARILAL v. GORELAL*, A. I. R. 1926 Nag. 203 **263**

Practice—Appeal to Privy Council—Interference with decision of Indian Courts. See LAND ACQUISITION ACT, 1894, s. 54 48**Criminal trial—Conspiracy—Agreement between conspirators sufficient for charge of—"Former part" in s. 239, meaning of.**

For a charge of conspiracy only an agreement between the conspirators is sufficient, and an accused person can be tried of all other offences committed in the course of the conspiracy even if those offences are more than three.

The expression "former part" in the direction at the end of s. 239 of the Cr. P. C., that "the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges" means the part under the heading "form of charge" prior to the part headed "joinder of charges." Section 234, therefore, will not control the provisions of s. 239 of the Cr. P. C.

In deciding whether a particular series of events do or do not form one transaction within the meaning of s. 239 of the Cr. P. C., the real and substantial test is whether they are so related to one another in point of purpose or as cause and effect or as principal and subsidiary acts, as to constitute one continuous action. Each event must be a link in the chain, and there must be no hiatus or rupture in the sequence. *O BISHAMBHAR NATH TONDON v. EMPEROR*, 26 Cr. L. J. 1602; 2 O. W. N. 760; A. I. R. 1926 Oudh 161 **706**

Criminal trial—Conviction by Magistrate of lighter offence than warranted by facts—Interference by High Court.

Where a Magistrate convicts an accused person of an offence falling within his jurisdiction, though the facts found would also constitute a more serious offence not within the jurisdiction of the Magistrate, the proceedings of the Magistrate are not void *ab initio* and the High Court will not ordinarily interfere with the order of the Magistrate unless the sentence appears to be inadequate or unless the accused has been deprived of the right of appeal. *PAT BARHAMDEO RAI v. EMPEROR*, 26 Cr. L. J. 1559; A. I. R. 1926 Pat. 36; 7 P. L. T. 272 **439**

Criminal trial—Counter-criminal cases—Procedure regulating trial—Counter-cases, whether should be tried simultaneously—Complainant in one counter-case anxious to have his case taken up after disposal of counter-case—Proper procedure.

The Cr. P. C. being silent as to whether two counter-criminal cases should be tried simultaneously or one after the other, no absolute rule of law can be laid down and each case must be decided according to its requirements.

If the complainant in one of the two counter-cases wishes that his case may be taken up after the case against him has been decided, on the ground that in the case against him a large number of witnesses have been examined and he does not want to be subjected to his adversary's cross-examination in the other case in which he is the complainant, it will serve the ends of justice if the case against him is disposed of first, as it is not fair to force him, so long as he is the accused in one case, to throw himself open to cross-examination in the case in which he is the complainant. *C MAKHAN MAPA v. MONINDRA NATH BOSE*, 42 O. L. J. 83; 23 Cr. L. J. 1615; A. I. R. 1925 Cal. 1260 **719**

Criminal trial—Fine, amount of—Cancellation or suspension of licence.

Practice—contd.

A fine inflicted on an accused person should not be excessive, having regard to his pecuniary means. **B** BASAPPA RACHAPA HUNDEKAR *v.* EMPEROR, 27 Bom. L. R. 1053; A. I. R. 1925 Bom. 526; 26 Cr. L. J. 1536 **320**

— *Criminal trial—Re-trial—Discharge of accused—Subsequent trial on same facts, legality of.*

When a Magistrate has passed an order discharging an accused person it is competent to the same Magistrate or to another Magistrate of co-ordinate jurisdiction to take fresh proceedings against the accused upon the same facts, although the order of discharge has not been set aside by a higher authority. Such a re-trial, however, should only be allowed under very special circumstances, and where such circumstances do not exist it is improper to allow the accused to be re-tried on the same charge. **L** GOPAL DAS *v.* MAGHI RAM, A. I. R. 1925 Lah. 439; 7 L. L. J. 252; 26 Cr. L. J. 1508 **292**

— *Criminal trial—Trial for object of conspiracy not within Court's cognizance—Other objects within Court's cognizance—Omission of one head beyond Court's cognizance, whether affect jurisdiction.*

Where a trial starts for an object of the conspiracy, which is beyond the cognizance of the Court, and other objects of the conspiracy which are within the cognizance of the Court, the omission of the head, which is beyond the cognizance of the Court, cannot affect the jurisdiction of the Court as regards the rest of the charge. **O** BISHAMBHAR NATH TONDON *v.* EMPEROR, 26 Cr. L. J. 1602; 2 O. W. N. 760; A. I. R. 1926 Oudh 161 **706**

— *Criminal trial—Witness belonging to same caste as party producing him, whether must be disbelieved.*

It is not a sound ground for disbelieving a witness that he is of the same caste or community as the person in whose favour he deposes. **PAT** BARHAMDEORAI *v.* EMPEROR, 26 Cr. L. J. 1559; A. I. R. 1926 Pat. 36; 7 P. L. T. 272 **439**

— *Decree, correct according to Privy Council ruling—Appeal—Subsequent change—Decree, whether should be confirmed.*

Whenever the Privy Council lays down a principle, in theory it only declares what is and has always been the law, any previous declaration not in consonance with its present declaration not having been the law at all.

Therefore, a decision of the lower Appellate Court which was right according to the view of the law then prevailing is liable to be set aside in second appeal if a subsequent ruling of the Privy Council takes a contrary view. **N** OHOTURAM BHIKRAJ *v.* NARAYAN, A. I. R. 1926 Nag. 49 **210**

— *Evidence not relevant to pleas—Party, whether can succeed.*

A party cannot succeed upon evidence which is not relevant to his pleas. **N** SARJABAI *v.* YADEOSA, A. I. R. 1926 Nag. 64 **58**

— *Order of Division Bench, whether can be questioned before another Division Bench.*

If an appellant obtains an adjournment from a Division Bench of the High Court to enable him to apply for an order to set aside the abatement of his appeal, under O. XXII, r. 4, C. P. O., it is not open to him to question the correctness of the order of the Division Bench when his application is laid before another Division Bench for disposal. **L** GURDITTA MAL *v.* MUHAMMAD KHAN, 7 L. L. J. 544; A. I. R. 1926 Lah. 37 **41**

Practice—contd.

— *Procedure—Appellate Court, whether can take notice of matters after institution of suit.*

Samble.—An Appellate Court can take cognizance of matters which have happened after the institution of a suit for the purpose, at any rate, of molding the relief which the plaintiff is entitled to. This will, however, be done only in exceptional cases where it is necessary to prevent injustice or to avoid multiplicity of proceedings. **M** DRONAMRAJU LAKSHMI *v.* IMMANI SESHAYYA, 48 M. L. J. 363; A. I. R. 1925 Mad. 825 **138**

— *Procedure—Judgment alleging admission of party—Admission denied—Review.*

Where a Judge states in his judgment that one of the parties through his Vakil made an admission in respect of an important fact, if the party affected desires to raise the contention that no such admission was made, it is his duty to apply to the Judge immediately for a review of the judgment when the matter is fresh in the minds both of the Judge and the Vakil and not to wait for a long time to get affidavits from gentlemen at the Bar as to what took place in Court. **M** YENDLURI NAGABHUSHANAM *v.* YENDLURI JAGANNAIKULU, 22 L. W. 234; 49 M. L. J. 671; A. I. R. 1925 Mad. 1031 **775**

— *Procedure—One plaintiff in two suits—Common question—Evidence in one suit treated as evidence in other suit—Consent of parties—Irregularity.*

Where there is the same plaintiff but different defendants in two suits and by consent of parties the evidence in one case is treated as evidence in the other, the irregularity is cured by the consent. **M** VARADARAJULU CHETTI *v.* VELAYUDHA UDAYAN, 22 L. W. 230; A. I. R. 1925 Mad. 1160 **743**

— *Procedure—Stay of execution—Costs, execution in respect of, when can be stayed—Patna High Court Rules, Part II, Ch. III, rr. 8, 12—Affidavit, contents of—Source of information, indication of.*

It is not the practice of the Court to stay execution for costs except in a case where it is abundantly clear that there will be no chance of recovering the costs if they are allowed to go unprotected to the person entitled to them under the decree which is the subject-matter of an appeal.

When in an affidavit on an interlocutory application the declarant makes a statement of his belief he must, if the facts are ascertained from another person, give such details of such person as are required by r. 8 of Ch. III of the Patna High Court Rules, Part II. If the facts are ascertained from a document or copy of a document then the declarant must state the source from which the document or the copy was procured and must state his belief as to the truth of such facts. **PAT** KESHUB PRASAD SINGH *v.* HARIHAR PRASAD SINGH, A. I. R. 1926 Pat. 54 **703**

— *Procedure—Transfer of parties—Defendant made co-plaintiff, effect of—Valuation of suit exceeding limits of jurisdiction of Court—Order directing presentation of plaint to proper Court.*

Where one of the defendants to a suit applies to be made a co-plaintiff, his application cannot be rejected on the ground that if it is granted the valuation of the suit will exceed the limits of the jurisdiction of the Court. If after adding the defendant as a co-plaintiff the valuation of the suit does exceed the limits of the jurisdiction of the Court, it is open to the Court to return the plaint to the plaintiffs to be

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presented in the proper Court. **PAT RAJKISHORE LAL NANDKEOLYAR v. ALAM ARA BEGUM**, A. I. R. 1926 Pat. 28
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Presidency Small Cause Courts Act (XV of 1882), ss. 31, 42—Civil Procedure Code (Act V of 1908), s. 47—Execution of small cause decree in respect of immoveable property—Transfer to Mofussil District Munsif's Court for execution on regular side—Order, whether appealable.

When a decree of the Madras Small Cause Court is transferred to a Mofussil District Munsif's Court for execution, not on its small cause side, but on its original side, against the immoveable property of the judgment-debtor, an order made by the latter Court in execution is appealable under s. 47 of the C. P. C.

A District Munsif's Court in executing a decree of the Madras Small Cause Court in respect of immoveable property exercises its powers not as a Small Cause Court, but as a Court of original jurisdiction, and the rules applicable to proceedings in execution of an original decree are applicable to the execution proceedings of the small cause decree so transferred to the original side of the Court. **M PONNAPPA REDDI v. THIRUVENGADA PILLAI & Co.**, 49 M. L. J. 101; 22 L. W. 455; A. I. R. 1925 Mad. 1179; (1925) M. W. N. 713
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Presidency Towns Insolvency Act (III of 1909), ss. 15, 17, 21—Adjudication on petition of insolvent—Withdrawal of petition, whether can be allowed—Procedure.

A debtor who has been adjudicated insolvent on his own petition cannot, even with the leave of the Court, withdraw his petition. Section 15 (2) of the Presidency Towns Insolvency Act only applies to petitions that are pending before any order has been made, and once an order of adjudication has been made, the debtor becomes an insolvent and remains so until the order of adjudication is annulled or he obtains the discharge. **R MAUNG MYINT v. OFFICIAL ASSIGNEE**, 3 R. 313; A. I. R. 1925 Rang. 351
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s. 18—Insolvency jurisdiction of High Court—Stay of proceedings in subordinate Courts.

Under s. 18 of the Presidency Towns Insolvency Act, the High Court in its insolvency jurisdiction has power to stay proceedings pending before a Mofussil Court subordinate to the High Court. **M OFFICIAL ASSIGNEE, MADRAS v. ZEMINDAR OF UDAYARPALYAM**, 22 L. W. 326; A. I. R. 1926 Mad. 150
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ss. 23, 30 (2)—Insolvency—Composition agreed to by majority of creditors—Annulment of adjudication—Secured creditor not party to composition, whether bound—Right of suit, whether barred.

Under the Presidency Towns Insolvency Act, a composition in the course of the insolvency proceedings agreed to by the prescribed statutory majority of creditors is binding on all creditors of the insolvent whether they were parties to the composition or not, but such composition takes effect and operates to discharge the insolvent from his liability in respect of a debt only if the compensation agreed to is paid or else a scheme is outstanding under which the creditor is required to proceed and obtain relief.

Where a scheme of composition has been approved the insolvent debtor is bound to pay to all his creditors, including secured creditors, whose debts are provable in insolvency, the amount of the balance of their debts according to the composition and the right to enforce such payment can be enforced in the ordinary Courts.

Presidency Towns Insolvency Act—concl'd.

Clause (2) of s. 30 of the Presidency Towns Insolvency Act is merely enabling in its nature and provides only for a summary remedy and does not exclude the jurisdiction of the ordinary Courts. It is applicable only to cases where there is something in the provisions of the composition or scheme which is capable of being enforced in the Bankruptcy Court.

A composition was agreed to by the statutory majority of the creditors of an insolvent and the adjudication was annulled. One of the secured creditors got no notice of the adjudication and had not yet proved his debt when it was annulled. There was no provision in the scheme of composition capable of enforcement under cl. (2) of s. 30 of the Presidency Towns Insolvency Act. In a suit by the secured creditor to recover the balance of what was due to him after deducting the value of his security since realised :

Held, (1) that s. 30, cl. (2) of the Act did not operate as a bar to the maintainability of the suit ;

(2) that the plaintiff was, however, bound by the terms of the composition and could only recover that proportion of the balance of his debt which had been paid to the other creditors.

Per Spencer, J.—In India the position of an insolvent whose adjudication has been annulled is not the same as that of a discharged insolvent.

Per Srinivasa Iyengar, J.—A composition in the course of the insolvency agreed to by the prescribed statutory majority of the creditors is binding on all creditors of the insolvent whether they were parties to the composition or not.

In the absence of express statutory provision excluding the jurisdiction of the ordinary Tribunals no right of action can be deemed to have been taken away. **M GOVINDAS CHATURBHUJAS v. RAMADOSS**, 48 M. L. J. 252; (1925) M. W. N. 148; A. I. R. 1925 Mad. 593; 21 L. W. 733; 48 M. 521
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Sch. II, r. 11—High Court Insolvency Rules, r. 128—Creditor under composition—Proof of debt.

The mere fact that a sum is payable under composition and is stated therein to be payable does not of itself forego the need for proof required by the concluding part of r. 128 of the Insolvency Rules. *In the matter of KANHYA LAL SEWBUX*, 29 C. W. N. 1019; A. I. R. 1926 Cal. 176
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Presumption—Customary marriage, whether approved forin. See HINDU LAW—CUSTOM
358

Principal and agent. See C. P. C., 1908, O. XX, RR. 16, 17
944

Liability of agent to render accounts—Dismissal of agent before time for taking accounts, effect of.

An agent who is bound to render accounts at the end of a year is not absolved from liability for acts committed in the course of that year, and, even if he is dismissed before the time arrives for the rendering of accounts, he would have to make good any misappropriations and, in doing so, the Court would call upon him to render an account to ascertain what they were. **M SANKARAN v. VATAKKIMYEDATH KIRANGHAT**, 48 M. L. J. 691; A. I. R. 1925 Mad. 894; 23 L. W. 205
346

Private defence, right of. See PENAL CODE, 1860, s. 99
400

Privy Council, appeal to—Interference with decision of Indian Courts—Practice. See LAND ACQUISITION ACT, 1894, s. 51
48

Probate and Administration Act (V of 1881), s. 64—*Court Fees Act (VII of 1870), s. 19 (1)*—*Letters of Administration for portion of property, application for—Stamp duty payable—Inventory of entire property, whether necessary.*

An application for the grant of Letters of Administration with the Will annexed in respect of a portion of the property covered by the Will need not contain an inventory of the entire property.

Letters of Administration can be granted in respect of a part of the property covered by a Will. In such a case the petition is leviable with stamp duty only on the value of the property claimed, and not on the value of the entire property. **L GURBACHAN KAUR v. SATWANT KAUR**, A. I. R. 1925 Lah. 493; 7 L. L. J. 288

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— **s. 86**—*Letters of Administration with Will annexed, application for—Order holding that certain person has locus standi to oppose application—Appeal, whether lies.*

A right of appeal under s. 86 of the Probate and Administration Act is subject to there being a right of appeal against the interlocutory order under the C. P. C.

An order passed in Probate proceeding holding that a certain person has a *locus standi* to oppose an application for the grant of Letters of Administration with the Will annexed is not open to appeal. **C MONORANJAN ADYA v. BIJOY KUMAR ADYA**, A. I. R. 1926 Cal 180

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Procedure.

See ALSO PRACTICE.

See C. P. C., 1908, s. 115

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Promissory note—*Partner, pro-note executed by—Firm's name not given—Firm, liability of.*

No person can be made liable on a negotiable instrument unless his name appears on the promissory-note, or if it is sought to make him liable as a partner the name of the firm in which he is a partner appears on it. **R NAGOOR MEERA v. MOIDEEN NAINAR MEERA ALI**, A. I. R. 1925 Rang. 264; 4 Bur. L. J. 110

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Provincial Insolvency Act (III of 1907), s. 6 (4)—*Limitation Act (IX of 1908), s. 5—Insolvency, petition for, by creditor—Debtor denying debt—Insolvency Court, power of, to determine existence of debt—Limitation for petition—Extension of time—Act of insolvency, date of—Transfer of property by debtor.*

Where a petition for insolvency is presented by a creditor and the debtor denies owing anything to the petitioning creditor, the Insolvency Court has jurisdiction to decide whether or not the debt alleged by the creditor is owing to him.

Section 5 of the Limitation Act does not apply to a petition for insolvency presented under the provisions of the Provincial Insolvency Act.

Where the act of insolvency relied on by a petitioning creditor is an alienation of his property effected by the debtor, the date of the act of insolvency must be taken to be the date of the alienation, that is to say, the date of the deed of transfer, and not the date on which mutation is attested. **L NUR MAHOMMAD v. LALCHAND**, A. I. R. 1925 Lah. 436; 7 L. L. J. 201

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— **s. 36**—*Transfer by insolvent—Transfer by transferee of insolvent—Annulment of transfer.*

Section 36 of the Provincial Insolvency Act of 1907 does not apply to a transfer made by an insolvent subsequent to his adjudication, but applies only to transfers made by him previous thereto. Nor does the sec-

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tion in terms apply to a transfer made by a transferee of the insolvent. **L HAYAT MOHAMMAD v. BHAWANI DASS**, 2 L. C. 135; A. I. R. 1926 Lah. 146

1037

Provincial Insolvency Act (V of 1920), s. 28 (6)

—*Mortgage executed prior to insolvency—Payment by fresh mortgage after insolvency—Transaction, whether protected.*

If a mortgage executed prior to the insolvency of the mortgagor is satisfied after his insolvency by the execution of a fresh mortgage to a third person, the transaction is protected by s. 28, cl. (6) of the Provincial Insolvency Act of 1920. **N RATAN LAL v. GOVINDA**, A. I. R. 1926 Nag. 29

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— **ss. 33 (3), 50**—*Schedule of creditors—Name when to be added or deleted—Duty of Court.*

Under s. 33 (3) of the Provincial Insolvency Act the name of a creditor should not be entered in the Schedule until the Court has considered any cause that might be shown against so doing.

The Court is bound to come to a judicial finding before it enters the name of any creditor under s. 33 or before it refuses to remove a name under s. 50 of the Provincial Insolvency Act after considering the report of the Receiver and any other evidence adduced as to whether the debts are really due or not. **C AMIR CHAND KHANNA v. ANUKUL CHANDRA BHANDARI**, A. I. R. 1926 Cal. 160

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— **s. 56**—*Bombay High Court Manual of Circulars, Ch. XXIII, r. 16—Insolvency—Receiver—Remuneration, rate of—Portion of amount realised paid to mortgagee, effect of.*

Under r. 16 of Ch. XXIII of the Manual of Circulars issued by the Bombay High Court the remuneration of a Receiver appointed under the Provincial Insolvency Act, other than an Official Receiver, must be in such proportion to the amount of the dividends distributed as the Court may direct, provided that it does not exceed 5 per cent of the amount of dividends. Where, however, the property sold is subject to a mortgage and a portion of the amount realised is payable to the mortgagee, the remuneration of the Receiver should be fixed with reference to the amount of the dividends distributed after deducting the amount of the mortgage and not with reference to the total amount realised. **B B. S. JORAPUR v. VENKATES BALVANT JOSHI**, 27 Bom. L. R. 1116; A. I. R. 1925 Bom. 472

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Provincial Small Cause Courts Act (IX of 1887), s. 17—*Ex parte decree, application to set aside—Deposit or security, absence of—Procedure—Dismissal of application.*

Defendant made an application to set aside an *ex parte* decree passed against him by a Small Cause Court. The Court directed the defendant to file security under s. 17 of the Provincial Small Cause Courts Act by a certain date. One day before that date defendant filed a draft security bond for approval by the Court undertaking to register it after such approval. On the date fixed the Court passed an order dismissing the application on the ground that it was not accompanied by a deposit or security. No further application was made by the defendant within limitation to set aside the decree.

Held, that inasmuch as the application was not accompanied by a deposit or security as required by s. 17 of the Provincial Small Cause Courts Act and no further application supported by a deposit or by a

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proper security was made within limitation, the Court had no option but to dismiss the application. **PAT KAWLESHWAR LAL v. SATYA BRATA BANERJI**, 7 P. L. T. 138; (1926) Pat. 121 **194**

— **s. 25—Costs, order as to—Interference.**

Ordinarily the Court of the Judicial Commissioner will not make use of its powers under s. 25 of the Provincial Small Cause Courts Act to upset an order of the Small Cause Court as to costs. **O RAM HAKH v. RAM AUTAR**, 2 O. W. N. 660; A. I. R. 1925 Oudh 539 **1036**

— **s. 25—Revision—Discretion of High Court—Limitation, nice question of—Interference.**

The High Court has a discretion under s. 25 of the Provincial Small Cause Courts Act and it will not under that section upset a decree passed by a Small Cause Court on the mere possibility that the Court may have gone wrong by a few days on a question of some nicety relating to limitation. **O BALI NATH v. RAMDAS SAHU**, A. I. R. 1926 Oudh 62 **321**

— **Sch. II, Art. 13—Civil Procedure Code (Act V of 1908), s. 102—Suit or rent and cesses, nature of—Appeal, second, whether lies.**

Where cesses have been paid as part of the rent, a suit to recover them does not fall within cl. 13 of Sch. II to the Provincial Small Cause Courts Act and the suit is consequently of the nature of a small cause. Where the value of such a suit is less than Rs. 500, a second appeal would not be competent. **M NARASIMHA CHARYULU v. GOVINDOSS KRISHNADOSS**, 49 M. L. J. 185; A. I. R. 1925 Mad. 1196 **496**

— **Art. 35—Joint trees, sale of—Suit for recovery of share—Small Cause Court, jurisdiction of.**

A suit for recovery of his share of the sale-price of trees by one joint owner against the other is cognizable by a Small Cause Court. Article 35 of Sch. II to the Provincial Small Cause Courts Act has no application to such a suit. **L GHULAM SARWAR v. GHULAM MUSTAFA**, A. I. R. 1925 Lah. 479; 7 L. L. J. 285 **603**

— **Art. 41—Joint decree against sharers—Payment by one of several sharers—Suit for contribution.**

The rights of the co-sharers *inter se* merge in their rights and liabilities as co-judgment-debtors in regard to the decree and a suit for contribution being between judgment-debtors does not fall under Art. 41 of the Second Schedule of the Provincial Small Cause Courts Act. **O RAM HAKH v. RAM AUTAR**, 2 O. W. N. 660; A. I. R. 1925 Oudh 539 **1036**

Public Gambling Act (III of 1867), ss. 3, 4, 5, 6

— **Cauries, whether instruments of gaming—Cauries found in house on search—Presumption of common gaming house—Intention to pass time—Conviction, whether legal.**

Cauries well fall within the definition of instruments of gaming given in the Public Gambling Act.

Where on a search under s. 5 of the Public Gambling Act, cauries are found in a house, there is a presumption that the house was used as a common gaming house, and further that the persons found were present there for the purpose of gambling.

The presumption raised, however, is rebuttable; and when it is shown that the object of the persons was to indulge in a friendly amusement and to pass time, and the idea of making any gain was entirely foreign to the mind of the entire party, the presumption is rebutted, and the persons cannot be convicted of an

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offence under ss. 3 and 4 of the Public Gambling Act. **O RAM CHARAN v. EMPEROR**, 2 O. W. N. 638; 12 O. L. J. 646; A. I. R. 1925 Oudh 674; 26 Cr. L. J. 1609 **713**

Public policy—Obligation connected with betting. See CONTRACT ACT, 1872, ss. 23, 30 **59**

Railway Company—Carriage, goods consigned for—Risk Note Form "A"—Loss of goods—Suit to recover damages. See CARRIAGE OF GOODS **1**

— **Carriage of goods—Goods consigned to Railway Company, loss of—Suit for damages—Wilful misconduct—Burden of proof.**

In a suit to recover damages from a Railway Company for the loss of goods consigned to the Company for carriage under Risk Note Form "B" the burden lies upon the plaintiff to prove that his case falls within the exceptions laid down in the Risk Note. The refusal of the Railway Company to account for the loss of the goods does not justify the Court in holding that the loss must have arisen from the wilful misconduct of the Company's servants. **L FIRM OF HIRA SINGH-PRITAM SINGH v. SECRETARY OF STATE FOR INDIA**, 2 L. C. 158; 7 L. L. J. 588; A. I. R. 1926 Lah. 40 **1054**

— **Goods consigned for carriage—Risk-Note Form "B"—Consignment of tins of oil—Delivery of empty tins—Loss of package—Liability of Railway Company.**

Where goods are consigned to a Railway Company for carriage under Risk-Note Form "B," the Railway Company would only be liable for the loss of a complete package or of a consignment consisting of a complete package or packages, and even if a package or packages are missing the Company would only be liable if the plaintiff can prove wilful neglect etc., as mentioned in the Risk-Note.

Where in such a case all the packages in the consignment are delivered to the consignee, the fact that the contents of some of the packages are lost does not make the Railway Company liable under the terms of the Risk-Note.

In the case of a consignment of tins of oil, if all the tins are delivered, then there is no loss of a package even although the tins delivered contain no oil when delivered to the consignee. **B G. I. P. RAILWAY CO. v. TARMAHOMED HASAM**, 27 Bom. L. R. 1111; 49 B. 827; A. I. R. 1925 Bom. 534 **562**

— **Goods consigned for carriage—Risk-Note Form "B"—Suit to recover damages for loss of goods—Burden of proof.**

Where a suit is brought to recover damages in respect of loss of goods consigned to a Railway Company for carriage under Risk Note Form "B" the burden lies upon the plaintiff to show that the Railway Company is responsible for the loss of the goods. In such a suit it is open to the Railway Company to admit the loss of the goods and the Company is not in any way bound to prove such loss. **PAT G. I. P. RAILWAY CO. v. RAMESHWAR PRASAD**, (1925) Pat. 311; 7 P. L. T. 90; A. I. R. 1926 Pat. 180 **687**

— **Carriage of goods—Risk Note Form "B"—Suit to recover damages for loss of goods—Loss, proof of—Wilful neglect, meaning of.**

In a suit to recover damages from a Railway Company in respect of the loss of goods consigned to the Company for carriage under Risk Note Form "B," in order to make the Risk Note applicable, it is sufficient that the plaintiff pleads loss to himself, it is not necessary for the Company to give evidence that the goods have been lost to it also. If the plaintiff admits the

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loss then all that the Company has to do in its written statement is to plead the contract. It is not required to bring any evidence to support its plea.

"Neglect" means the omission to perform a duty and implies that a person does something which ought either to be done in a different manner or not at all or that he omits to do something which ought to be done. But wilful neglect goes further than this and implies that the person charged with such neglect knew that he should do a particular act or that he should refrain from doing a particular act and that he deliberately abstained from doing it or deliberately did it. In order to prove wilful neglect it must be shown that the neglect was not accidental and that the person charged with such neglect knew that mischief would result from his conduct or that there was an indifference to his duty to ascertain whether such conduct was mischievous or not. **Pat** EAST INDIAN RAILWAY CO. v. GOBARDHAN DAS, (1925) Pat. 333; 7 P. L. T. 140; A. I. R. 1926 Pat. 165 **790**

— *Carriage of goods—Risk Note Form "B"—Suit to recover damages for loss of goods—Negligence—Burden of proof.*

In a suit to recover damages for the loss of goods consigned to a Railway Company for carriage under Risk Note Form "B" the onus of proving negligence of the Company lies on the plaintiff; the Company is not bound in law to assist the plaintiff in fastening liability on itself. The mere assertion by the plaintiff that the Company's servants must have been negligent because the Company had failed to deliver the goods is by itself of no value as proof of negligence. In such a case it is quite unnecessary for the Company to do anything more than to prove or admit the loss of the goods; having done that the onus of proving that the loss was occasioned under one of the exceptions contained in the Risk Note lies upon the plaintiff.

Pat GREAT INDIAN PENINSULA RAILWAY v. DATTI RAM, (1925) Pat. 305; 5 Pat. 118; A. I. R. 1926 Pat. 148 **812**

— *Goods consigned for carriage—Risk Note Form "H"—Wilful neglect—Failure to place lock on wagon.*

A Railway Company to whom goods are consigned for carriage under Risk Note Form "H" is liable for the loss of the goods only if the consignment is lost through the wilful neglect of the Railway Administration or through theft by or wilful neglect of its servants.

Failure of the Railway Company to place a lock on the wagon in which the goods are being carried does not amount to wilful neglect within the terms of the Risk Note. **O** AGENT, ROHILKHAND & KUMAON RAILWAY v. GOURI LAL, 2 O. W. N. 749; A. I. R. 1926 Oudh 68 **46**

— *Suit against Agent—Misdescription. See LIMITATION ACT, 1908, s. 22* **426**

— *suit against—Description of defendant. See C. P. C., 1908, O. XXIX, R. 2* **680**

Railways Act (IX of 1890), s. 77—Damages, suit for—Non-delivery of goods due to loss—Notice, whether necessary.

Notice under s. 77 of the Railways Act is required in all cases in which the loss of goods is alleged by the plaintiff. If the plaintiff alleges non-delivery without stating what the cause of non-delivery is, and it appears upon the trial that in fact non-delivery was due to loss, then the plaintiff fails if he has not given notice under s. 77. A case of non-delivery may or may not be a case of loss. If it is a case of loss, then

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notice is required. **O** EAST INDIAN RAILWAY CO. v. MOEA RAM-GAJA NAND, 2 O. W. N. 689; A. I. R. 1925 Oudh 615 **572**

— *s. 77—Goods entrusted to Railway for carriage—Non-delivery—Damages, suit for—Notice, whether necessary.*

Non-delivery of goods entrusted to a Railway Company for carriage constitutes "loss" within the meaning of s. 77 of the Railways Act and, therefore, notice under s. 77 of the Railways Act must be given before a suit for the recovery of damages for non-delivery can be maintained. **Pat** AGENT OF THE B. N. R. CO. LTD. v. HAMIR MULL CHAGAN MULL, 6 P. L. T. 565; A. I. R. 1925 Pat. 727; 5 Pat. 106; (1926) Pat. 114 **374**

Receiver, position of—Payment made by Receiver, whether payment made by owner.

The nature of the office of a Receiver is simply this, that he is an impartial person appointed by the Court to collect and receive pending the proceedings the rents, issues and profits of land or personal estate or other things in question which it does not seem reasonable to the Court that either party should collect or receive. The object sought by the appointment of a Receiver is the safeguarding of property for the benefit of those entitled to it. His possession is on behalf and for the benefit of all the parties to the suit in which he is appointed, and is the possession of all the said parties according to their titles. The property in his hands is in *custodia legis* for the person who can make a title to it. The title of the real owner is in no way affected either in theory or principle by his appointment. He collects and receives the rents, issues and profits not upon his own title but upon the title of some persons, parties to the action. One of the main incidents of his duties is to preserve and protect the property which is put into his possession and from this it necessarily follows that where a Receiver is appointed in respect of lease-holds, upon him devolves the performance of the obligations imposed by the possession of land and consequently he must out of the sub-rents discharge the head rents payable in respect of the lease-holds.

A payment made by the Receiver of an estate of the rents justly due, out of the funds in his hands, is equivalent in law to a payment made by the owner himself. **C** EASTERN MORTGAGE & AGENCY CO. v. MOHAMMAD FAZLUL KARIM, 41 C. L. J. 571; 52 C. 914; A. I. R. 1926 Cal. 385 **851**

— *remuneration of.*

By consenting to act without remuneration so far as the keeping of the firm's accounts are concerned, a Receiver does not forego his right to such remuneration as he would be entitled to for managing and carrying on the business. **C** MOHAMMAD KAMIL v. HEDAYETULLA, A. I. R. 1926 Cal. 380 **492**

— *Suit against legal representatives of deceased to recover money—Receiver, whether necessary party—Decree, whether can be granted against Receiver—Procedure.*

Where a money suit is filed against the heirs of a deceased person, whose estate is in the hands of a Receiver, the Receiver has nothing to do with the satisfaction of the claim, and all that the Court can do is to pass a decree in favour of the plaintiff against the defendants, as the legal representatives of the deceased. The fact that the plaintiff has obtained an order from the Court which appointed the Receiver granting him leave to add the Receiver as a party to the suit does in no way affect the question whether

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the Court which hears the suit can grant relief against the Receiver. If the decree obtained by the plaintiff against the heirs of the deceased is not satisfied and the plaintiff wishes to execute it against the estate of the deceased, he must go to the Court which appointed the Receiver for permission to attach the estate of the deceased in the hands of the Receiver. The Receiver is not a necessary party in a suit to decide whether the plaintiff is entitled against the legal representatives of the deceased to recover money which he had advanced to the deceased in his lifetime. **B MOOS v. ABDUL HUSAIN**, 27 Bom. L. R. 1147; A. I. R. 1925 Bom. 523 600

— — — *Suit for rent—Appointment of Receiver—Direction to sell press installed in leased premises—Sale—Prior mortgagee of press, acquiescence of, in Receiver's management, effect of—Expenditure incurred by Receiver—Priority over mortgagee's claim.*

In execution of a decree for arrears of rent and for ejectment of a tenant, a Receiver was appointed who was directed by the Court to sell a press and machinery installed in the leased premises for the best price obtainable and meanwhile to keep it running as a going concern and to pay the rent due to the landlord. A mortgagee of the press and machinery, though not a party to the suit, acquiesced by his acts and conduct in the employment of and management by the Receiver for the benefit of all parties. The press and machinery when sold fetched a price less than the amount due under the mortgage.

Held, that the mortgagee was not entitled to the sale-proceeds without paying thereout the rent due to the landlord, wages of the workmen employed in running the press and the Receiver's remunerations which items were entitled to priority over the mortgagee's claim.

Per Srinivasa Iyengar, J.—When property is placed in *custodia legis* by the appointment of a Receiver all the orders passed by the Court for the management of such property will be binding on all persons who, if not actual parties to the suit have so conducted themselves either with regard to the litigation or with regard to the management of the property under the directions of the Court, as to make themselves virtually or constructively parties to the suit or have otherwise submitted themselves to such management by the Court. **M RAJA-GOPALA CHARIAR v. JAMAL AYISHA BIBI**, 21 L. W. 312; A. I. R. 1925 Mad. 571 337

Registration—Mortgage—Invalid registration—Simple money-decree, whether can be passed.

When the registration of a mortgage-deed is invalid with respect to the property mortgaged it is invalid for all purposes and even a simple money decree cannot be passed on it on the ground that there was an acknowledgment of the debt evidenced by the deed. **Q RAJ BAHADUR LAL v. SURAJ BAX SINGH**, A. I. R. 1925 Oudh 138 792

Registration Act (XVI of 1908), s. 2—"Lease," meaning of. See TRANSFER OF PROPERTY ACT, 1882, s. 105.

— **s. 17 (1) (b)—Family arrangement—Petition of compromise addressed to Court—Antecedent title, recognition of—Registration, whether necessary.**

Where a *bona fide* dispute between the parties is eventually composed, each party recognizing an antecedent title in the other and the parties address a

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petition to the Court stating the terms of the agreement arrived at between them, there is no necessity to have the petition registered. Such a petition does not purport to create, assign, limit, extinguish or declare any rights in immovable property within the meaning of s. 17 (1) (b) of the Registration Act. It is merely a recital of facts by which the Court is informed that the parties have come to an arrangement.

Per Sulaiman, J.—Division of property by way of family settlement does not amount to a transfer by one party to the other, nor does any party to such settlement derive title through the other. The settlement merely recognizes the right of the other party and accepts it in part. Not being a transfer, gift or exchange from one party to the other the transaction does not fall under any of the sections of the Transfer of Property Act which require registration.

Even in the absence of a registered document it is open to either party to a family settlement to prove that there has been a family settlement which was acted upon.

Where, however, a compromise is reduced to writing, then if the document is sought to be used as a document of title purporting to create or declare rights in immovable property worth more than Rs. 100 the deed would require registration. If the document does not purport to be a document of title creating or declaring such right but contains a mere recital of a previous settlement arrived at between the parties, the document may be used in evidence in proof of that previous settlement, even though not registered. **A BAKHTAWAR v. SUNDER LAL**, L. R. 6 A. 625 Civ.; 24 A. L. J. 116; A. I. R. 1926 All. 173; 48 A. 213 992

— **s. 17 (2) (xi)—Receipt for payment of mortgage-debt, whether requires registration.**

The extinction of a mortgage-debt must be distinguished from the extinction of the mortgage itself, and a receipt which purports to be merely a receipt in full of the mortgage-debt is admissible in evidence without registration.

The Law of Registration in the case of a receipt of mortgage-money does not enquire how the receipt operates, but merely what it purports to do.

A receipt granted on behalf of a mortgagee to the mortgagor was in the following terms:—"Received from S the sum of Rs. 6,000 only in full satisfaction of the amount due from him under a mortgage-deed of his share in village B executed by him in favour of the late K, who had obtained a decree for possession of the mortgaged property."

Held, that the receipt did not require registration. **O INDER KURR v. MOHAMMAD TAQI**, A. I. R. 1926 Oudh 61 505

— **ss. 17, 49—Lease for period exceeding one year—Registration, absence of—Possession delivered to lessee, effect of—Part performance, doctrine of, applicability of.**

Plaintiffs were the owners of a certain *mahal*. Their agent addressed them a proposal in writing for granting a lease of the *mahal* on certain terms to certain persons who had approached him for such lease. Plaintiffs authorized their agent to grant the lease and to issue a *parwana* to the lessees. A *parwana* was eventually issued to the defendants purporting to grant them a lease of the *mahal* on the terms accepted by the plaintiffs for a period of five years and the defendants were put in possession of the *mahal*. Plaintiffs subsequently brought a suit to eject the defendants from the *mahal* on the allegation that the

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parwana being unregistered did not operate as a lease and that the defendants were consequently trespassers :

Held, that the doctrine of part performance applied to the case and that the plaintiffs were bound by the terms of the lease which they had authorized and could not eject the defendant from the *mahal*. **PAT PEARI DAI v. NAIMISH CHANDRA MITRA**, 7 P. L. T. 183; 5 Pat. 40; A. I. R. 1926 Pat. 184 **822**

— **ss. 17, 49**—*Partition karar—Registration, whether necessary—Part-performance, doctrine of, applicability of—Contract Act (IX of 1872), ss. 239, 253—Property managed jointly—Co-ownership—Partnership—Agreement, implied, to share equally.*

A division settlement *karar* between members of a family by which certain immoveable properties are exclusively given to one member for his enjoyment and certain other properties are awarded to other members creates rights in immoveable property and is inadmissible in evidence without registration.

The doctrine of part-performance is irrelevant in considering the question of admissibility of documents.

Three Hindu brothers constituting a joint family lived as one family with a Christian relation who owned considerable property. The brothers managed the property of the Christian relation along with the family properties and fresh acquisitions were made to the family from the income of the properties and by the joint labour and skill of all the members :

Held, (1) that although the parties had combined their properties, labour and skill, the combination did not go beyond the mere stage of co-ownership, and did not amount to a partnership within the meaning of s. 239 of the Contract Act ;

(2) that even if the parties constituted a partnership their relationship would be regulated by the provisions of s. 253 of the Contract Act only in the absence of a contract to the contrary ;

(3) that the fact that all the properties were treated as the common property of the whole family implied an agreement among the members that they were all to share the properties alike. **M PEDDI REDDI JOGI REDDI v. PANEEN CHINNABIREDDI**, 22 L. W. 116; A. I. R. 1925 Mad. 1195 **1016**

— **ss. 17 (1) (d), 49**—*Lease, unregistered, whether admissible in evidence—Construction of document.*

A document began by describing itself to be an agreement for letting out a *basa bari* and a *tin ghar* and contained the following statement "you having come to me and Rs. 150 having been fixed as the annual *jama* of the said *basa bari* and the *tin ghar* I let out the same to you for carrying on your trade and commerce therein." Then followed a clause as to the way in which the expenses for repairs were to be met. It was then laid down that after the accounts had been made up and the amount of money expended on the repairs totalled, there would be a fresh deed and that on re-payment of the debt incurred by the owner in respect of the repairs the owner would be able to make a new settlement of the land according to his wish. Then followed certain conditions as to the maintenance of boundaries, payment of damages for injuries to the *ghar* not caused by accident, keeping the house in repair by the owner, etc.:

Held, that the document was a lease for a number of years and not being registered was not admissible in evidence. **C RAM CHANDRA AGARWALA v. SYAMESWARI DASYA**, 42 C. L. J. 71; A. I. R. 1925 Cal. 1171 **98**

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— **ss. 17 (1) (d), 49**—*Lease, agricultural—Oral lease, validity of—Document containing admission of oral lease—Registration, whether necessary—Transfer of Property Act (IV of 1882), s. 106.*

Section 106 of the Transfer of Property Act excludes agricultural leases from the operation of its own provisions and allows such leases or agreements to lease to be made without a written instrument.

The Registration Act only comes into operation when a written document has been executed either because the transaction cannot legally be carried out without one or because the parties choose to have one though it is not compulsory.

In proof of an oral lease granted by the defendant to the plaintiffs the latter produced a document executed by the defendant which ran as follows :—

"Of the annual rent for the two years 1918-19 and 1919-20 for the field of which I had given you a lease for five years, you have to-day paid me Rs. 65 as the rent for the current year, and you have already paid me the rent for last year and taken a receipt for it, leaving the rent for the next three years which I will take from you in each of those three years with a rent note :"

Held, that the document contained nothing more than a mention of an oral agreement made previously and did not require registration, but could be used as evidence of an admission by the defendant, just as if he had casually mentioned the agreement in the course of a private letter. **N MAHADEO v. SHIORAM**, A. I. R. 1926 Nag. 9 **51**

— **s. 58 (1) (e)**—*Consideration—Endorsement by Registering Officer—Presumption—Burden of proof.*

An endorsement made on a *kabala* by a Registering Officer in accordance with the statutory provision in s. 58 (1) (e) of the Registration Act that a certain sum of money was paid as consideration in his presence raises a presumption that the consideration was paid and the onus lies on the person who alleges that it is untrue to prove it. **C RAKHAL CHANDRA BARDHAN v. PROSAD CHANDRA CHATTERJEE**, A. I. R. 1926 Cal. 73 **229**

Religious Endowment—Custom—Succession—Mutt
—*Head of mutt in Native State, ex-officio trustee of public temple in British India—Dismissal from headship of mutt by Government of Native State, whether effects forfeiture of trusteeship of temple.*

Where the head of a *mutt* situate in a Native State was, as such, the trustee of a public temple in British India which latter was, however, an independent institution governed by its own usages, and the Government of the Native State in exercise of its sovereign powers dismissed the head of the *mutt* and appointed another person to the office, and it was found that all the proved successions to the two offices were to simultaneous vacancies both in the *mutt* and the temple caused by the death of the prior incumbents :

Held, that the dismissal of the head of the *mutt* did not operate to effect a forfeiture of and create a vacancy in the trusteeship of the temple, and that the person appointed as the head of the *mutt* did not automatically succeed to the trusteeship of the temple which had not been vacated. **M PARAMESWAR BHARTICAL v. T. P. S. ISSOOP ROWTHAN**, 48 M. L. J. 299; 21 L. W. 587; A. I. R. 1925 Mad. 800 **106**

Res Judicata.

See ALSO C. P. C., 1908 s. 11.

See EXECUTION OF DECREE

Res Judicata—concl.

— *Appeal—Issue decided by Trial Court not decided by Appellate Court.*

When the judgment of a Court of first instance upon a particular issue is appealed against, that judgment ceases to be *res judicata* and becomes *res subjudice* and if the Appellate Court declines to decide that issue and disposes of the case on other grounds, the judgment of the First Court upon that issue is no more a bar to a future suit than it would be if that judgment had been reversed by the Court of Appeal. **C KARUNA CHARAN DAS v. KRISHNA SUNDAR MAJUMDAR, A. I. R. 1926 Cal. 179** 480

— *Co-plaintiffs—Active controversy and adjudication—Necessary.*

In order to constitute *res judicata* between co-plaintiffs, there should be active controversy between them and an adjudication upon the point in dispute must have been essential for the purpose of giving a decree against the defendant. **M SHYAMA BHAI v. PURSHOTAMDASS, 21 L. W. 551; A. I. R. 1925 Mad. 645** 124

— *Decision on point of law—Decision, whether binding in same proceeding.*

When a definite decision has been given between the parties to any proceeding on any matter in controversy, and such decision purports finally to adjudicate on such matter, it is not competent to the same Judge or his successor-in-office to set aside the decision, notwithstanding that the decision is on a point of law. Section 11, C. P. C., does not apply to such a case; but the binding force of such a decision depends on general principles of law. **L SHER KHAN v. PRABH DAYAL, A. I. R. 1925 Lah. 507; 7 L. L. J. 319** 683

— *in execution proceedings.*

The principle of *res judicata* applicable to suits upon a party's failure to raise an issue which he might have raised, is not applicable to execution cases. **PAT GAYAN NATH SAHI v. MALHIJI VAIDYA, (1925) Pat. 160; 6 P. L. T. 507; A. I. R. 1925 Pat. 588** 276

Review. See ALSO C. P. C., 1908, O. XLVII.

— *Judgment alleging admission of party—Admission denied.* See PRACTICE 775

Revision.

See ALSO C. P. C., 1908, s. 115.

See ALSO CR. P. C., 1898, ss. 435 to 439.

— *Erroneous interpretation of rule—Interference by High Court.* See MADRAS DISTRICT MUNICIPALITIES ACT, 1920, s. 4(a) 368

— *Error of law.*

An order based on an error of law but within the jurisdiction of the Court passing it will not be interfered with in revision. **O SRI KISHAN v. DEBI DYAL, 2 O. W. N. 823; A. I. R. 1925 Oudh 739; 26 Cr. L. J. 1619** 915

Riparian owners, rights of—Artificial and natural watercourses—Law in Burma same as in England—Lower owner damming channel—Damage caused to higher owner's property—Liability of lower owner.

In the case of a natural stream or water-course, each of the riparian owners is entitled to the unimpeded flow of water in its natural course and to its reasonable enjoyment as it passes through his land as a natural incident of the ownership of his land; while in the case of an artificial water-course, any right of the owner to the flow of water-course must rest on prescription or grant from or contract with the owner of the land from which the water is artificially brought.

Riparian owners—concl.

A water-course originally artificial may have been made under such circumstances, and have been used in such a way, that an owner of land situate on its bank will have all the rights over it that a riparian owner would have if it had been a natural stream.

The law applicable in lower Burma to the flow of and flooding by fresh-water rivers or water-courses, whether they be natural or artificial, or trespasses on the bed or soil of such rivers and streams, is not different from the law as applied to similar subjects in England.

A raised road or *bund* ran transversely across a depressed ground through which flowed a channel of water, and was properly provided with a gap for the flow and a bridge over the channel. The *bund* thus provided with an eye and a bridge to permit the inflow and out-flow of water, was interfered with by the owner of the land lower down who filled up the eye and channel course thereat and converted an innocuous *bund* into a dam, which dammed back the water on to the owner of the land higher up:

Held, (1) that the owner of the land lower down was responsible for the damage thus caused to the property of the higher owner;

(2) that it was wholly irrelevant who the body or person was which or who had actually formed the channel. **P. C. MAUNG BYA v. MAUNG KYI NYO, 42 C. L. J. 156; 49 M. L. J. 282; A. I. R. 1925 P. C. 236; 27 Bom. L. R. 1427; 3 R. 494; (1925) M. W. N. 894; L. R. 6 A. (P. C. 209; 30 C. W. N. 218; 52 I. H. 385 (P. C.)** 198

Rulings, interpretation of.

A ruling should be constructed on the facts on which it is based. **C PRIA NATH CHATTERJEE v. LAKS NARAYAN BHATTACHARJYA, 42 C. L. J. 100; A. I. R. 1925 Cal. 1139** 835

Sale of goods. See CONTRACT ACT, 1872, s. 38 481

Set-off—Time-barred debt, whether can be set-off.

A time-barred debt can be claimed by way of equitable set-off. **PAT NATHAN PRASAD SHAH v. KALI PRASAD SHAH, (1925) Pat. 317; A. I. R. 1926 Pat. 77; 7 P. L. T. 158** 785

Sonthal Parganas Settlement Regulation (III of 1872), s. 5—Area declared under settlement—Officer appointed under sub-s. (2) of s. 5—Execution proceedings, pending, disposal of—Procedure.

An execution proceeding is merely a continuation of the suit and proceedings in execution are proceedings on the suit. Therefore, an application in a pending execution proceeding is a "suit" within the meaning of s. 5 of the Sonthal Parganas Settlement Regulation III of 1872.

Where an officer has been appointed under sub-s. (2) of s. 5 of the Sonthal Parganas Settlement Regulation III of 1872, an Execution Court must transfer a pending execution proceeding to the officer so appointed and ought not to dismiss the proceeding on the ground of want of jurisdiction. **PAT BAIJULAL MARWARI v. THAKUR PRASAD MARWARI, A. I. R. 1926 Pat. 33, 7 P. L. T. 153** 262

Specific Relief Act (I of 1877), s. 21—Contract for sale of immoveable property, breach of—Provision for damages on default, effect of—Specific performance, right to—Extension of time for payment—Power of Court.

Where a contract for the sale of immoveable property provided for payment of damages in default of performance, whether by the vendor or the vendee, but

Specific Relief Act—contd.

it appeared that the provision for payment of damages could not be treated otherwise than as one for furnishing security for performance of the contract:

Held, that the breach of contract to sell could not be adequately relieved by compensation in money and a decree for specific performance was the appropriate relief.

The Court which actually passes a decree for specific performance, whether it is the Trial Court or the Court of Appeal, has power to make any stipulations it thinks fit with reference to the performance including the power to extend the time fixed for payment of the purchase-money by a party.

In considering whether extension of time should be granted, the delay need not be explained so minutely in a case of this sort as under the Limitation Act where it is sought to excuse a bar of limitation, but must be looked at more leniently.

Where it appeared that the plaintiff was not aware of the provisions of the decree until the time for payment had passed, and that the main cause of the delay was the inordinate time taken by the Court in granting a copy of its decree:

Held, that the delay should be excused and the time for payment extended. **M RAMBHATLU v. ANNIAHBHATLU**, 49 M. L. J. 152; 22 L. W. 366; A. I. R. 1926 Mad. 144
605

Stamp Act (II of 1899), ss. 12, 17, 47—Hundi bearing uncanceled one anna stamp—Date written across stamp by drawee—Hundi, whether duly stamped.

A hundi chargeable with the duty of one anna was presented for payment bearing an uncanceled one anna stamp and the drawee when making the payment wrote across the stamp the date of the payment:

Held, (1) that the writing of the date across the stamp which had not been cancelled at the time of the making of the hundi did not have the effect of converting the hundi from an unstamped document into a stamped document and that the provisions of s. 47 of the Stamp Act had no application to the case;

(2) that consequently the hundi continued to be an unstamped document and that no suit could be brought on the basis of it. **B DAYARAM SURAJMAL v. BHANDULAL DAYABHAI**, 27 Bom. L. R. 1118; A. I. R. 1925 Bom. 520
689

s. 68—Hundi—Stamp, necessary—Duty of Court—Practice.

The Court in determining whether a document is sufficiently stamped for the purpose of deciding upon its admissibility in evidence must look at the document itself as it stands and not at any collateral circumstances which may be shown in evidence. **B RAMPARSHAD SHIVLAL v. SHRINIVAS BALMUKAND**, 27 Bom. L. R. 1122; A. I. R. 1925 Bom. 527
685

Succession Certificate Act (VII of 1889), s. 4—Pro-note in favour of individual—Debt due to joint family—Succession certificate, whether necessary.

Where a promissory note is executed in favour of an individual member of a joint Hindu family but the debt is due to the joint family, no succession certificate is necessary, even if there is nothing on the face of the document to show that the debt is due to the joint family. **M VARADARAJULU CHETTI v. VELAYUDH UDAYAN**, 22 L. W. 230; A. I. R. 1925 Mad. 1160
743

Suits Valuation Act (VII of 1887), s. 11. See BENGAL TENANCY ACT, 1885, ss. 5, 103A
895

Transfer of Property Act (IV of 1882), s. 6—Mortgage of reversionary right, validity of—Suit to obtain personal decree—Limitation—Contract Act (IX of 1872), s. 65.

Defendants, who had an expectation as reversioners in certain property, mortgaged that property by a registered deed to the plaintiff in 1895. Plaintiff filed a suit in 1923 to enforce the mortgage:

Held, (1) that the mortgage being of an expectation was void and could not be enforced as such;

(2) that plaintiff being aware at the time when he took the mortgage that the defendants had only a reversionary interest in the property which they purported to mortgage, s. 65 of the Contract Act had no application to the case, and that the plaintiff's claim to a personal decree against the defendants was barred by time. **O SUKHDEO SINGH v. KASHI SINGH**, A. I. R. 1926 Oudh 119
340

s. 26—Agreement that female holding estate shall not effect transfer without consent of male claimants—Death of some male claimants—Transfer with consent of surviving claimant, validity of—"Substantial compliance" with condition, what amounts to.

An agreement, arrived at between a female claimant to an estate on the one hand and three male claimants on the other, provided that the female should remain in possession of the estate during her lifetime and should pay the debts due from the estate out of the income of the property, appropriating the balance of the income to her own use but that she would not transfer any portion of the property without the consent of the male claimants, and that on her death the latter would get the property. It was further provided that should any of the male claimants die before the death of the female, his share would descend to his heirs. After the death of two of the male claimants, who had died leaving heirs, the female executed a mortgage in respect of property comprised in the estate with the consent of the surviving male claimant. The mortgage was also consented to by the majority of the heirs of the deceased claimants, but one of them who had not consented to the mortgage brought a suit to recover possession of his share of the estate on the allegation that he was not bound by the mortgage:

Held, (1) that on a proper construction of the agreement arrived at between the claimants the consent of the heirs of a male claimant who should happen to die during the lifetime of the female was not necessary to validate a transfer by the female;

(2) (Per Mukerji J., Boys, J. dissenting)—that the consent of the surviving male claimant did not amount to a "substantial compliance" with the condition laid down in the agreement and that the mortgage could not, therefore, be held to be binding on the plaintiff;

Per Mukerji, J.—Broadly speaking till the majority of at least one-half of the persons whose consent is necessary to a transaction give such consent, it cannot be said that there has been a "substantial compliance" with the condition within the meaning of s. 26 of the Transfer of Property Act.

Per Boys, J.—The test to be applied to cases such as the one under consideration is whether it is possible to form upon all the known circumstances of the case as existing at the time the condition was made, a reasonable opinion as to whether the deceased persons would have been likely to agree that the consent

Transfer of Property Act—contd.

of a survivor should be accepted as sufficient if they had foreseen the circumstances in which the sufficiency of his consent might be in question. *A BENI CHAND v. EKRAM AHMAD*, L. R. 6 A. 617 Civ.; A. I. R. 1926 All. 181; 24 A. L. J. 128 **887**

— **s. 41—Evidence Act (I of 1872), s. 115—Estoppel—Attestation, effect of—Transferor represented as owner of property transferred, effect of.**

The fact that a person has attested a deed does not by itself estop him from denying that he knew of its contents or that he consented to it, but there might be circumstances which would show that the attestation was intended to convey something more than a mere witnessing of the execution, and was meant as involving consent to the transaction.

Where one person by a mis-statement of fact intended to operate upon the mind of another induces a certain belief in the latter upon which he has acted, the person who has made the representation is estopped from subsequently denying its truth.

Where a person attests a deed of transfer of immoveable property in token of the fact that the property belongs to the transferor and that he is competent to transfer it, he is estopped by the provisions of s. 41 of the Transfer of Property Act from subsequently contending that the property did not belong to the transferor but belonged to himself. *O MOHAMMAD MAZHAR-UD-DIN HASAN v. ZAHUR-UD-DIN*, A. I. R. 1926 Oudh 131 **547**

— **s. 51—Grant of land on darkhast—Improvements by grantee—Subsequent cancellation of grant, effect of—Damages, whether can be recovered.**

Where a grantee of land on darkhast by a Tahsildar pays the assessment in respect of it and makes improvements thereon in ignorance of a pending appeal against the grant and the grant is ultimately cancelled on appeal, the grantee is entitled not only to a refund of the assessment collected but also to damages under s. 51 of the Transfer of Property Act for value of the improvements effected by him. *M CHENNAPRAGADA NARAYANAMURTY v. SECRETARY OF STATE FOR INDIA*, 48 M. L. J. 682; 22 L. W. 482; A. I. R. 1925 Mad. 963 **555**

— **s. 52—Claim for rent, whether right to immoveable property.**

A mere "claim for rent" is not a right to immoveable property within the provision of s. 52 of the Transfer of Property Act. *C DHIRENDRA NATH GHOSH v. CHARUSHASHI DEBYA*, A. I. R. 1926 Cal. 191 **431**

— **s. 52—Lis pendens, doctrine of—Execution sale—Compromise decree—Compromise brought about by inducement of money—Fraud—Suspicion.**

It is not safe to come to a finding of collusion and fraud on mere suspicion.

The doctrine of *lis pendens* applies to a purchase at an execution sale during the pendency of a suit which terminates in a consent decree and the fact that the compromise was the result of inducement in money makes no difference. *PAT RAMDULARI KUBER v. UPENDRANATH BASU*, (1925) Pat. 143; A. I. R. 1925 Pat. 462; 6 P. L. T. 483; 4 Pat. 619 **251**

— **s. 52—Lis pendens, doctrine of, applicability of—Pre-emption suit—Property transferred after institution of suit in favour of person having equal right of pre-emption with plaintiff, effect of.**

The doctrine of *lis pendens* applies to pre-emption suits just as well as to other suits.

Where after the institution of a suit for pre-emption but before the expiry of the limitation for

Transfer of Property Act—contd.

the institution of such a suit, the vendee transfers the property to a person who has an equal right of pre-emption with the plaintiff, any rights which the plaintiff had against the transferee at the date of the institution of the suit cannot be affected by the subsequent transfer of the property in the latter's favour. The position in such a case is the same as if the transferee instead of taking a transfer of the property had brought a rival suit for pre-emption. *A BACHAN SINGH v. BIJAI SINGH*, 24 A. L. J. 130; A. I. R. 1926 All. 180; 48 A. 221 **238**

— **s. 55—Contract Act (IX of 1872), s. 69—Vendor and purchaser—Covenant against encumbrances, operation of—Suit based on breach of covenant, when maintainable—Rent due for period prior to sale—Purchaser, whether liable—Payment made by purchaser—Suit to recover the amount paid, whether maintainable.**

In order to justify a suit based on the breach of a covenant against encumbrances contained in a conveyance it is requisite that an actual interruption, claim or demand be made on the purchaser; some hindrance or prevention of enjoyment proved; for, the chance of his being disturbed, and his liability to satisfy claimants, or, in other words, the mere existence of outstanding encumbrances, unless they prevent entry and enjoyment, will not constitute an immediate breach of the covenant.

Under s. 55 of the Transfer of Property Act, a purchaser of immoveable property is not liable for rent due to the landlord for a period prior to the date of the sale.

Per Mukerji, J.—Where a purchaser discovers defects in the property before conveyance, he can either rescind the contract or successfully oppose a suit for specific performance; but if he discovers material defects after the conveyance he must make out a case of fraud in order to set aside the sale.

The mere existence of an encumbrance on the property conveyed does not give the purchaser a right to sue as on a breach of the covenant against encumbrances. In a suit of this description the plaintiff must allege the facts constituting the disturbance and that the disturbance was lawful, with sufficient particularity to show the breach of the covenant.

Where in order to save the property purchased from being proceeded against for the recovery of rents due to the landlord in respect of a period prior to the date of the sale, the rents are paid out of the estate of the purchaser and the purchaser subsequently brings a suit against the vendor to recover the amount of the payment, the suit is not one based on a breach of the covenant against encumbrances contained in the sale-deed but is one under s. 69 of the Contract Act.

In a suit under s. 69 of the Contract Act it is essential that there should be, first, a person who is bound by law to make a certain payment, secondly, another person who is interested in such payment being made, and thirdly, a payment by such last mentioned person. If these circumstances exist, the fiction of an implied request from the defendant to the plaintiff to make the payment may be properly imported into the case so as to bring it within the section.

The words "interest in the payment of money which another is bound by law to pay" in s. 69 of the Contract Act include the apprehension of any kind of loss or inconvenience or of any detriment capable of being assessed in money. Arrears of rent which form the first charge on an estate under s. 65 of the Bengal

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Tenancy Act and for which the estate is liable to be sold, if not paid, reasonably create such an apprehension. It makes no difference that a decree has not yet been obtained, for a suit may be instituted at any moment and the loss and the inconvenience consequent on the institution of a suit are manifest. **C EASTERN MORTGAGE & AGENCY CO. v. MAHOMMAD FAZLUL KARIM**, 41 C. L. J. 571; 52 C. 914; A. I. R. 1926 Cal. 385

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— **s. 59.** See C. P. C., 1908, O. XLI, R. 27 630
 — **s. 59—Mortgage—Attestation, proof of—**
Scribe, whether attesting witness.

It cannot be said as a matter of law that a scribe cannot be an attesting witness of a mortgage-deed. It is a question of fact which must be determined by a Court of fact. **C ACHOLA SUNDARI DEBI v. DOMAN SUNDARI DEBI**, A. I. R. 1926 Cal. 150

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— **ss. 60, 61, 62—Mortgages, several—Redemption—Consolidation—Burden of proof.**

The principle established by ss. 60 and 62 of the Transfer of Property Act is that redemption of every separate mortgage should be permitted unless there is clear and unequivocal evidence to prove a contract between the parties to the contrary. There is a heavy burden cast on a mortgagee who wishes to prove a contract between him and the mortgagor to prevent such a redemption enjoined by law.

There is no authority for the proposition that a mortgagor not otherwise bound by contract, cannot redeem one or two or more mortgages held by his mortgagee over the same property without redeeming another or the others. If the mortgagee wishes to lend money or to make further advances on the term that of the mortgage of the property shall not be redeemed until the money due on another mortgage is paid he should effect that object by making it expressly part of his contract with the mortgagor. **O BUNYAD SINGH v. NAUBAT SINGH**, 2 O. W. N. 753; A. I. R. 1926 Oudh 59

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— **s. 68 (b).** See C. P. C., 1908, O. II, R. 2 622

— **ss. 83, 84—Mortgagor, deposit of money by—Son of mortgagee minor—Guardian ad litem, appointment of, whether necessary.**

Under ss. 83 and 84 of the Transfer of Property Act, where the mortgagee is a minor and unable to draw the mortgage-money out of Court, without security, it is necessary that a guardian *ad litem* should be appointed and unless such a guardian is appointed it cannot be said that the mortgagor has done all that is necessary for him to do to enable the mortgagee to draw the money. **M APPA PAI v. SOMU**, 22 L. W. 145; 49 M. L. J. 327; A. I. R. 1925 Mad. 1017; (1925) M. W. N. 547

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— **s. 100.** See HINDU LAW—ADOPTION 1000

— **s. 101—Discharge of prior mortgage—Intention to keep alive mortgage—Presumption of fact or law.**

The presumption is that a person paying off a mortgage intends to keep alive the mortgage if it is for his benefit to do so.

But the presumption is not irrebuttable. It is not one of law but of fact and the inference of intention has to be drawn from the circumstances in each case. **M TIRUVENGADAM PILLAI v. SABHAPATHI PILLAI**, (1925) M. W. N. 608; 49 M. L. J. 361; A. I. R. 1925 Mad. 1217

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— **s. 105—Registration Act (XVI of 1908), ss. 2, 17—Burma Registration Directions—"Lease," mean-**

Transfer of Property Act—contd.

ing of—Agreement by tenant to cultivate land—Registration.

An agreement executed by a tenant only, agreeing to cultivate land and to pay rent is not a "lease" under s. 105, Transfer of Property Act, because the document, being not executed by the lessor, the land owner, cannot transfer any right in the property within the definition as given in the section.

Direction 46 (d) (i) in the Burma Registration Directions has no application to such a document as the above. The document, however, is a "lease" within the wider definition given in s. 2 of the Registration Act, and is compulsorily registrable if it falls under s. 17 of the Act. **R U THA NYO v. MG. KYAW THA**, A. I. R. 1925 Rang. 273; 3 R. 379; 4 Bur. L. J. 99

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— **ss. 105, 55—Lessor, premium payable to—Charge—Sale and lease, distinction between—Transfer of Property Act, whether exhaustive.**

When the owner of a land grants a perpetual lease of it in consideration of rent to be paid, as well as a premium, he gets no charge on the leasehold that he thus creates for the premium so payable.

There is a fundamental distinction under the Transfer of Property Act between a transfer of immoveable property and a transfer of the right to the enjoyment of immoveable property. A lease in perpetuity is merely a transfer of the right to enjoy property.

The only charge, valid in the Indian Law, on landed property is to be found in s. 55 of the Transfer of Property Act which is confined to cases which deal with the transfer of the property itself.

Per *Coutts Trotter, C. J.*—The Transfer of Property Act is intended to be exhaustive. **M TIRUMALA TIRUPATI v. VENKATASUBBA RAO**, 49 M. L. J. 313; 22 L. W. 335; (1925) M. W. N. 768; 48 M. 821; A. I. R. 1926 Mad. 55

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— **s. 111 (g).** See LIMITATION ACT, 1908, SCH. I, ART. 144 1007

— **s. 123—Gift of mango tree, nature of—Tree, whether immoveable property—Registration, whether necessary.**

A transfer of mango tree by way of gift must be made by a stamped and registered instrument where it is intended that the donee should enjoy the fruits of the tree for an indefinite period and where the immediate or approximately immediate severance of the tree from the land is not within the contemplation of the parties at the time of the making of the gift. In such a case the tree is immoveable property and its transfer is a transfer of an interest in land. **PAT ASHLOKE SINGH v. BODHA GANDERI**, A. I. R. 1926 Pat. 125

769

— **ss. 123, 118—Hindu Law—Partition—Allotment of share to stranger—Registered deed, whether necessary—Title, acquisition of.**

Where at a partition between members of a joint Hindu family, a share in the family properties of the value of more than Rs. 100 was allotted to a stranger, but the deed was not registered:

Held, that there being no registered instrument, whether the transaction was a gift or an exchange, it offended against the provisions of the Transfer of Property Act and that the stranger acquired no title in the properties allotted to him.

A person cannot by the mere recognition of another as a co-sharer of his convey to the latter a title in immoveable property without observing any of the

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formalities required by law for the purpose. **M MADH GOUDA v. CHENNE GOUDA**, 21 L. W. 709; 49 M. L. J. 150; A. I. R. 1925 Mad. 1174 331

— **s. 130**—Assignment of interest, mode of.

Section 130 of the Transfer of Property Act provides only one mode of the devolution of the interest of one person to another and cannot be said to exhaust all other ways and means by which the interest of one person may be transferred to another. **S MULIBAI v. SHEWARAM MENGHRAJ**, A. I. R. 1926 Sind 78 111

Trust. See CONSTRUCTION OF DOCUMENT 1000

— See HINDU LAW—WILL 593

— **Estoppel**—Trustee, whether can deny validity of trust—Trustee, whether can buy trust property—Partner of trustee, whether can buy—Purchase by two persons—Shares undefined—Presumption as to half share of each—Bona fide purchase by person jointly with trustee—Purchase, whether affected in respect of half share of bona fide purchaser.

After a trustee has taken possession of properties as trustee and dealt with them in the capacity of a trustee, he is estopped from disputing the validity of the trust.

A trustee for sale cannot purchase. A trustee, even if he be not a trustee for sale, can buy only subject to certain limitations.

When purchase is made through a trustee or in the name of a trustee, though for the benefit of a third person, it is as bad as the purchase by the trustee himself.

A partner of a trustee or any person from whom he may directly or indirectly derive benefit by reason of the purchase, cannot purchase a trust property from the trustee.

If the shares of two purchasers of property are not defined, the presumption is that they have one-half share each.

If property is purchased by two persons, one of whom owing to some inherent incapacity in him or owing to his original relation with the property is incapable of acquiring any title to it, the title of the other purchaser is not affected by reason of the incapacity of his co-purchaser. Therefore, if a purchase is made by a bona fide purchaser jointly with a trustee, the purchase is invalid and inoperative only in respect of half share of the trustee. **C PRIA NATH CHATTERJEE v. LAKSHMI NARAYAN BHATTACHARJIA**, 42 C. L. J. 100; A. I. R. 1925 Cal. 1139 835

U. P. Land Revenue Act (III of 1901), s. 40 (2).
See Or. P. C., 1898, s. 145 399

Vendor and purchaser—Agreement of sale—Date fixed for completion of sale—Time, whether of essence of contract—Purchaser, when entitled to possession—Earnest money—Forfeiture—Defect of title discovered subsequently, whether entitles purchaser to recover money forfeited.

In the absence of an express stipulation to that effect and of circumstances implying such an intention, the date fixed for the completion of a sale of immoveable property in the agreement for sale cannot be regarded as of the essence of the contract. It may, however, be made so by either party giving proper notice to the other to complete within a reasonable time, provided that at the time of the notice there has been some default or unreasonable delay by that other.

There is an implied repudiation if the purchaser fails to complete the sale on the day he is bound to complete under the contract, otherwise, if the purchaser is in

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default the vendor can make time of the essence of the contract by giving the purchaser notice to complete at a reasonable date and threatening forfeiture of the deposit on non-completion on that date.

Where the stipulation in the agreement is that possession would be given by evicting tenants, on completion of the conveyance, the purchaser's right to possession is coincident with the right to the execution of the conveyance by vendor.

A deposit paid under a contract of sale serves two purposes; if the sale is carried out it goes against the purchase-money but primarily it is a security for the performance of the contract. Even if there is no express provision in the agreement for sale to that effect the vendor would be entitled to retain the deposit as forfeited when the contract goes off by the default of the purchaser.

If the purchaser has, by his default in completion after he has accepted the title, given the vendor the right to rescind the contract and retain the deposit as forfeited and such right has been exercised the forfeiture is final. A subsequent discovery of any defect in the vendor's title does not confer on the purchaser the right to recover the deposit. **C FAZLE AHMED v. RAJENDRA NATH ROY CHOUDHURI**, A. I. R. 1926 Cal. 339 795

— **Agreement to sell—Part-payment of purchase-money—Marketable title, stipulation as to—Waiver—Transfer of possession—Vendor, duty of.**

In order that there may be an effectual waiver of any stipulation in an agreement, it must be intentional and based upon full knowledge of the circumstances.

If the purchaser enters into possession or pays the whole or part of the purchase-money, or does other acts, which a purchaser is not bound to do until a good title has been made, he may be deemed to have waived objections to the title.

The question as to whether the objection as to title is waived, is one of fact, and it may be that under certain circumstances the payment of purchase-money may indicate a waiver on the purchaser's part.

Where there is an agreement for sale, and where there has been transfer of possession in pursuance of that agreement to the purchaser and the contract price has been received by the vendor, the vendor cannot recover back the possession, but must be prepared to fulfil the contract by executing a conveyance. **B MEGHJI MOORJI v. TYEBALLI KAMRUDDIN**, 26 Bom. L. R. 1019; A. I. R. 1925 Bom. 64 189

— **Contract for sale of goods—Time, whether of essence of contract—Breach by buyer—Supply of goods by seller—Subsequent breach by seller—Buyer, whether entitled to damages.**

Plaintiff, a ruling Prince, entered into a contract with the defendant Company whereby the latter agreed to supply a certain number of goods wagons to be used for the purposes of the plaintiff's Railway on condition that one-third of the price was to be paid along with the order, another third at the time when the under-frames of the wagons should be wheeled and the balance on delivery. The wagons were required for a metre gauge Railway and delivery was to be made within six months from the date of the order. One-third of the price of the wagons was paid along with the order but there was considerable delay in the construction of the wagons due to war conditions and when the defendant Company called upon the plaintiff to pay the second instalment of the price of the wagons

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on the under-frames being wheeled, the plaintiff made default and failed to make the payment in accordance with the terms of the contract. The defendant Company thereafter completed the construction of the wagons and delivered a certain number of wagons to the plaintiff, and refused to deliver the remaining wagons until the whole of the price was paid by the plaintiff. As the plaintiff in spite of the repeated demands of the defendant failed to pay the balance of the price the defendant Company disposed of the remaining wagons elsewhere. Thereupon the plaintiff sent the defendant Company a cheque for the second instalment of the price of the wagons and called upon the Company to deliver the remaining wagons and receive the balance of the price. On the failure of the Company to comply with this demand plaintiff filed a suit against the Company to recover damages for non-delivery of the remaining wagons:

Held, (1) that having regard to the times when the three instalments of the contract price were according to the contract to become payable, and to the fact that the manufacture of the wagons involved considerable expenditure by the defendant Company in providing materials for their construction, and in the payment of men who would necessarily be employed in constructing them, and to the fact that it might be difficult to enforce, in a British Court or, in a Court of the State of which the plaintiff was the ruler, payment by the plaintiff of the contract price, it must have been the intention of the parties when the contract was made that time should be of the essence of the contract as to the times when the three instalments of the contract price should be paid;

(2) that when plaintiff had, after he had notice that the under-frames of the wagons had been wheeled, made default in payment of the second instalment of the price, which, in fact, was a refusal by him to perform the contract in its entirety, the defendant Company was entitled to treat the contract as void and to rescind it;

(3) that the defendant Company by delivering some of the wagons to the plaintiff treated the contract as a subsisting contract and that, inasmuch as the contract price was not payable until all the wagons had been delivered, the defendant Company was not justified in refusing to deliver the remaining wagons till the whole of the price was paid;

(4) that, therefore, the defendant Company had committed a breach of the contract and were liable to the plaintiff in damages. **P C BURN & Co. v. LUKHDIRJI OF MORVI STATE**, 23 A. L. J. 806; A. I. R. 1925 P. C. 188; L. R. 6 A. (P. C.) 147; 30 C. W. N. 145 **52**

Goods to be imported, sale of—Shipment arriving at different dates—Breach of contract—Damages, suit for—Due date of performance of contract.

In the case of a contract for sale, by a firm of importers, of goods of a particular shipment, where a portion of the goods of that shipment arrives some months after the receipt of the bulk of the goods, if no goods are appropriated to the contract, the due date for the performance of the contract, both for the purposes of limitation and the assessment of damages is the date when all the goods have arrived. **L PHUL CHAND-FATEH CHAND v. CHOTE LAL-AMBA PERSHAD**, A. I. R. 1925 Lah. 513; 7 L. L. J. 360 **654**

Portion of purchase-money left with vendee to redeem mortgages on property other than that

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sold—Vendee, duty of—Failure to redeem mortgage—Damages, whether can be recovered.

Plaintiff sold certain land to the defendant and a portion of the purchase-money was left in deposit with the defendant for payment to certain mortgagees of land other than that sold to the defendant. Defendant failed to redeem those mortgages and the plaintiff brought a suit against the defendant to recover damages from him on the allegation that his failure to redeem the mortgages had caused loss to the plaintiff:

Held, that inasmuch as the defendant was not himself entitled to sue for redemption of the mortgages, it was the duty of the plaintiff to take steps to redeem the mortgages or to ask the defendant to refund the portion of the purchase-money which had been left with him, and that, not having done so, plaintiff was not entitled to recover any damages from the defendant. **L SANSARI v. RAHMI**, A. I. R. 1925 Lah. 405; 7 L. L. J. 206 **164**

Sale of goods—Breach by purchaser—Part purchase-money not appropriated to loss, forfeiture of.

In the case of an alleged breach of contract by a buyer, the seller cannot forfeit any amount paid by the buyer as part purchase-money, where the seller has not claimed to appropriate the amount against any loss suffered by him in consequence of the breach but has rather expressly reserved his right to institute a suit in the proper Court for the recovery of any amount that may be due to him. **S PREMJI MULJI v. GARLICK & Co.**, A. I. R. 1925 Sind 254 **573**

Sale of goods—Delivery to be taken at warehouse of vendor—Property, when passes—Goods despatched at request of buyer—Vendor making delivery conditional on payment of price, effect of—Shortage and breakage, liability for.

Plaintiff purchased certain goods from the defendant at Calcutta and it was agreed that delivery of the goods should be taken from the defendant's warehouse at Calcutta but that if the plaintiff so desired the defendant would forward the goods to Lucknow. Plaintiff asked the defendant to despatch the goods to Lucknow, which the defendant did, but instead of forwarding the Railway receipt to the plaintiff, the defendant sent it to a Bank in Lucknow with the instructions that it was to be handed over to the plaintiff only on payment of the price of the goods. Plaintiff paid the price of the goods and on taking delivery of the goods found that there was a shortage of goods and that out of those goods which had been despatched from Calcutta a considerable portion had been badly damaged either in transit or before they were despatched. The plaintiff, therefore, sued the defendant for a return of the price of the goods which had not been delivered in safe condition to the former plus proportionate freight:

Held, (1) that delivery having been agreed to be taken at the defendant's warehouse at Calcutta, the property in the goods had passed to the plaintiff and that thereafter the defendant was only the plaintiff's agent for the purpose of forwarding the goods to Lucknow;

(2) but that the defendant having imposed a condition upon the plaintiff that he must pay for the price of the goods before he would be able to take delivery of them at Lucknow, a condition which had not been agreed upon between the plaintiff and the defendant as his agent, had altered the terms of the

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original contract, the effect of which was that the property in the goods had gone back to the defendant and that consequently the plaintiff was not liable to pay for more goods than he had actually received at Lucknow in a safe condition;

(3) that, therefore, the plaintiff was entitled to a decree for the return of the price of the goods which had not been delivered to him plus proportionate freight. *O RAM PRASAD BABU v. PAUL BROTHERS*, A. I. R. 1926 Oudh 46. 381

Vendor agreeing to purchase goods from third persons—Tender—Goods not in vendor's physical possession, effect of—Repudiation of contract, effect of—Advance, whether can be recovered—Damages.

Plaintiff agreed to purchase 50 bales of yarn of a particular brand from the defendants from out of a lot which the latter had agreed to buy from L & Sons who in their turn had agreed to buy from S & Sons. Defendants gave intimation to the plaintiffs of the arrival of "two bales out of the bales mentioned in the contract letter," but the latter ignored the intimation. Reminders were sent by the defendants stating that L & Sons had intimated to them that the terms of the contract would be enforced and that the defendants were giving intimation to the plaintiffs accordingly. In a suit by the plaintiffs to recover from the defendants the amount of the advance paid by the former in respect of the contract:

Held, (1) that the description of the goods mentioned in the letter of intimation sent by the plaintiffs was sufficiently definite and must be presumed to correspond to that in the contract;

(2) that it was not a condition precedent to delivery by defendants to plaintiffs that there should have been actual delivery to each of the prior purchasers in turn, and that the tender by the defendants was, therefore, good and valid and plaintiffs committed a breach of the contract by failing to take delivery;

(3) that the plaintiffs' breach of contract as to the lots tendered amounted to a repudiation of the whole contract and the defendants were not bound to tender the rest of the goods under the contract;

(4) That the plaintiffs' suit must fail inasmuch as the amount of damages which the defendants could have claimed was in excess of the amount of the advance claimed by the plaintiff. *M LAKSHMANA v. RAMALINGA MUDALIAR*, 48 M. L. J. 522; A. I. R. 1925 Mad. 888. 206

Wajib-ul-arz, entry in, value of—Burden of proof.

A *wajib-ul-arz* unsupported by other evidence may be sufficient to establish a family custom.

Where a *wajib-ul-arz* is unambiguous and records a custom in clear terms, the burden is shifted on to the party which alleges a custom contrary to the terms of the *wajib-ul-arz*, to prove by oral and documentary evidence either that no such custom as recorded in the *wajib-ul-arz* exists or that it has fallen into desuetude. *O RAZA HUSSAIN KHAN v. SUBHANI*, 2 O. W. N. 838; A. I. R. 1926 Oudh 53. 525

—, entry in, value of. See Custom 327

Will, construction of—Devise in favour of wife—Estate taken.

An Indian Christian left a Will in the following terms:—"I hereby give away to my second wife all the moveable and immoveable properties I possess. After me she should enjoy the said properties and

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she should at her death divide and give the same to the children of my deceased wife's daughter."

Held, that under the Will the widow of the testator got an absolute estate in the properties of the testator and not merely a life-estate coupled with a power of appointment. *M ALBERT KARUNAKARAN STEPHEN v. ADMINISTRATOR-GENERAL, MADRAS*, (1925) M. W. N. 308; 49 M. L. J. 197; 22 L. W. 94; A. I. R. 1925 Mad. 686. 498

—, construction of—Principles applicable—Equest, vested or contingent—Gift over, effect of—De feasance.

The first principle to be borne in mind in regard to the construction of a Will is that as far as possible, the real intentions of the testator as expressed in the Will should be gathered and ascertained and given effect to. The so-called rules of construction are merely aids to enable the Court to discern or discover the real intentions of the testator.

In construing a Will by an Englishman in the English language drawn up by a Solicitor and bristling with highly technical expressions and clauses, it must be assumed that the technical expressions employed were employed with the meaning and significance generally understood to attach to them in the particular branch of the law.

A bequest to a person for life and after his death to his children, becomes vested in each child as and when he or she is born and the vesting is not postponed till the death of the life-tenant. The expression "after the death" is taken to indicate merely the time when the gift over becomes reduced to session and not the time when the right to possession vests. The principle underlying this rule is that no contingency is imported by the fact that the legacy is given after a life-estate in the property bequeathed. As nothing is more certain than that every person who lives must die, the death of a life-tenant is an event not contingent but certain; and therefore, a gift on the death of a life-tenant is a bequest to take effect not on a contingency but on an event certain to happen; and, therefore, the donees of the gift are held to obtain a vested interest in it as and when they come into being. But if from the words of the bequest the intention of the testator is clear that the persons taking should be only such persons as survive or are alive on the death of the life-tenant, then it is a contingent bequest contingent upon the donee surviving the life-tenant. In such a case till such contingency is fulfilled, there can be no vesting. The principle underlying this rule of construction is that though the death of the life-tenant is certain, still it is by no means certain that the donee will survive the life-tenant.

The law does not favour the divesting of an estate already vested and in any case the condition for divesting and the intention to divest should be clearly made out. If, however, from a gift over clause the intention of the testator is to be clearly gathered that any estate that may have vested previously should be divested on the contingency referred to in the gift over clause then such intention should be given effect to and not otherwise.

A testator made a bequest to his daughter as follows:—"As to the sum of Rs. 30,000, unto my daughter Alice Gray for her life for her sole and separate use and after her death in trust for the lawful children or any lawful child of the said Alice Gray who being sons or son shall attain the age of

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21 years." A later clause provided: "If the said Alice Gray shall die leaving no child living at her death who being a son shall attain the age of 21 years, then after her death and such default or failure of children, I bequeath the said monies and investments, or so much thereof as shall not have become vested, unto my son Campbell Gray whom I hereby appoint as my residuary legatee." Alice Gray died leaving no issue living, her only son having predeceased her after attaining 21 years of age. On her death the widow and the representative of Campbell Gray, the son and residuary legatee, claimed the monies on the ground that there was no vesting in the deceased son and that in any case there was a defeasance, while the father and representative of the deceased son of Alice Gray claimed that the estate had vested in her son on his attaining 21 years of age:

Held, on a construction of the Will, (1) that the contingent bequest in favour of Alice Gray's son became vested in him on his attaining 21 years of age, without reference to the death of his mother;

(2) that the intention of the testator in the gift over clause was that it should not affect any interest already vested and that the clause did not operate to divest Alice Gray's son of the estate which had vested in him;

(3) that, therefore, the father and legal representative of Alice Gray's deceased son was entitled to the

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monies in dispute. *M ADAMS v. GRAY*, (1925) M. W. N. 123; 48 M. L. J. 707; A. I. R. 1925 Mad. 599 5

WORDS AND PHRASES:—

Demand in Promissory Notes. See EVIDENCE ACT, 1872, s. 92 378

Istimrari Mokarrari, meaning of. See MUHAMMADAN LAW—WAKF 781

Kaimi Mourashi.

The words "*kaimi mourashi*" are quite appropriate when used with respect to a permanent *jama* of a piece of homestead land, and apply very aptly to a non-agricultural tenancy. *C BIDHUMUKHI v. GOBINDA CHANDRA PAL*, 42 C. L. J. 78; A. I. R. 1926 Cal. 215 104

Kharij Jama, meaning of. See LANDLORD AND TENANT 777

Malik, use of, effect of. See HINDU LAW—WILL 757

Moghli. See CONSTRUCTION OF DOCUMENT 352

Neglect, wilful, meaning of. See RAILWAY COMPANY 790

Raiyat.

The word *raiya*t does not necessarily mean an agricultural tenant. It is often used in the *moffussil* in its wider sense of meaning a tenant in general. *C BIDHUMUKHI v. GOBINDA CHANDRA PAL*, 42 C. L. J. 78; A. I. R. 1926 Cal. 215 104

